

FINAL EXAMINATION

WATER LAW

P.N. Davis

Friday, May 1, 1998

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 = 25 min. II = 25 min. III = 25 min. IV = 45 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.
(25 minutes)

Union Electric constructed Bagnell Dam about 1934. It flooded the Osage River valley and valleys of its tributaries creating Lake of the Ozarks. It purchased the entirety of the flooded land which now comprises the bed of the reservoir and a 10 foot strip around it. Thus, there are no riparians on the Lake.

Article 13 of its Federal Power Commission [FPC] (now Federal Energy Regulatory Commission [FERC]) license provides:

So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and water for navigation and for outdoor recreations purposes, including fishing and hunting; *Provided*, that the Licensee may reserve from public access, such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property.

Assume that Union Electric [UE] in 1995 promulgated a policy statement barring the use of jetskis on its reservoir. This policy resulted from a fatal accident in which a jetski had collided with a houseboat, killing 7 persons including the jetski driver. UE sent a notice of the policy to each landowner on the reservoir and published the notice in the Lake Ozark newspaper. Also, it posted the notice at each public boat landing.

Thereafter, a consortium of jetski rental companies and private landowners owning jetskis brought suit against Union Electric seeking an injunction against enforcement of the jetski ban. The Missouri Attorney-General joined the defendant in the suit. Should the court grant the injunction? Discuss all relevant legal issues and theories. State a result.

II.
(25 minutes)

In 1960, Charles and Ruth Walters purchased an artificial lake filling an abandoned surface coal mine. They developed a commercial catfish farming facility in the lake.

In 1995, the Northern Coal Corporation began surface mining the same coal seam on a tract a few hundred feet away from the Walters's lake. To enable mining, Northern had to pump out any drainage water and seeping groundwater entering the mine. When the dragline reached a depth of 50 feet, water began rushing in through rock fractures and abandoned underground mine shafts. Northern began a major pumping operation. After a few weeks of pumping, the Walters' fish farm lake was completely dewatered.

The Walters sued Northern Coal for damages. Assume that this situation arose in the State of Jefferson and is a case of first impression. Assume also that surface mining could not be continued if water were not pumped out of Northern's mine. Should the court award damages? Discuss all relevant legal issues and theories. State a result.

III.
(25 minutes)

Northern Coal Corporation discharged its mine drainage, discussed in question II, into a small stream about one mile from the mine located over the watershed divide. (Before depositing the drainage water in the stream, it was deacidified with lime; therefore, it met all water quality regulations.) Downstream from the discharge outlet the stream crossed the land of Walter and Linda Rothman.

In 1997, there was a major rainstorm in the area. The consequences of the increase in streamflow caused by the addition of Northern's drainage water after the large rainstorm was described by Linda Rothman as follows:

Massively. It is scouring the banks and leaving dirt on the rocky streambed, it has removed our fence and flattened it down flat, and took the retaining wall askew along the bank, and the tree roots are hanging out, and the banks are falling in, and my favorite willow tree fell in, too, 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.

The "culvert" and "bridge" referred to by Linda Rothman is a timber box culvert on the private road between the Rothman house and the public road on the other side of the stream. It was washed out in the rainstorm. The culvert had always been large enough to carry increases in streamflow from rainstorms prior to the addition of Northern's drainage water to the stream. The rate of bank scouring and siltation of the bed greatly increased because the Northern's drainage water doubled the flow in the stream from what it was before both between rainstorms and during rainstorms. (Effectively, Northern had doubled the size of the watershed feeding the stream.) But it was the combined storm runoff from the stream's natural watershed and from the mine that exceeded the capacity of the culvert and caused its destruction.

The Rothmans sued Northern Coal for damages to replace the culvert and willow tree and to repair the bed and banks of the stream in their property and for an injunction to prohibit the discharge of the mine drainage in the stream. Northern asserts that it cannot operate its surface mine if it cannot dispose of drainage water in this stream. (It is true that the next nearest major stream is 5 miles away. Disposal there would require construction of a large pipeline.) Assume these events occurred in an eastern state. Should the court grant damages and an injunction? Discuss all relevant legal issues and theories. State a result.

