

FINAL EXAMINATION

WATER LAW

P.N. Davis

Wednesday, December 6, 2000

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 FIVE (5) QUESTIONS.

I = 40 min. II = 30 min. III = 30 min. IV = 15 min. V = 20 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.
(40 minutes)

The Peters own a tract of land in the State of Jefferson abutting the end of a cove on a natural lake. The tract contains a cottage. Several years ago, the Peters built a 30 foot pier from their shore extending straight out into the cove. They own both a 16 foot power boat and a 12 foot sailboat.

Adjacent to the Peters is a tract owned by the Johnsons. Their tract, too, contains a cottage. Recently, they have built a 50 foot pier from the shore across the cove to its middle. The cove at this point is only 100 feet wide. The end of the Johnson's pier is about 20 feet from the end of the Peters's pier. The two piers are at right angles to each other. *See* attached diagram. The Johnsons dock a 30 foot powerboat and a 20 foot houseboat on either side of the outer end of their pier.

The result of this pier relationship is that the Peters find it difficult negotiate the crankhandle course they must follow to and from their pier around the end of the Johnson's pier. This is particularly difficult in the sail boat because of the quick changes in direction involved. Also, because of the width of the two boats the Johnsons dock at their pier, the effective width of the channel to the Peters's pier is only 6 feet. Thus, the Peters can, as a practical matter, use only the one side of their pier which does not involve negotiating the crankhandle course. Furthermore, the course they must follow to stay a reasonable distance from the end of the Johnson's pier takes them into the shallows opposite the end of the Johnson's pier.

The Peters sued the Johnsons for an injunction requiring the Johnsons to shorten their pier to a maximum length of 30 feet. The state attorney general joined the suit as a plaintiff. The Johnsons argue that such a pier would be too short for their boats. Should the court allow the state attorney general to join the suit? Should the court grant or deny the relief requested? Assume the natural lake is 3 miles long and a mile wide. Discuss all relevant legal issues. State a result.

I, cont.

DIAGRAM

II.
(30 minutes)

Davis Oil Company sells gasoline, other automobile petroleum products, tires, batteries, and the like, at its retail gasoline service station in Thomasville, in the State of Jefferson. The gas station is located at the lower end of a slightly sloping street. Immediately uphill from it on the same side of the street was a small decrepit wetland about 1 acre in size. The village street had no curb or gutter and was not served by a storm water drainage sewer. During heavy rains, the shallow ditch on the side of the street overflowed and spilled into the wetland.

A few months ago, the Stevens Furniture Company bought the adjacent property, filled the wetland to an elevation one foot above street level and built a store. As a result, during heavy rains the drainage flow along the street now ponds on the driveway and service area around the gas station gas pumps. Customers have to slog through 6 inches of water to use the gas pumps and to go to the gas station building to pay for their gas. Since the building is nearly at the driveway level, it, too, fills with water during storms, to a depth of about 3 inches. [Since the underground storage tanks have sealed openings, water does not enter them when the driveway/service area is flooded, nor does gasoline contaminate the water.]

About 300 feet behind the gas station is another street, which is at a lower level than the gas station. Both the Davis and Stephens properties extend to that street. Because the intervening ground is higher, the ponded water does not drain that way. Water cannot continue to flow down the street because it rises to cross a railroad track. Thus, the water ponding on the gas station property must slowly seep into the ground or evaporate. All that takes about a week.

Davis Oil Company is suing Stephens Furniture Company for damages and for an injunction requiring Stephens to construct a drain along its property to the street behind their properties, so as to enable rapid drainage of any storm water entering Davis's gas station property. Assume this a case of first impression. Should the court grant the requested relief under each of the various rules used in the United States? Which rule should the State of Jefferson adopt? Should the court grant relief under that rule? Discuss all relevant legal issues. State a result under each of the rules you consider..

III.

(30 minutes)

The City of Burr in the State of Jefferson (an eastern state) has been diverting water from the Hamilton River since 1970. The diversion has caused a reduction in flow to the Adams Mills downstream since that year; it had been using the run of the river for its mill since 1880. This has reduced the mill's power output. The City water utility uses about one-third of the water to provide a public water supply to residents in the city. It uses the other two-thirds as cooling and boiler feed water in its streamside electric power plant. About 35 percent of the diverted water is returned to the stream below the Adams Mill dam and millwheel; about 55 percent is returned to the stream above the mill dam; the remaining 10 percent is evaporated in the power plant's boilers.

