

FINAL EXAMINATION

WATER LAW

P.N. Davis

Thursday, May 4, 1995

8:30 - 10:30 AM

THIS IS A TWO (2) HOUR EXAMINATION.

THIS EXAMINATION CONSISTS OF FOUR (4) PAGES.

THIS EXAMINATION CONTAINS FOUR (4) QUESTIONS.

I = 40 min. II = 30 min. III = 20 min. IV = 30 min.

FILL IN YOUR EXAMINATION NUMBER ON THE BLUEBOOK STICKER.

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THIS IS A CLOSED BOOK EXAMINATION.

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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 2 hours. You will be given 2 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.
(40 minutes)

Keith Farms and Virgin Ranch are adjoining landowners. Keith owns the land to the north of Virgin. Keith constructed a dam across Crane Creek, which contained a 3-foot diameter steel culvert at creek bed level. Only when the flow in the creek exceeded the flow which could pass through the culvert did the dam retain any water. It amounted to a flood retention structure. In 1992, Keith reconstructed the dam with two 15-inch culverts, one above the other. This had the effect of retaining water in the dam at a much lower creek flow rate than before, and reducing the amount of flow in Crane Creek which passed to Virgin's land.

Keith used the water retained in the reconstructed dam in two ways. First, it flooded some low-lying land adjacent to the reservoir for a new artificial wetland. It rented the wetland to 4 hunters for \$1000 per year. Second, it pumped water over a low divide to irrigate an apple orchard.

Virgin had used the water in Crane Creek for many years to water dairy livestock. The water was pumped from the creek to some watering troughs in a pasture and in a barn located on the same tract of land. After Keith reconstructed the dam, the flow in Crane Creek was insufficient for the same amount of livestock watering as before. As a result, Virgin had to drill a well for a supplemental water supply.

Virgin sued Keith, seeking an injunction protecting its livestock watering use, suggesting that the court order restoration of the original 3-foot culvert in the dam.

A.

In an eastern state, is Virgin entitled to the injunction? Discuss all relevant legal issues. State a result.

B.

In a western state, is Virgin entitled to the injunction? Discuss all relevant legal issues. State a result.

II.

(30 minutes)

Trapper Siegfried, Inc., [TS] operates a canoe rental service in the State of Jefferson. It is located on a small creek about 200 feet above its mouth on the Bass River. People launch its rental canoes at a landing on the creek near its store and storage building. Between the canoe rental landing and the river is a private road. The road connects a large resort, Jefferson Lights, with the nearby county road. It is located on a fee simple right-of-way where it crosses the creek. The private road previously bridged the creek on a small timber bridge 5 feet wide and 5 feet high. Canoeists could float under the bridge without ducking their heads. As the bridge timbers were rotting, the resort replaced it with a pair of 3 foot metal culverts covered with the road embankment. [Culverts are metal tubes.] The culverts were too small for canoeists to float through. The resort refused to allow TS or its renters to drag their canoes across the road where the creek went through the culverts.

TS sued Jefferson Lights for violation of its rights of access and use of the creek. Does Assume this is a case of first impression in the State of Jefferson. TS or its patrons have any such rights? Discuss all relevant issues. State a result.

III.

(20 minutes)

Edward Wayne built a flow retention dam on his property in rural Boone County, Missouri, to prevent flooding of his property and his home. The dam was built in a grass-lined depression running from the land of his neighbor, Harry Gresham, across Wayne's land to a drainage ditch along County Highway D. It drained both Gresham's and Wayne's properties. Water flowed in the depression both after rains and generally in the spring time when the water table was high. However, from the middle of the summer until the fall rains, no water flowed in the depression except immediately after rains. Because of the low gradient of the depression on Wayne's land, water flowed quite slowly and often overflowed onto the surrounding flat land after rains, flooding Wayne's houseyard and basement. By building the dam and its spillway, Wayne was able to reduce the peak flow in the depression and avoid the flooding after rains. However, the dam penned back water up the depression, causing it to overflow onto Gresham's land for extended periods in the spring and after rains the rest of the year. It flooded and waterlogged his household garden and ruined his spring lettuce, pea, and radish crops. It also flooded his barnyard, preventing its use by farm animals after rains all year.

Gresham sued Wayne. Is he entitled to relief? Discuss all relevant legal issues. State a result.

IV.
(30 minutes)

Define briefly the following terms:

- (1) *Appalachian Electric Power*
- (2) reserved rights
- (3) beneficial use
- (4) American Rule
- (5) navigation servitude
- (6) equitable apportionment
- (7) salvaged water
- (8) unity of title test
- (9) drainway
- (10) ordinary high water mark

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I. (40 minutes)

- A. Eastern state.
- abutting riparians are each entitled to natural flow and to make a reasonable use of water
 - American courts emphasize the latter
 - reasonableness (each riparian is entitled to a reasonable share of water):
 - irrigation is *per se* a reasonable use
 - livestock water is *per se* a reasonable use
 - use of water for an artificial wetland probably is a reasonable, but less compelling, use
 - recreational uses (hunting) probably are reasonable uses
 - natural/artificial use dichotomy (natural uses must be fully satisfied before artificial uses can have any water):
 - livestock watering is a natural use
 - irrigation is an artificial use
 - wetland is an artificial use
 - riparian water uses must occur on riparian land (as here) and within the watershed
 - here, the irrigation use was outside the watershed
 - hence, Keith's irrigation use is a nonriparian and invalid use
 - probably, Virgin's livestock watering use should be preferred over Keith's wetland use under the reasonable use analysis
 - Virgin's livestock watering, as a natural use, must be fully satisfied before Keith's artificial uses can have any water
- B. Western state.
- prior users have priority over subsequent users
 - prior appropriation: "first in time, first in right"
 - use must be a beneficial use
 - livestock watering is a beneficial use
 - irrigation is a beneficial use
 - maintaining the water level in an artificial wetland is not a beneficial use
 - place of use is irrelevant; water can be used anywhere, including outside the watershed
 - here, Virgin's livestock watering use has priority over Keith's more recent uses
 - also, Keith's wetland use is not a beneficial use, and cannot support an appropriation

II. (30 minutes)

- A. riparian rights of access and floatage
- abutting riparians have right to use surface, under 1 of 2 rules:
 - (1) only above own bed; (2) on entire surface of watercourse
 - here riparian can pass bridge only under 2d rule
- B. public right of floatage
- public has right to float on public waters; abutting riparian may not obstruct

- defined under 1 of 3 rules
 - (1) tidal waters; (2) commercially navigable waters; (3) floatable waters
- public rights exist here only if 3rd rule is adopted
 - here creek is floatable by canoes
- enforceable by members of public (inc. canoe rental service)

C. public trust doctrine

- obligation of state to preserve navigability
- applies to public waters (above)
- bed owners cannot obstruct
- enforceable by members of public (beneficiaries) as well as by state?

III. (20 minutes)

A. drainway or watercourse?

- bed, banks, more or less continuous flow? No!
- dsw subject to comparative reasonable use rule in MO
- before *Heins* in 1993, MO followed drainway rule -- drainway flow could not be obstructed by landowner below
- drainway rule probably an element of reasonableness today [ed. confirmed by *Kueffer* in 1994]
- under drainway rule, not reasonable to block drainway
- under regular rule, not reasonable to block flow which damages upstream vegetable garden

IV. (30 minutes)

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