

FINAL EXAMINATION

WATER LAW

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Wednesday, December 16, 1998

8:30 AM - 11:00 AM

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

THIS EXAMINATION CONTAINS SIX (6) PAGES.

THIS EXAMINATION CONTAINS SIX (6) QUESTIONS.

I = 25 min. II = 30 min. III = 15 min. IV = 25 min. V = 25 min. VI = 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.
(25 minutes)

In 1975, Hannah Bailey purchased a 4 acre tract of land in Karl City. Soon after purchasing the property, she cleared out some brush and other natural debris and noticed an ankle-deep creek or stream that ran through her land. (On old maps, it is called Goose Creek.) Often the stream was completely dry and flowed with water only during and after rain storms. Above Bailey's land, the stream ran from a 10 acre wetland and across Karl City's municipal airport.

In 1996, Karl City began trenching the existing stream with bulldozers and backhoes. The project ran from a new subdivision, through the wetland and across the airport property, ending at Bailey's property line. The project took storm water from the subdivision, drained the wetland, and removed storm water from the airport.

Bailey sued Karl City for damages and for an injunction requiring it to construct a storm water flow retention basin immediately above her property line. Karl City denied liability.

At trial, Bailey testified on the effect of the project on her land:

“Massively. It is scouring the banks, it has removed our fence and flattened it down flat, and took the retaining wall askew in the ditch, and the tree roots are hanging out, and the banks are falling in, and the bridge posts are all exposed, and it washed out the culvert and shot it out under the fence and down onto the next property south of our property. Every time it rains there is more damage.”

The city introduced evidence that the size of the area drained by the stream was the same as before the project was constructed.

The case arose in Missouri. Should the court grant the relief requested by Bailey? Discuss all relevant legal issues. State a result.

II.
(30 minutes)

Ozark Ecology Center, Inc., owns a huge tract of land with 14 miles of frontage on both banks of Silver Creek. It acquired the land from Ozark Timber Company, which had once used the land for lumbering and as a timber reserve. Silver Creek is quite small and contains many shallow places and rapids. But there is a wide place in the stream in the middle of the Center's property. In the spring and after heavy rains, the flow in the stream is quite large. But in low-rainfall periods, there are many exposed rocks in the streambed because of the stream's low flow. The Center conducts ecological research on the stream. To prevent recreational boaters, floaters and fishermen from using the stream within the boundaries of its property and to prevent disturbances to its scientific research, the Center has constructed a 7 foot tall chain-link fences around its entire property, including across the stream where it enters and exits its property. Also, it has placed "No Trespassing" signs on the fence at frequent intervals, including at the places where the stream passes through the fence.

Will Grant and Barbara Wilson are members of Ozark Canoeists, a unincorporated sporting organization. On two occasions they entered the Center's property to use the stream for canoeing. The first time they cut the chain-link fence and dragged their canoe through the opening. They were arrested for trespassing. A week later they used a helicopter to transport them to the wide place in the stream and canoed on the stream from there. Both occasions occurred in late springtime. Again they were arrested for trespassing.

At trial they admitted that they had used the stream for canoeing on both occasions, but argued that they had a right to use the stream and, thus, they were not trespassing.

Should the court hold as a matter of law that Grant and Wilson has a right to canoe on Silver Creek within the boundaries of the Center? Discuss all relevant issues. State a result. (Assume this is a case of first impression in the State of Jefferson, a Midwestern state.)

III.
(15 minutes)

Plaintiffs Luther and Charlotte Stone, and defendant Dorothy Cantlon, own adjacent tracts of land both abutting on a nonpublic lake. The lake straddles their joint property line. After they bought their property in 1987, the Stones used the entire lake for boating, swimming and fishing. After Cantlon bought her property in 1992, she erected a fence extending along the joint property line approximately 10 feet into the lake in order to keep her cattle from entering the Stones' property. However, the cattle managed to go around the ends of the fence, so in 1993 Cantlon extended the fence all the way across the lake. This fence prevented the Stones from using the entire lake.

The Stones now bring a suit seeking an injunction ordering Cantlon to remove the fence from the lake. How should the court rule? Discuss all relevant legal issues. State a result. (Assume that this case arises in the State of Jefferson, that the lake is defined as nonpublic under prior cases, and that the case is one of first impression.)

IV.
(25 minutes)

Ozark Water Company installed a water well and pumped 90,000 gallons per day from its for its water bottling plant. The bottled water is sold in grocery stores as *Great Spring Natural Water*. There are two effects resulting from Ozark's pumping. First, the wells of three neighbors dried up and had to be deepened to reach a dependable water supply. Second, the flow of water in Door Creek, which flowed near Ozark's well, was reduced by two-thirds. The Village of Door depended on creek water for its public water supply, which it had been diverting to its streamside water plant, and then distributing to its customers within the village limits. As a result, the Village of Door had been build a deep water well for a replacement water supply.