IV.
(45 minutes)

In the State of Fremont, a western state, the Cimerron River flows from the mountains onto the plains. Its average summer flow where it leaves the mountains is 10 cfs.

In the foothills is located the Heavenly Valley Orchard and Resort. It diverts water from the river to irrigate fruit orchards, a private golf course, a catfish farm, and the resort grounds. It began a 2 cfs diversion in 1950 for the orchard and resort grounds, and increased it to 5 cfs in 1970 when the golf course and catfish farm were constructed. It makes this diversion under a permit for the entire 5 cfs issued by the State of Fremont in 1947.

Downstream about 5 miles is the Benson Dude Ranch. It diverts water to irrigate about 225 acres of valley land (grazing 20 horses and about 500 head of cattle) and to maintain an out-of-river marsh used as a private waterfowl refuge, where its guests can observe and photograph the birds. During migration season, the marsh is frequented by trumpeter swans, an endangered species, and many people come to the ranch and pay to view the swans. The pasture has been irrigated with 2.5 cfs of water under a 1930 permit. The marsh originally was supplied with water by natural overflow and seepage from the river, but in 1965 Benson began diverting water through a short canal to the marsh under a 1964 permit. The marsh diversion is 2.5 cfs.

In 1995, a major long-term drought began in the area, and the average summer flow of the river was reduced to 7 cfs. Benson sued Heavenly Valley for an injunction requiring it to reduce its diversion to 2 cfs so long as the average summer flow of the river remains at 7 cfs (and in amount equalling to amount of flow below 10 cfs the river experiences for the duration of the drought). Should the court require Heavenly Valley to reduce the size of its diversion? If so, how much of a reduction should be required? Does Heavenly Valley have any defenses? Discuss all relevant legal issues and theories. State a result.

V
(30 minutes)

Define briefly the following terms:

- (1) navigation servitude
- (2) common enemy rule
- (3) salvaged water
- (4) equitable apportionment
- (5) ripprature
- (6) reasonable beneficial use
- (7) natural use
- (8) surface watercourse
- (9) unity of title test
- (10) drainway

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I. (25 min.)

- right of public navigation
 - federal basis
 - federal gov't has authority under Commerce Clause to regulate navigation on "navigable water of the US"
 - those are waters which (1) are, (2) historically were, or (3) could be made navigable in interstate commerce -- *Appalachian Elec.*
 - Osage River was used by French & Indian fur traders
 - that is the basis for FPC (now FERC) authority over private hydrodams
 - FPC article 13 is intended to protect public right of navigation
 - state basis
 - "floatable" streams in Mo. are public waters subject to the public right of navigation -- *Elder*
 - is part of the inherited sovereign power of Parliament
 - public has a right to navigate such public waters -- *Elder*
 - jetski is a boat; use is navigation
- public trust doctrine
 - state has obligation to protect the useability of navigable waters by members of the public -- *State v. PSC*
 - applies to waters defined as navigable under state law
 - state, as public trustee, may not impair such use by the public -- *State v. PSC*
 - such as, by obstructing navigation, by authorizing such obstruction, by delegating regulatory authority to other entities -- *Illinois Central*
 - but, state can impose regulation of public navigation to promote safety of public using trust waters -- *State v. Bleck* (by implication)
 - enforceable by members of public -- *Muench*
 - *bonus*: does the public trust exist in Missouri?
 - consider *Longfellow* (discussed in class)
- private titles are subject to public right of navigation and public trust as a servitude
 - they preexist the creation of private titles & water rights -- *Elder, Illinois Central*
 - hence, UE, as bed owner, cannot impose a regulation in violation of either
- can state ratify the ban on public safety grounds?
 - clearly, it could not ban jetskis if there were no public safety rationale, because it would violate both the public right of navigation and the public trust

