

WATER SECURITY AND THE LAW: CONFLICTS AND COMPATIBILITY

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INTRODUCTION

Recent world events and natural forces, such as an increased incidence of intense drought across the United States, compel policy makers to address water security issues. Policy responses must consider existing legal frameworks or risk reversal in the courts. Legal principles often shape final policy by prohibiting some responses while allowing or even facilitating others.

Water supply and water rights concerns often present uniquely novel and complex issues. However, courts often rely on well settled, but ancient, legal doctrines in deciding water rights issues. Many courts and legislators also lack a basic understanding of the complex science of hydrology.

This paper discusses the interaction between water security and the law. Water rights form a particularly important part of the water supply security issue. Consequently, this paper focuses on water supply issues and private water rights, both with respect to surface water and groundwater, as they relate to water security measures. Both conflicts and compatibility are revealed.

WATER SECURITY

The literature fails to provide a clear definition of “water security”. Some writers appear to focus upon the vulnerability of water infrastructure and water supply to terrorist attacks or other intentional acts by outside parties which contaminate public water supplies, interrupt the supply of water to the public, or both. See, e.g., Clark and Deininger 2000. This focus intensifies in the literature after September 11, 2001.

Other writers however, appear to give water security a broader meaning, without defining the scope or particulars of the term. See, e.g., Bankobeza, et al. 2001; Wouters, Salman and Jones 2001. This paper uses this approach and defines water security as assured adequate supplies of water of sufficient quality to meet the needs of human needs for agriculture, fire protection, drinking water and other essential human needs.

WATER LAW

Water law and water security in the United States draw from several areas of the law, including private property rights, local, state and federal environmental laws, federal and state freedom of information rules, and state laws regulating public service authorities. The fragmented nature of the regulation of water and water security prevents a thorough review of all areas of law impacting water. This paper focuses upon private water rights and water security. Private water

rights derive mainly from state court decisions. However, state legislatures increasingly regulate water use and water supply.

Five possible systems of percolating groundwater rights under common law exist in the United States. Abrams (1997). First, the English rule or absolute ownership rule grants the right to use water to the owner of overlying land who is able to withdraw the water. Ibid. If the withdrawal of groundwater in a jurisdiction adhering to the English Rule harms another landowner, the injured landowner has no recourse. The only exception to this rule occurs where a landowner maliciously withdraws groundwater. In that case, the injured landowner may seek recourse in the courts. Texas is the only state that has adhered to this doctrine and even Texas has made modifications. Ibid.

Secondly, the reasonable use rule, or American rule, also grants the right to use the water to the owner of overlying land who is able to withdraw the groundwater. However, the use is legally protected only if it is (1) made on the overlying tracts and, (2) a "reasonable" use. Ibid.

Third, the *Restatement Second of Torts*, at section 858, adopts a reasonable use rule which is basically an adoption of the riparian rights reasonable use rule. "A proprietor of land or a grantee who withdraws groundwater from the land and uses it for a beneficial purpose is not subject to liability for interference of the use of water by another, unless (a) the withdrawal of groundwater unreasonably causes harm to the proprietors of neighboring land through lowering of the water table or reducing artesian pressure, (b) the withdrawal of groundwater exceeds the proprietor's reasonable share of the annual supply or total store of groundwater, or (c) the withdrawal of groundwater has a direct and substantial effect upon a water course or lake and unreasonably causes harm to a person entitled to the use of the water." American Law Institute (1970).

Fourth, California has adopted the correlative rights doctrine that combines a rule of sharing for contract uses with a rule of priority for export. Abrams (1997). Nebraska has a similar groundwater regime. Ibid. Finally, many western states follow the doctrine of prior appropriation. Ibid. This doctrine is based on seniority in time based on the date of initiation of the use. Ibid.