In 1998, the Adams Mill sued the City of Burr seeking to enjoin the City's diversion totally. Should the court grant the requested relief, in whole or in part? Discuss all relevant legal issues. State a result.

IV.
(30 minutes)

Gale Gravel Company opened a gravel pit in the State of Jefferson in 1995. To work the pit, they found it necessary to dewater the pit by massive pumping of groundwater in the area. As a result, the perennial spring on adjacent property owned by Matthews ceased to flow for the first time in living memory. Sarah Matthews had just signed a contract to construct a bottling works on their property for the purpose of bottling spring water for the retail market. [It was to be called "Jefferson Water".] As a result of the drying up of the spring, Matthews had to cancel her plans and paid a construction contract cancellation fee.

The Matthews has sued Gale for violation of their rights in the spring water. Should the court grant either damages and/or an injunction against dewatering the gravel pit. Assume this is a case of first impression. Which rule should the State of Jefferson adopt? Should the court grant relief under that rule? Discuss all relevant legal issues. State a result under each of the rules you consider.

V.
(20 minutes)

Briefly define the following terms and identify the importance of the following cases:

- (1) developed water
- (2) equitable apportionment
- (3) navigable water of the United States
- (4) beneficial use
- (5) abandonment
- (6) adjudication
- (7) watercourse

WATER LAW – Fall 2000
P.N. Davis

I (40 min.)

Riparian right to use the surface of riparian waters:

- each riparian has a right of access to the surface of abutting waters and to navigate on those waters
- states differ whether a riparian can navigate the surface of the entire riparian water (civil law rule) or only that portion overlying the portion of the bed owned by that riparian (“common law rule”)
- this is an issue of first impression in Jefferson

Riparian right to wharf out:

- each riparian has, as an incident of title, a right to construct a pier or wharf to gain access to the navigable portion of abutting waters
- this right must be exercised in a reasonable manner so as not to unreasonably interfere with the coequal rights of other riparians to navigate riparian waters and to wharf out
- the pier or wharf must be built on the portion of the bed owned by that riparian
- *result:* here, D’s pier arguably unreasonably interferes with P’s right of access to the lake by making access too difficult (and dangerous)
- if the civil law rule of riparian navigability is adopted, D’s pier can be enjoined and be required to be reduced in length.

Public navigation rights:

- members of the public have a right to navigate on navigable waters
- navigable waters are defined by state law
- three rules have been adopted by various states:
 - (1) waters affected by the ebb and flow of the tide
 - (2) waters navigated in fact for commercial purposes (transport of goods and/or passengers)
 - (3) waters which can float a sawlog or recreational boat
- here, the waters would be navigable only under the third rule (no facts suggest satisfaction of the other two rules)
- public rights are enforceable by the state attorney-general or by a member of the public who uses the waters (here, P)
- choice of public navigability rule is a matter of first impression in Jefferson
 - if rule #3 is adopted, attorney-general can join the suit

Purpresture:

- if a riparian unreasonably interferes with public waters used by the public by making a private enclosure, the interference can be enjoined as a public nuisance and be required to be removed
- *result:* here, D’s pier arguably interferes with the right of public navigation enjoyed by P, because it makes access to the lake too difficult

II (30 min.)

- there are 3 drainage rules adopted by various states:
 - (1) *common enemy rule*: each landowner may dispose of drainage water in any manner he/she chooses or to block drainage of such water onto his/her land without liability to adjacent or nonadjacent landowners who are adversely affected
 - this rule has been modified in most states to bar malicious alterations of drainage patterns
 - this rule has been modified further (in 3 states) to require maintenance of drainways, which can be used by upper landowners to the limit of its natural flow capacity
 - (2) *civil law rule*: no landowner may alter the natural drainage pattern to the detriment of another landowner
 - this rule has been modified in some states to allow minor alterations of the natural drainage pattern for purposes of “good husbandry”
 - (3) *reasonable use rule*: each landowner may make modifications to the natural drainage pattern that do not unreasonably impact on other landowners
 - choice of rule is a matter of first impression in Jefferson
- here, D would be allowed to fill in his land under the common enemy rule, would not be allowed to do so under the civil law rule, and probably would be required to mitigate the flooding on P’s land under the reasonable use rule
 - would the 1-acre wetland be considered a drainway under the modified common enemy rule? If so, the filling violates the rule, and mitigation could be required

III (30 min.)

