

FINAL EXAMINATION

WATER LAW

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Friday, December 13, 2002

8:30 AM - 11:00 AM

THIS IS A TWO AND ONE-HALF (2½) HOUR EXAMINATION.

THIS EXAMINATION CONTAINS FIVE (5) PAGES.

THIS EXAMINATION CONTAINS FIVE (5) QUESTIONS.

I = 45 min. II = 15 min. III = 30 min. IV = 30 min. V = 30 min.

FILL IN YOUR EXAMINATION NUMBER ON THE BLUEBOOK STICKER.

Instructions:

1. These questions will be graded on the basis of the times indicated with each questions. The indicated time for the questions total 2½ hours. You will be given 2½ hours to write the examination. Budget your time carefully or you may not finish.
2. Be sure to state a result whenever a question asks for one. Merely stating the arguments on both sides of a legal issue will result in only partial credit because you will not have completed the analysis required by that type of question.
3. If you find it necessary to make factual assumptions in order to answer a question, be sure to state the assumption.
4. Do not assume additional facts for the purpose of avoiding a legal issue or making its resolution easier.
5. Comment briefly on each legal issue reasonably raised by the questions and on each reason for your answer, even when you decide that one legal issue or reason controls the result.
6. The difference between triumph and disaster may lie in a **careful** reading of the questions.

I.
(45 minutes)

Willow Creek, in the rural northern part of the State of Jefferson (an eastern state), averaged about 15 feet wide and flowed at least 90 percent of the time (similarly to Hinkson Creek in Columbia, Missouri). A real estate developer, Blue Eagle Development, Inc., decided to build a modest recreational development on the creek and purchased the land on both sides of the creek at a location called Jesse's Crossing (allegedly a place where the Jesse James Gang forded the creek in the 1870's). Near the downstream boundary of the purchased tract, Blue Eagle constructed a dam, creating a reservoir called Jesse Lake. Blue Eagle platted 30 lots abutting on the reservoir, built vacation homes on them, and sold them to individual purchasers; each lot abutted on the reservoir and continued underwater to the center of the original stream. Blue Eagle transferred title to the dam site, and the land and reservoir bed 20 feet to either side of the base of the dam wall, to the Jesse Lake Home Owners' Association, a group controlled by the 30 lot/home purchasers. Blue Eagle also conveyed to the Village of Possum Creek (2 miles away) both an easement (but not fee title) across the dam site tract to the reservoir and a right to withdraw water from the reservoir for public water supply. Possum Creek later built a 2-mile long pipeline from the village water plant to the development, through the easement, and to the reservoir.

In summer 2001, a drought year, the Village of Possum Creek for the first time withdrew water from Jesse Lake through its pipeline, causing the reservoir level to drop 3 feet. Since most of the piers the homeowners had build in Jesse Lake were located in water less than 3 feet deep, the reservoir level drop had the effect of preventing the homeowners from using their piers and stranding their boats farther out in the reservoir. A couple of homeowners had dug canals to boathouses; those canals, also, were less than 3 feet deep. Those canals went dry. Needless to say, the 30 homeowners were not pleased.

Some of the homeowners had irrigated their lawns and gardens with water pumped from the reservoir. Also in summer 2001, in order to protect its water source, the Possum Creek village council enacted an ordinance under its extraterritorial public works jurisdiction banning all pumping from the reservoir by any entity other than the village. The homeowners were further outraged.

In fall 2001, the 30 homeowners and the Jesse Lake HOA sued the Village of Possum Creek to enjoin the diversion of water from Jesse Lake to the village and to enjoin enforcement of the no-diversion ordinance. Should the court grant either injunction? Assume the legal issues involved have never been decided in the State of Jefferson. Discuss all relevant issues. State a result for each requested injunction.