The Village of Door and the three neighbors sued Ozark for damages. Should the court award damages? Discuss all relevant legal issues. State a result. [Assume this case arose in Missouri.]

V.
(25 min.)

Russell and Emily Stokes own a 5 acre tract in the State of Lewis, a western state, on which their residence is located. They have a water right permit authorizing them to divert water from an particular “unnamed spring” and to use water flowing from that spring for irrigating their lawn and garden. Instead of running a pipe on an easement to the spring, they dug a hole in the intermittent stream leading from the spring about 500 feet from the spring and placed a collection box in the hole. They divert their water from the collection box, instead of from the spring, and use the water to irrigate their lawn and garden. They have continued to do this for over 5 years.

The relevant statutes of the State of Lewis provide:

§ 540.610. “Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state. Whenever the owner of a perfected and developed water right ceases or fails to use all or part of the water appropriated for a period of five (5) successive years, the failure to use shall establish a rebuttable presumption of forfeiture of all or part of the water right. Thereafter, the water which was the subject of use under such water right shall revert to the public and become again the subject of appropriation in the manner provided by law, subject to existing priorities.”

§ 540.510. “[N]o change in use or place of use or any water for any purpose may be made without compliance with the [water rights transfer] provisions of [the statutes of Lewis]. However, the holder of any water use subject to transfer may, under compliance with the [water rights transfer] provisions of [the statutes of Lewis], change the use and place of use, the point of diversion or the use theretofore made of the water in all cases without losing priority of the right theretofore established.”

The water rights transfer statutes of Lewis require an application for transfer and approval of the application by the Lewis Water Resources Department.

The owner of a tract downstream from that owned by the Stokes brought suit to cancel the Stokes’ water use permit on the grounds that they did not divert the water at the authorized point of diversion and that this had continued for more than five years. All agree that the water was and is being used at the place and for the purposes specified in the permit.

Should the court cancel the Stokes’ permit? Discuss all relevant legal issues. State a result.

VI.
(30 minutes)

Briefly define and state the significance of the following terms:

- (1) *parens patriae*
- (2) navigable water of the United States
- (3) civil law rule
- (4) abandonment
- (5) common enemy rule
- (6) navigation servitude
- (7) public trust
- (8) beneficial use
- (9) natural flow rule
- (10) equitable apportionment

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I. (25 min.)

Is stream a watercourse, drainway, or mere drainage water?

- definition of watercourse: bed, banks & substantially continuous flow of water
 - definition of drainage water: water flowing over surface of ground after rains & snowmelts and not within beds & banks
- definition of drainway: drainage water in confined channel
- here, there are bed & banks, but not substantially continuous flow
- conclusion: "Goose Creek" is a drainway

What rules apply?

- in Missouri, all three classes of water are subject to the comparative reasonable use rule
 - *definition*
- drainways probably are still controlled by the *Borgmann* drainway rule
 - it provides that upper owner cannot add water to drainway which exceeds its natural capacity
- here, evidence shows that the amount of water increased after the project, coming from 3 sources: (1) subdivision storm drain, (2) draining wetland, (3) airport drainage.
 - but, the drainage area of the drainway was not increased
 - flow increase must result from acceleration of storm flow, partly from paved areas in subdivision & airport, and partly by destruction of retention capacity of wetland
- in view of the damages to B's land, this increase clearly is actionable
 - damages for repair of past destruction of B's land clearly is appropriate
 - injunction for a flow retention basin probably is appropriate

II. (30 min.)

While the Center may own the bed of Silver Creek within the boundaries of its property, members of the public may use the creek if it is a public water or if it is subject to the public trust doctrine.

- public has a right to float the surface of public waters
- Silver Creek is a public water if it meets the definition of public waters
 - states have adopted one of 3 tests for public waters:
 - (1) tidal test: subject to the ebb & flow of the tide
 - (2) commercial navigation test: stream is used for commercial navigation, or was so used historically
 - [no state has adopted the third-prong of the federal test: susceptibility of commercial navigation in the future]
 - (3) floatability by sawlogs or recreational boats
- clearly, neither of the first two tests is satisfied by the facts
 - Nebraska is the only midwestern state to adopt the tidal test for any purpose (bed title)
- is Silver Creek floatable?
 - it is shallow and full of rocks; flow is low during low-rainfall periods

- decide!
- landowner cannot exclude the public where a public water crosses private land is Silver Creek subject to the public trust?
 - public trust applies to all waters defined as public waters under state law (discussed above)
- rights of private landowners are servient and subordinate to rights of beneficiaries of public trust
 - that stems from sovereign obligation to protect public rights of navigation & fishery on public waters
 - pedigree of public trust
- state can enforce those rights
- can members of the public enforce those rights?
 - some states so hold (WI), others hold *contra* (MD).

bonus:

- purpresture
 - *definition:* private enclosure of that which belongs to the public (such as public waters)
 - enjoined as a public nuisance if enclosure does not benefit the public
 - fence is an unlawful enclosure, if the water is a public water

RESULT

III. (15 min.)

What rights does a riparian have to use the entire surface of a *nonpublic* lake?