- a riparian has a right to divert, impound, or use water for various purposes
 - diversion for municipal drinking water supply is an appropriate purpose
 - diversion for boiler feedwater and cooling are appropriate purposes
 - impoundment for a mill is an appropriate purpose
- all riparians, including downstream riparians, have a coequal right to both:
 - (1) maintenance of natural flow, and
 - (2) diverting, impounding, or using the water for reasonable purposes
- reasonableness is defined as reasonable under all the circumstances, and involves a comparison of the factors involved in P’s and D’s uses
 - but, under the reasonable use rule, some depletion is allowed, as long as it does not unreasonable affect the lower riparians’ rights to use water
- water must be used on riparian land
- riparian land is defined under either two rules (adopted by various states):
 - (1) *source of title test*: water must be used only on abutting land which has historically always been part of the abutting tract (no land can be tacked on after the original acquisition; all portions of the original tract which are severed can never regain riparian status)
 - (2) *unity of title test*: land which is part of a contiguous abutting tract is riparian regardless of when the particular portion was acquired (land can be tacked onto an original riparian tract)

- choice of rule is a matter of first impression in Jefferson (but is irrelevant)
- lots within a municipality are not considered riparian because they are within the city limits, unless they happen individually to abut the stream
- a riparian must return diverted water to the stream above the lower riparian who otherwise would be adversely affected (to the extent it exceeds a reasonable depletion)
- *result*: here, the lots with the city limits supplied from the municipal water plant are nonriparian; diversion of water to them by the city is a nonriparian use
 - but the municipal power plant is located on a riparian lot and the use of water there is a lawful riparian use
- thus, the water diverted around P's milldam violates his riparian rights (particularly if it is drainage from the nonriparian lots in the city (since diversion there is unlawful)
- however, a court would not initially enjoin the municipal diversion, since the public relies on it and because the city has the power to condemn the water rights it needs
 - but the court would require the city to either exercise its condemnation power or to cease the unlawful portion of its diversion (that which goes to nonriparian land or which exceeds its reasonable use rights)

IV (30 min.)

- there are three rules for use of groundwater adopted by various states:
 - (1) *absolute ownership rule*: groundwater can be withdrawn by a landowner for any purpose for use onsite or offsite, without liability to adversely affected neighbors
 - usually, states impose a requirement that the withdrawal be nonwasteful and nonmalicious
 - (2) *American Rule*: groundwater can be withdrawn for any use on the land or to enable use of the land, without liability to adversely affected neighbors
 - usually, states impose the same bar against wasteful or malicious withdrawals
 - (3) *comparative reasonable use rule*: groundwater can be withdrawn for any reasonable use onsite or offsite, provided neighbors are not unreasonably impacted
 - the choice of rule is a matter of first impression in Jefferson
- here, quarry dewatering and bottling works are considered reasonable uses
- the quarry dewatering would be allowed without liability under the first 2 rules, and may violate the comparative reasonable use rule
- when 2 uses are fundamentally incompatible under the comparative reasonable use rule, the court has to choose between them
- here, neither P's nor D's uses are preferred uses – they have equal status
- under those circumstances, the court probably would not enjoin the use first in time, but might grant damages to the use second in time, since sharing of groundwater is not possible
 - if P could access the groundwater with a well (instead of the spring), it probably would require D to pay for construction of the well
 - that would enable both uses to proceed

V (20 min.)

Briefly define the following terms and identify the importance of the following cases:

- (1) developed water
- (2) equitable apportionment
- (3) navigable water of the United States
- (4) beneficial use
- (5) abandonment
- (6) adjudication
- (7) watercourse