

FINAL EXAMINATION

WATER LAW

P.N. Davis

Saturday, June 14, 2008
8:30 - 10:00 AM

THIS IS A ONE AND A HALF (1½) HOUR EXAMINATION.
THIS EXAMINATION CONTAINS THREE (3) PAGES.

THIS EXAMINATION CONTAINS THREE (3) QUESTIONS.

I = 25 min. II = 50 min. III = 15 min.

FILL IN YOUR EXAMINATION NUMBER ON THE BLUEBOOK STICKER.

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YOU MAY BRING IN YOUR STATUTORY SUPPLEMENT, BUT NOTHING ELSE. You may write in the margins and on the blank pages of the supplement.

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Instructions:

1. These questions will be graded on the basis of the times indicated with each questions. The indicated time for the questions total 1½ hours. You will be given 1 hour, 30 minutes 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)

Members of the Boonville Historical Society, a Missouri non-profit entity, removed a large rock situated in the Missouri River close to the shore. When the river is high, the rock is submerged in the river. When the water is low, the rock is exposed, but still in a few inches of shallow water. This rock is considered to have historic importance, because Lewis and Clark tied their boat to it for an overnight stop on their return from the West in September 1806. To make the rock more accessible, BHS arranged for a crane on a barge to lift the rock out of the river and take it to shore at a public access ramp, where it was hauled to the waterfront park for display.

The Union Pacific Railroad owns the land along the shore in fee and uses it for a railroad right-of-way with 2 tracks and a siding.

Members of the Boonslick River Monitor Society, a non-profit environmental group, consider moving the rock to violate the ecological and historic ambiance of the river. Its members canoe in the river on weekends, using the public access point. Several members of the group complained to the Boonville city government and the Cooper County commissioners and prosecuting attorney. They declined to take action.

Are there any other governmental entities that members of the group might complain to who would have legal authority to take action? What are the sources for their jurisdictions? What legal actions, if any, can the government entities, or BRMS, take? What is the likely legal result? Discuss all relevant legal issues.

II.
(50 minutes)

There are three (3) water users on Wet Creek. A fourth person proposes to begin a new use. The creek has a total flow of 6 cfs.

The following water uses are now located on Wet Creek. Their lands are situated on the creek in the following order from upstream to downstream:

The first user, Oscar One, diverts 2 cfs from the river to irrigate a peach orchard located on land abutting the creek. Most of the water is consumed by the peach trees, and the remainder percolates into the ground. None is returned to the creek. This use was begun in 1950.

The second user, Thomas Two, operates a dairy and cheese factory on abutting land. He began his use in 1960 and diverts 1 cfs. Because this water is polluted after use, it is not returned to the creek, but, instead, is discharged into a parallel creek which bypasses the water users below.

The third user, Terry Three, is a wealthy landowner with a big horse farm, an extensive irrigated garden, and a large ornamental fish pond and fountain. He diverts 2 cfs for these uses. All of these facilities are located on a non-abutting tract contiguous to Three's abutting tract. Three acquired the abutting tract in 1970 and the non-abutting contiguous tract in 1975. He began his water use in 1980. The return flow of 1 cfs from these uses is returned to the creek at Three's lower property boundary.

In 2005, Frank Four purchased land downstream from Three's land. The previous owners had not used water from Wet Creek. Four wishes to divert 3 cfs from the creek. He proposes to transport his diverted water from his small lot on Wet Creek through a lateral canal on an easement to his non-abutting land two miles away. That land happens to abut the parallel creek mentioned above. He plans to use the water to operate a commercial fish hatchery. (Fish hatcheries require a constant large flow of water for the fish breeding tanks.)

A.

Assume that Wet Creek is located in an eastern state. May Four divert water for his proposed use? Discuss all relevant legal issues. State a result.

B.

Assume that Wet Creek is located in a western state. . May Four divert water for his proposed use? Discuss all relevant legal issues. State a result.

III.

(15 minutes)

Briefly identify and define the following terms:

- (1) common enemy rule.
- (2) watercourse.
- (3) equitable apportionment.
- (4) navigable water of the United States.
- (5) adjudication.

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I. (25 min.)

bed title

- beds of navigable waters in Missouri are owned by the State.
- the Missouri River is a commercially navigable water (under both federal and state law).
 - because the river is used by vessels in interstate and intrastate commerce.
- state bed title extends laterally to the ordinary high water mark.
- thus, the bed is not owned by the abutting riparian, the Union Pacific Railroad.
 - it cannot sue for trespass.
- as bed owner, the State could sue BHS for trespass, because the rock sat on the riverbed.

public trust

- navigable waters and their beds in MO are subject to the public trust.
- as public trustee, the State has an obligation to protect public trust property from damage or conversion. Nor can it transfer title to public trust property. *Illinois Central*.
 - it cannot abrogate or delegate those public trust obligations.
- thus, the State is entitled to:
 - (1) restoration of the rock to the river bed at its former location.
 - (2) damages.
 - (3) civil and/or criminal fines for conversion.
 - (4) criminal liability for theft of state property.
- the public trust can be enforced by public officials.
 - this would include the Cooper County prosecuting attorney and the State Attorney-General (since MoDNR does not have independent litigation authority).
- the public trust also can be enforced by a member of the public, as beneficiary of the public trust.

federal jurisdiction

- Corps of Engineers has authority over all physical activities in federal navigable waters. Rivers & Harbors Act of 1899, § 10.
 - this authority is designed to protect the navigable capacity of navigable waters, and to prevent the creation of obstructions to navigation.
- the Corps's
 - thus, a permit was required to remove the rock from the river.
 - *note*: the rock cannot be restored to the river unless/until the Corps issues a permit.
 - because BHS did not get a permit, the Corps can seek civil and criminal remedies.
 - only the Corps can enforce the R&H Act, since that act does not contain a citizen suit provision.