II. (25 min.)

- flooded strip mine is an artificial lake
- there are no riparian rights in artificial lakes
- since the fish lake was dewatered by removal of groundwater, groundwater allocation rules govern
- removal of groundwater is governed by one of three groundwater allocation rules
 - (1) absolute ownership
 - landowner may use or dispose of groundwater in any fashion without liability regardless of place of use or consequences on neighbor
 - there would be no liability for dewatering the fish farm lake
 - (2) American reasonable use rule
 - landowner may use groundwater on-site or dispose of groundwater for purpose of making on-site land useable regardless of consequences on neighbor
 - off-site use of water is not permitted
 - because on-site land use is the purpose of groundwater removal, there would be no liability for dewatering the fish farm lake
 - (3) comparative reasonable use rule
 - landowner may use or dispose of groundwater in any fashion so long as the consequences on neighbor are not unreasonable
 - on liability, *see* below
- today, a majority of states follow the comparative reasonable use rule
 - it is probable that in a case of first impression, the comparative reasonable use rule would be adopted
- here, the fish farm and the surface mine are completely incompatible
 - dewatering the mine destroys the fish farm lake
 - prohibiting the mine dewatering makes mining impossible
 - thus, this situation is like that in *Harris v. Brooks*
- the court must choose one use over the other
- since the Walters are seeking damages, not an injunction, the court would grant damages and allow the mine dewatering to continue

III. (25 min.)

- riparian rights control water allocation & disputes in eastern states
- riparian rights apply to owners of land abutting watercourses
 - watercourses are largely continuous flows of water within banks and a bed
- here, the question states this is a “stream”; thus riparian rights apply
 - drainage water entering a watercourse stream becomes part of the watercourse --
Ramsbotham
- the riparian doctrine states that each abutting landowner is entitled to make a reasonable use of water -- *Tyler, Bollinger, Harris v. Brooks*
 - also, it states that the landowner is entitled to natural flow -- *Tyler*
 - factors to be considered in determining reasonableness:
 - (1) types of water uses by each party
 - (2) effects of each party’s water use on the other party
 - (3) original flow pattern of stream
 - (4) change in flow pattern caused by defendant
 - (5) investments & expectations affected by changes in flow
 - see, *inter alia*, RESTATEMENT 2D, TORTS § 850, 850A
- doubling the flow of water may be unreasonable
 - it depends on the consequences
 - increasing the flow of water enough to wash out a culvert, to scour banks, and to silt up the bed, none of which occurred previously, is not reasonable
 - this amounts to exceeding the natural capacity of the watercourse, which is actionable --
Moore
- a riparian is not entitled to discharge water into a stream coming from outside the watershed
 - just as he is not entitled to divert water for use outside the watershed -- *Anaheim*
- but such discharge in some states will not be actionable unless there is injury -- *Stratton*
 - here, there is injury
- the Rothman’s are entitled to damages & an injunction
- *bonus*: but the comparative convenience doctrine may bar an injunction
 - the comparative convenience doctrine (“balancing of the equities”) will bar an injunction when the social consequences of barring the activity outweigh the injury to plaintiff if the activity is allowed to continue
 - decide