II.
(15 minutes)

Suppose in Question I that the Village of Possum Creek had been diverting water each summer out of Jesse Lake for the 9 years before 2001, and that in each of those years the diversions caused the reservoir level to drop 1 foot. Then, during the drought and very hot weather in summer 2001, the village diverted the same amount of water as it had in the previous 9 years, but because of smaller than usual flow from the creek into the reservoir and a higher than usual evaporation rate, the reservoir dropped the 3 feet mentioned in Question I, instead of the typical 1 foot.

The drop in reservoir level each summer before 2001 did not prevent use of the piers for typing up boats or going swimming, except very close to the shore, because very few of the boats had a draft greater than one foot and at least that much water remained next to the homeowners' piers.

Should the court grant the requested injunction against the diversion by the Village of Possum Creek? Assume a 10 year statute of limitations in real property actions. Discuss all relevant issues. State a result.

III.
(30 minutes)

The Peters family owns 2 miles of shoreline on the Ohio River in Kentucky. In that state, title to the bed of the river out to the state line is in the abutting riparians. (*Informational note:* This is different from the rule in Missouri where the state owns the beds of the Mississippi and Missouri River.) The Davis Towage Company regularly has anchored numerous barges at that location about 100 feet from the shore. The family finds this most annoying because barge and tow crew shout obscenities at the younger members of the family, male and female. (The crew members do not come ashore.) Although navigation on the river is unaffected, the anchoring of barges also makes access to the river from the family dock more difficult, because their boats have to thread past the anchored barges and to go near the obnoxious crew members.

The Peters family sued Davis Towage to obtain injunctions against anchoring of barges off their shoreline in the future and against the obnoxious behavior of crew members. Should the court grant those injunctions? Discuss all relevant legal issues. State a result for each requested injunction.

IV.
(30 minutes)

In the western state of Wyoming, Dan Cody started irrigating a pasture on his cattle ranch in 1950. He obtained water by building a wing dam partly across the Powder River and redirecting part of its flow through a notch in the bank and onto the ungraded pasture. Previously, the pasture had flooded naturally during spring floods. But the state water master advised him that he could get a more secure water right by actively diverting the water. Cody applied for and received a permit for his wing dam and his use of 10 acre-feet of water each year to irrigate the pasture.

In 2000, the Fremont Coal Company began developing an underground coal mine upstream from Cody's land. It installed pumps to drain its mine; the drainage was discharged into a gully which crossed onto Cody's land (but not near the irrigated pasture). As a result of the pumping of drain water from the mine, the river flow (after the flood season) became much reduced compared to its prior condition. As a result, during the hot days of July and August Cody could not obtain enough water to irrigate his cattle pasture.

The drainage water from the mine, discharged into the gully, flowed onto a low place on Cody's ranch and waterlogged it. While this area had a few inches of standing water for a few weeks during the spring snowmelt each year, it was dry enough to use for grazing during the rest of each year. Since the mine drainage began, there is ponding there year-round and Cody cannot use the area anymore for cattle grazing. To regrade the area so it could be flood irrigated with the mine drainage water would be very expensive, though technically feasible, and Cody is not interested in making such an investment.

Cody sued Fremont Coal for an injunction against future interference with his water rights and against future drainage onto his land. Should the court grant the injunction? Discuss all relevant legal issues. State a result.

V.
(30 minutes)

Briefly define the following terms:

1. Beneficial use
2. Abandonment
3. Equitable apportionment
4. Absolute ownership rule
5. Diffused surface water.
6. Source of title test
7. Common enemy rule
8. Public trust doctrine
9. Adjudication
10. Underground stream rule.

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I. (45 min.)

Injunction against diversion by village.