II. (50 min.)

A. Eastern state:

nature of water rights system:

- eastern states follow the riparian rights doctrine.
- only abutting riparians can use water.
- each riparian has a coequal rights: new users share the water with earlier users.
- each riparian is entitled to natural flow and to make a reasonable use.
 - today courts emphasize reasonable use.
 - reasonable use employs a comparative reasonableness standard.
- reasonable use compares uses made by each user and stream flow characteristics to determine how to allocate the water between riparians.

place of use:

- water can be used only on riparian land; it cannot be used at all on nonabutting noncontiguous land.
- states follow one of two rules to determine the extent and location of riparian land.
 - *source of title test*: only the abutting tract originally conveyed to the original riparian has riparian status.
 - no land can be added to that original tract.
 - *unity of title test*: all the land abutting and contiguous to the shore is riparian regardless of when various component tracts were acquired.
- thus, One's and Two's lands are entirely riparian.
- Three's use is on a contiguous tract acquired after he acquired the abutting tract.
- thus, Three's use is nonriparian and unlawful under *source of title*, and riparian and lawful under *unity of title*.
- thus, Four's proposed is unlawful under both *source of title* and *unity of title*, because his place of use is nonriparian; it is both nonabutting and noncontiguous.
- the choice of rule determines the result.

type of use:

- riparians can use water for any use, consumptive or nonconsumptive.
- irrigation, livestock watering, factory process water, and ornamental garden, pond, and fountain uses all are lawful.

amount of use:

- riparians must share the water.
- since the right is coequal, new users must be let in, even if earlier users must reduce the size of the uses somewhat.
- since Four proposes to divert more water than is unused, Four must be let in and take less than he wants, and the other three riparians must reduce their uses.
- a court would consider many factors, including the nature of their uses, to determine their respective shares.

Bonus – *prescription:*

- in riparian states, rights contrary to those of riparians may be prescribed.
- the use must be open, notorious, continuous for the S/L period, and adverse/hostile.
- adversity occurs only when another riparian is able to use less water than before.
 - in some states, any use on nonriparian land is *per se* adverse.

- in other states, use on nonriparian land is adverse only if the flow of water to lower riparians is reduced.
- there is no adversity against upper riparians.
- thus, since Three's nonriparian use was below One's and Two's uses, there is no adversity against them; since water hasn't yet been used on Four's land, there is no adversity yet.

result: since Four proposes to use all of his water on nonriparian land, his diversion can be prohibited; the uses by One, Two, and Three remain unaffected (although Three's use on his contiguous tract is unlawful under *source of title*).

B. Western state:

nature of water rights system:

- western states follow the prior appropriation system. (Today, all western states have prior appropriation permit statutes.)
- "first in time, first in right."
- earlier users can take their entire appropriations, and later users can take what is left, if any.
- new users cannot take water if the stream flow is entirely appropriated by earlier appropriators.
- for a valid appropriation, water must be diverted (or impounded) at a particular place, and applied to a beneficial use at a particular place.
- a beneficial use traditionally is an economic use outside of the stream. (Instream uses were not considered beneficial until enactment of statutes in recent decades.)
- (water must be diverted, transported, and used under contemporary standards of efficiency.)
- (the water must be applied to the land with reasonable diligence.)

place of use:

- water can be used anywhere. (There is no riparian land restriction.)
- thus, there is no location of use problem with Three's use, and Four can divert and use water on nonabutting noncontiguous land.

type of use:

- irrigation, livestock watering, and factory process water are valid beneficial uses.
- ornamental garden, fish pond, and fountain uses all are not considered beneficial uses under traditional concepts.
- a fish hatchery is a valid beneficial use.
- thus, the uses by One and Two are entirely valid beneficial uses.
- Three's horse watering is a form of livestock water and is valid, but irrigation of the ornamental garden, maintenance of the ornamental fish pond, and the fountain are invalid uses.
- Four's proposed use is valid.

amount of use:

- uses by earlier appropriators prevail of uses by later appropriators.
- here, the net uses by One (2 cfs), Two (1 cfs), and Three (2 cfs less 1 cfs return flow) consume 4 cfs. That leaves 2 cfs unappropriated.
- Four proposes to divert 3 cfs. That is more water than is available. He can take only 2

cfs.

- *bonus*: however, a portion of Three's net 1 cfs is being used for nonbeneficial uses.
 - Four could sue for a declaration reducing the size of Three's appropriation, or petition the state agency for an adjudication. That would make more water available for appropriation by Four.

Bonus – prescription:

- adverse use against other appropriators, above and below, occurs only when the other appropriators can obtain less water than before.
 - otherwise, the other appropriators have no physical notice and can presume that other diverters are using water lawfully until they get actual notice to the contrary.
- this doctrine applies only in some states.
- in other states, no one can prescribe against other appropriators even if they know of the unlawful diversion.
 - because no one can lawfully take water without obtaining a permit.
- [no one can prescribe unappropriated water – same reason.]

result: (*see amount of use, above.*)

III. (15 min.)

Briefly identify and define the following terms:

- (1) *common enemy rule*. – drainage (diffused surface) water rule which provides that a landowner may repel or divert drainage water in any manner or direction without liability to adversely affected neighbors.
- (2) *watercourse* – water within bed and banks with a more or less continuously flow.
- (3) *equitable apportionment* – interstate allocation rule which provides that each state is entitled to a fair share of the water under the circumstances.
- (4) *navigable water of the United States* – definition under the navigation power which provides that federal jurisdiction extends to waters which are presently, historically or are susceptible of waterborne commercial navigation in interstate commerce.
- (5) *adjudication* – procedure for comprehensive basin-wide redetermination of exercised prior appropriation claims.