- riparian is a person whose land abuts on a watercourse
- a nonpublic lake is one on which members of the public have no rights
- where can a riparian go on the surface of a private lake?
 - there are 2 rules followed by various states:
 - (1) riparian can use only the portion of surface above the portion of bed he owns
 - under this rule, Cantlon can block off her part of the lake with a fence
 - (2) riparian can use the entire surface
 - under this rule, Cantlon cannot block off her part of the lake, but must allow Stones access to the entire lake surface

IV. (25 min.)

Neighbors' wells.

- of the 3 groundwater rules (absolute ownership, American rule, comparative reasonable use), Missouri has adopted comparative reasonable use in *Higday*
- under that rule, one well users cannot unreasonably interfere with the use of others' wells
- drying up neighbors' wells is an unreasonable use (analogously to drying up a stream by a riparian)
 - damages should be granted, since the neighbors incurred expenses to deepen their wells to reestablish dependable water supplies

Village of Door's well

- this case involves streamflow reduction because of diversion to a well

- that is a hydrologic cycle interface problem
- the law has not established clear rules for such interface effects
 - however, both *Springfield Waterworks* (MO: stream diversion depletes spring) and *New Canaan* (CT: well diversion depletes stream) recognize the hydrologic connection and hold that diversion of one class of water affecting another class of water is actionable
 - in Missouri, both watercourses and groundwater are subject to the same comparative reasonable use rule
- substantially reducing the flow to Door's water plant probably is unreasonable
- BUT, Door's customers are nonriparian
 - *definition*: property which does not abut a stream
 - the fact that Door itself is making the diversion to a riparian location, the water plant, does not make the use riparian if the place of use is nonriparian (as a result of sale of the water) — *Pernell*
- nonriparians do not have the riparian right to make a reasonable use — *Kennebunk*
 - thus, Door cannot recover damages for interference with its diversion to nonriparian customers

V. (25 min.)

Does use of the wrong place of diversion of water cause a forfeiture under prior appropriation statutes?

forfeiture vs. abandonment

- *forfeiture*: loss of water right after expiration of the requisite statutory period regardless of reason or intent.
- *abandonment*: loss of water right after expiration of the requisite statutory period only if the water users intends to give up the water right.
- here, the statute speaks of both “forfeiture” and a “rebuttable presumption of forfeiture.”
- however, forfeiture is automatic and neither requires intent nor creates any rebuttable presumptions.
- DECIDE what this statute means.

wrong place of diversion

- water was used at place of use and for purposes specified in permit
- water was diverted at an unauthorized point of diversion
- statute provides that change in point of diversion must be approved by LWRD
- statute does not specify whether use of unauthorized POD causes forfeiture
 - statute does provide that failure to use water for 5 years causes rebuttable presumption of forfeiture
- DECIDE whether use of unauthorized POD also works a forfeiture

VI. (30 min.)

Definitions:

- (1) ***parens patriae***: part of equitable apportionment doctrine -- state acts for its water users, decree binds them
- (2) **navigable water of the United States**: federal jurisdictional waters -- are, were or are susceptible of being used as highway of waterborne interstate commerce

- (3) **civil law rule:** drainage law rule -- landowner cannot interfere with natural drainage pattern
- (4) **abandonment:** prior appropriation -- requires intent to give up right to use water
- (5) **common enemy rule:** drainage law rule -- landowner can get rid of drainage water in any way without liability for consequential injury
- (6) **navigation servitude:** part of navigation power -- US can take or use or obstruct water above the bed of navigable waters of the US without compensation; private bed titles & water rights are servient
- (7) **public trust:** state navigable or floatable waters are subject to a state obligation to protect public rights of navigation/floatage & fishery; private rights are servient
- (8) **beneficial use:** element of valid prior appropriation -- diverted water must be applied to land for an economic use
- (9) **natural flow rule:** riparian rights -- each riparian is entitled to flow of water down to him as it flowed naturally; no ascertainable diminution or alteration of flow is allowed
- (10) **equitable apportionment:** interstate waters -- each state is entitled to a fair (equitable) share of flow