Two main doctrines of private property rights apply to surface water: riparian rights and prior appropriation. Riparian rights refer to the rights of landowners adjacent to streams or rivers and entail the right of reasonable use of surface water by abutting landowners. The general rule allows use of the entire flow or the entire water surface so long as the rights of other riparian owners are not infringed upon. Abrams (1983). Minor exceptions exist to the general rule. For example, the entire flow of the stream may be used for domestic uses regardless of the impact on other riparian owners.

Similar to the American Rule for groundwater, riparianism prohibits "lift", or transport of the water from the riparian site for use on other sites. This rule applies to local governments or water authorities also. See, e.g., *Town of Purcellville v. Potts*, 179 Va. 514, 521, 19 S.E.2d 700, 703 (1942).

The prior appropriation doctrine for surface water mimics the groundwater rule. However, arid and semi-arid western portions of the United States more uniformly apply the rule to surface water in the. Tarlock (1998).

STATE LEGISLATIVE ACTION

A recent trend finds state legislatures limiting and even attempting to eliminate private property rights in water. Courts unanimously hold that state governments may regulate water rights, within the limits of the state and federal constitutions. “Like zoning legislation, legislation which limits or regulates the right to use underlying water is permissible.... Where regulation operates to arbitrate between competing public and private land uses, however, as does the water priority statute in this case, such legislation is upheld even where the value of the property declines significantly as a result.” *Crookson Cattle Co. v. Minnesota Department of Natural Resources* (1980).

Some states take the regulation a step further and assert “ownership” over water resources. For example, a Virginia statute asserts that “all of the state waters belong to the public for use by the people for beneficial purposes...”

THE PUBLIC TRUST DOCTRINE

States that declare water as “owned by the public” appear to base their assertions upon the public trust doctrine. The public trust doctrine maintains that the government (state government in this instance) holds legal title to certain natural resources, holding them in trust for the public. The public trust doctrine clearly applies to beds and banks of most navigable waters and mainly protects the public’s right to navigation.

However, the public right of navigation rarely infringes upon surface water rights. More fundamentally, the doctrine doesn’t apply to groundwater at all. Only one case has applied the public trust doctrine in the context of water rights. *National Audubon Society v. Superior Court of Alpine County* (the “Mono Lake” case), 658 P.2d 709 (Cal. 1983). In this case, the California Supreme Court held that the public trust doctrine applies to the nonnavigable streams affecting a navigable lake. The expansion of the doctrine from navigable waters to nonnavigable waters affecting navigable waters makes the decision significant. Further, the court explained that the public trust doctrine and the water allocation system in question operated independently of each other, but that the state must consider the public trust when allocating permitted withdrawals. The decision may be interpreted as ruling that some private water rights are subject to the public trust doctrine, but is valid only in California. No other court has adopted the Mono Lake rationale in the intervening nineteen years.

In any case, private property rights established prior to the any pronouncement of public “ownership” must either be preserved or the owner must be compensated to avoid a “takings” claim. Applying the public trust doctrine to groundwater rights undoubtedly results in a plethora of successful takings claims.

This prohibition against the taking of private property for public purposes applies even in situations where the Governor or President declares official states of emergency. “Private rights,

under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice.” *United States v. Russell* (1871), p. 629.

CONCLUSION

Often, water rights conflict with water security policy by, for example, preventing control of water resources by government agencies. The takings clause prevents local, state and federal governments from seizing groundwater or surface water for public purposes without just compensation. The public trust doctrine, contrary to popular belief, fails to excuse governmental agencies from this obligation.

However, state and local governments may regulate water to advance the public good so long as this regulation stops short of a taking. Drawing this line presents difficulties for policy makers.

On the other hand, a system of dispersed private water wells presents a difficult target for terrorists, as opposed to a single public water supply source. Use of private water wells, for the primary water supply or even as a back-up system, should be encouraged.

Most importantly, policy makers must seek to understand the basic legal framework of common law water rights and allowable legislative alternatives to those rights. This understanding allows policy makers, federal and state agency experts and others to pursue research on water security alternatives that will result in legally defensible policy decisions.

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