- riparian rights exist in surface watercourses
 - definition: flow of water with bed & banks, and mostly continuous flow
 - here, there is a surface watercourse
- reservoir is enlargement of natural stream
- riparian rights attach to lands abutting stream (*Tyler, Harris, Bollinger*)
- riparians have a coequal right to use water (*Tyler, Harris, Bollinger*)
 - homeowners are riparians on reservoir (as successors in title to Blue Eagle)
- each riparian has a right to make a reasonable use of water in the stream (*Tyler, Harris, Bollinger*)
- riparian right includes right to use surface and to maintenance of reasonable water level
- unreasonable drop in water level is actionable (*Collins, Harris*)
- riparian must use water on his own riparian land
 - riparian land defined by “source of title test” (*Anaheim*) or “unity of title test” (*Jones*)
 - *bonus*: since there was no severance/acquisition here by homeowners, definition issue is moot
- riparian cannot use water on his own nonriparian land
 - but *Stratton* argues that there is no cause of action for a nonriparian diversion until riparians are adversely affected
 - *Anaheim* holds contra that any diversion to nonriparian land is actionable immediately
- most commentators assume that riparian cannot authorize a nonriparian to divert water
 - but, *Pyle* holds that a riparian can so authorize
 - *Duckworth* holds that riparian grantor is bound
 - *Apfelbacher* holds that nonriparian has a derivative right, and can take no more than riparian grantor had a right to use
- thus, here, village is making a nonriparian use [customers are not riparians] (*Adams*)
 - as against homeowners, the diversion is either *per se* unreasonable (*Anaheim*) or unreasonable on the facts (*Stratton*), because water level was reduced so much
 - as against Blue Eagle, the diversion is enforceable (*Duckworth*)
 - *bonus*: village can acquire diversion right by exercising eminent domain (*Adams*)

Injunction against enforcement of no-diversion ordinance.

- riparian (and nonriparian grantee) have coequal rights of use
 - no riparian has a right to use all the water (*Bollinger, Farrell, Botton* by analogy?)
 - ordinance banning use by other riparians constitutes a regulatory taking (*Bino*)

II. (15 min.)

Injunction against diversion by village.

- law of prescription applies
 - prescriptive water right is acquired when there is open, notorious, continuous, and adverse use for the period of the statute of limitations (*Pabst*)
- here, homeowners' right to a reasonable water level is involved
- *open & notoriousness*: interference must not be hidden and could be noticed
 - homeowners presumably were aware of the diversion and noticed that the village was diverting water
- *continuity*: requires that the interference occur almost all the time
 - or in the case of seasonal interference, it must occur each season
- *adversity*: adversity requires interference with property right of another
 - here, boats could still dock at piers when reservoir level dropped one foot, so it is hard to show adversity
- thus, village acquired right to divert water because it had done so for 10 years (1992-2001)
 - but does it have a right to divert the same volume of water each year, or to cause the same interference?
 - because in 2001, diversion of the same amount of water caused a much greater interference.
 - **decide**

III. (30 min.)

- navigation vs. trespass.

- Ohio River is a major commercial waterway; as such, it is a "navigable water of the United States".
 - definition: a "navigable water of the United States" is one that is or was navigable in interstate commerce, or could be made so at reasonable expense.
- on such waterways, private bed titles are subordinate to the federal navigation power.
- also, on waterways that a navigable in intrastate commerce, private bed titles are subordinate to the state sovereign power to protect the public right of navigation and vessel passage.
 - in some states, that state power extends to all waters floatable by recreational vessels.
 - *note*: Kentucky has not selected a rule for defining which waters are subject to public rights; but selection of the tidal water test is highly unlikely.
- thus, on such waterways, no one can unreasonably interfere with navigation and the public right of vessel passage as a matter of both federal and state law.
- anchoring barges involves use of the bed, as distinguished from use of the water above the bed.
- the issue, therefore, is whether anchoring barges on a regular basis is an exercise of the public right of navigation, or whether it constitutes a trespass on the bed.
- **decide.**

- *reasonableness of the exercise of the public right of navigation.*
 - *Botton* suggests that the public must exercise its public rights in a reasonable way *re* private riparian owners.
 - *bonus:* but, *Botton* involves public invitees on a nonpublic lake. Thus, it is not direct precedent.
 - *bonus:* courts have held that riparians cannot unreasonably interfere with navigation in building piers. *Capune*.
 - courts have held that public may not wade on beds of public waters or sit on banks.
- Cases discussed after Elder.*
 - thus, it appears that public may not unreasonably interfere with private rights in their exercise of public rights.
 - arguably, the obscenities are an unreasonable interference. *Botton*.
 - but, if barges are anchored in such a way so as not to block access to P's dock, there would be no unreasonable interference with P's private right to wharf out and to have access to the river.

