

AGEC 3713 Agricultural Law - Water Law

true

Introduction

Key questions:

- ▶ What is the legal type or category of water?
- ▶ How does one wish to use water?
- ▶ consumption by humans or animals
- ▶ domestic use
- ▶ irrigation of crops
- ▶ cooling for power plants
- ▶ generation of electricity

Other uses

- ▶ recreation
- ▶ transportation
- ▶ boundaries
- ▶ disposal of water (too much)
- ▶ water as a sink of waste

Water rights

- ▶ riparian rights
- ▶ prior appropriation
- ▶ Riparian rights based on English common law
- ▶ Eastern US and states bordering the Mississippi river use riparian rights
- ▶ California, Nebraska and Oklahoma use a hybrid system
- ▶ Statutory withdrawal systems
- ▶ Some states apply the riparian rights doctrine to groundwater but not to surface water
- ▶ Central plains and the west use prior appropriation

Types of water

6 types:

- ▶ natural surface waters
- ▶ diffuse surface waters (from precipitation)
- ▶ underground streams
- ▶ percolating groundwater
- ▶ springs
- ▶ water in artificial channels, ponds and lakes

Natural surface waters

- ▶ Found creeks, rivers, streams ponds, lakes, etc.
- ▶ Old ponds or canals may be regarded by law as natural
- ▶ A natural watercourse has a well defined channel with a bed and banks and a direction of flow
- ▶ Natural watercourses can include seasonal streams (no need for continuous flow)

Runoff or diffuse water sources

- ▶ arise from precipitation
- ▶ floodwaters are runoff not natural surface waters
- ▶ floodwaters are not bound by a bed or banks

Underground streams

- ▶ natural surface waters except underground
- ▶ so they have a clear course

Percolating groundwater

- ▶ diffuse
- ▶ water table
- ▶ aquifer (interconnected water tables)

Law of riparian Rights

- ▶ rights of owners and occupants
- ▶ Riparian rights: surface and subterranean watercourses and natural bodies of water, e.g. springs
- ▶ Natural flow theory
- ▶ Reasonable use theory

Natural flow theory

- ▶ right to have the water in its stream in its natural state
- ▶ free from diminution in quantity or quality

Reasonable use theory

- ▶ riparian owners have the right to make the maximum reasonable use of water
- ▶ As long as it does not interfere with others
- ▶ Reasonable use theory more prevalent
- ▶ Upstream users cannot take all the water
- ▶ Riparian owners may not sell or give water to one who is not a riparian owner
- ▶ Riparian rights cannot be separated from the land
- ▶ Purchase of easements from downstream users allows upstream users to take water.
- ▶ Not the latter is different to international law, see the Harmon doctrine

Loss of riparian rights

- ▶ If water is being used inconsistently with riparian rights failure to act (within statutory period) by riparian owners could result in loss of rights by prescription.

The Law of Prior Appropriation

- ▶ First in time is first in right
- ▶ Rights are lost if water is not put to beneficial use
- ▶ Notice of intent to appropriate (except Colorado)
- ▶ File with administration
- ▶ Appropriative rights may be separated from the land
- ▶ Abandonment: intentional surrender of appropriative rights
- ▶ Non-use is not abandonment.

Administrative permit systems

- ▶ State's police powers
- ▶ Notice required to alter water rights, 14th and 5th amendments, due process.
- ▶ Compensation claims under 5th amendment takings clause

Certainty

- ▶ prior appropriation provides greater certainty
- ▶ test of reasonableness depends on jury or judge

Percolating groundwater

- ▶ absolute dominion or ownership (similar to Harmon)
- ▶ reasonable use of American rule
- ▶ Correlative rights doctrine (riparianism on its side)
- ▶ Beneficial purpose doctrine

Artificial bodies and water treaties

- ▶ not governed by common law rules
- ▶ Regulators: FERC and TVA
- ▶ International treaty or Indian treaty may govern some waters

Runoff

- ▶ Civil law rule (landowner cannot change flow)
- ▶ Common enemy rule (all diversions and retentions are allowed)
- ▶ Absolute ownership rule
- ▶ Landowner may not have right to surface water in prior appropriation states.

Water as a boundary

- ▶ navigable waters
- ▶ non-navigable waters
- ▶ non-navigable waters owned by riparians to middle of channel (unless deed states otherwise)
- ▶ tidal waters boundary mean high tide line
- ▶ Property boundaries change accretion (expansion of land)
- ▶ Erosion can reduce a properties size.
- ▶ Sudden and artificial changes do not change property boundaries (e.g. storm changes banks, avulsion).

Water pollution

- ▶ federal Clean Water Act regulate water pollution
- ▶ EPA has jurisdiction
- ▶ point vs non-point source pollution
- ▶ normal agricultural runoff is defined as nonpoint source