IV. (30 min.)

Groundwater law.

- there are 3 possible rules: absolute ownership rule, American rule, and comparative reasonable use rule.
 - *absolute ownership rule:* landowner may use or withdraw groundwater for any reason or no reason without liability to neighbors
 - *American Rule:* landowner may withdraw groundwater for use on his overlying land or to enable such use
 - *comparative reasonable use rule:* groundwater may be use, withdrawn or exported provided that neighbor's use or access is not unreasonably interfered with
- apparently groundwater rule has not been selected in State of Fremont.
 - **decide choice of rule**
- Fremont Coal has absolute right to drain mine under first 2 rules, regardless of consequences on river flow; but it has a right to drain mine only to extent it does not unreasonably interfere with other groundwater users under 3rd rule.

Prior appropriation doctrine applies to river flow.

- Fremont is a western state; thus, water rights are governed by prior appropriation principles.
- "first in time, time in right" – Cody has a 1950 appropriation to 10 ac.ft.
- that means that no person diverting water from the river subsequently can interfere with Cody's right to receive that appropriated water.

Drying up of river by mine drainage.

- where groundwater and surface streams are hydrologically connected, courts in prior appropriation states will recognize the connection legally, and subject both the groundwater and the surface stream to the same prior appropriation list.
- thus, Fremont Coal cannot divert groundwater (by draining the mine) which interferes with Cody's appropriation of water.
 - *suggestion:* Fremont Coal should discharge the drainage upstream from Cody's wing dam. (but is it polluted?)
- *result:* Fremont Coal is violating Cody's appropriation rights and can be ordered to stop by either the state water agency or by the court

Discharge of mine drainage onto grazing land.

- there are 3 rules applying to drainage: common enemy rule, civil law rule, and comparative reasonable use rule.
 - *common enemy rule*: landowner can get rid of or pen back drainage water in any manner or location without liability to neighbors
 - *civil law rule*: landowner may not alter drainage pattern; is liable if he does so and neighbor is adversely interfered with
 - *comparative reasonable use rule*: drainage water may be altered in volume or location, provided that neighbor's land use is not unreasonably interfered with
- choice of rule apparently is a matter of first impression in State of Fremont.
 - **decide choice of rule.**
- the discharge is permitted under the 1st rule, barred by the 2nd rule (because it alters the drainage pattern), and probably is unreasonable under the 3rd rule.

VI. (30 min.)

Briefly define the following terms:

1. *Beneficial use* – under prior appropriation, it is an application of water to a reasonable economic use outside the watershed
2. *Abandonment* – under prior appropriation, it is a cessation of water use with intent not to resume such use
3. *Equitable apportionment* – each state is entitled to a fair share of water in an interstate watercourse
4. *Absolute ownership rule* – landowner may use or withdraw groundwater for any reason or no reason without liability to neighbors
5. *Diffused surface water* – water flowing over the surface of the ground after rains and snowmelts
6. *Source of title test* – one definition of riparian land – abutting land must always remain in single ownership with the shoreline
7. *Common enemy rule* – landowner can get rid of or pen back drainage water in any manner or location without liability to neighbors
8. *Public trust doctrine* – state has obligation to protect the public rights of fishery & navigation on navigable waters (state definition)
9. *Adjudication* – an administrative procedure under a prior appropriation permit statute for updating the validity, size and place of diversion and application of water to the land
10. *Underground stream rule* – comparative reasonable use rule is applying to groundwater in confined aquifers [underground analog to surface watercourses]