IV. (45 min.)

- diversions:
 - 1930: Benson - irrigate pasture - 2.5 cfs [1930 permit]
 - 1950: Heavenly Valley - orchard & resort grounds - 2 cfs [1947 permit]
 - 1965: Benson - waterfowl refuge marsh - 2.5cfs [1964 permit]
 - 1970: Heavenly Valley - golf course & catfish farm - 3 cfs [1947 permit]
- prior appropriation law applies in western states
- “first in time, first in right” principal applies -- *Irwin*
- all states have statutory prior appropriation permit systems -- discussion after *Wyoming Hereford*
- valid appropriation requires:
 - application for appropriation permit
 - construction of facilities with due diligence -- *Denver*
 - *i.e.*, within a reasonable time after permit is issued
 - diversion from the stream -- *Idaho, Empire*
 - natural overflow from stream is not considered a diversion -- *Empire*
 - application of water to land outside of the stream
 - application of water to a reasonable beneficial use
 - *i.e.*, an economic use
 - irrigation of pasture, crops, orchards clearly are beneficial uses
 - irrigation of resort grounds is a beneficial use -- *Empire*
 - because that is necessary to attract paying customers
 - instream uses are not beneficial uses (and don't involve diversions)
 - maintaining the water level in a marsh is not a beneficial use -- discussion after *Empire*
 - is that true even is people pay to view birds in marsh? Probably!
 - application of water with reasonable efficiency -- *Grimes*
- validity of Benson diversions:
 - pasture in 1930:
 - OK: irrigating pasture is a valid beneficial use; diversion; diligence
 - waterfowl refuge marsh in 1965:
 - perhaps invalid: diversion; diligence
 - but, is waterfowl refuge a valid economic use?
 - even though fee is charged to view & photograph birds?
- validity of Heavenly Valley diversions:
 - orchard in 1950:
 - OK: irrigating orchard is a valid beneficial use; diversion; diligence
 - taking 3 years to complete facilities probably constitutes diligence
 - resort grounds in 1950:
 - OK: irrigating resort grounds is a valid beneficial use -- *Idaho, Empire*; diversion; diligence
 - golf course & catfish farm in 1970:
 - invalid: irrigating orchard & fish farming probably a valid beneficial uses
 - but completing facilities 23 years after permit undoubtedly is not diligence -- *Denver*
- Benson's suit should succeed as to Heavenly Valley's 2.5 cfs diversion for golf course & catfish farm -- lack of diligence

- Heavenly Valley must apply for new permit, which will be junior to Benson's appropriations
- Benson's appropriation for waterfowl refuge marsh may be invalid -- nonbeneficial use
 - if so, Benson can force Heavenly Valley to cut back only 2.5 cfs (assuming it obtains a new permit for its golf course & catfish farm diversion)
 - because Heavenly Valley's new permit would apply to the 3 cfs which Benson has been diverting unlawfully
 - *bonus: prescriptive right?:*
 - prescription requires taking of water contrary to rights of other appropriators -- *Hammond*
 - open, notorious, continuous & adverse standard must be met
 - unappropriated water cannot be prescribed -- *Hammond*
 - because applying for permit is exclusive means for acquiring an appropriation -- *Hammond, Wyoming Hereford*
 - hence, prescriptive right can be acquired only if diversion physically takes water away from an existing appropriator -- *Hammond*
 - that did not happen here
 - there was enough water in the river for both Benson & Heavenly Valley until the drought began in 1995

V. (30 min.)

definitions;

- (1) *navigation servitude* -- US may use or regulate waters or beds of “navigable waters of the US” without paying compensation; there is no “taking”; private titles are subordinate to this paramount federal servitude
- (2) *common enemy rule* -- each landowner may get rid of drainage water by any means to any location without liability to adversely affected neighbors
- (3) *salvaged water* -- water in a western watershed saved by improvements in use or transmission efficiencies inures becomes available to new appropriators; the salvor may not use the water saved
- (4) *equitable apportionment* -- each state on an interstate water is entitled to a fair share allocation of its water (local water allocation rules are irrelevant)
- (5) *purpresture* -- enclosure by private entity of space belonging or open to the public; enjoined as a public nuisance if the detriment to the public is unreasonable; private pier is an example (because it affects the public’s right to navigate)
- (6) *reasonable beneficial use* -- an element of a valid appropriation under prior appropriation doctrine; is an application of water to an economic use in a reasonably efficient manner
- (7) *natural use* -- under riparian rights doctrine, is a use for domestic or livestock watering purpose; all natural uses must be satisfied before any artificial uses can be accommodated
- (8) *surface watercourse* -- bed, banks and more or less continuous flow of water
- (9) *unity of title test* -- under riparian doctrine, defines where water can be used; consists of all contiguous land owned by person who owns land abutting a watercourse; various portions of that land can be acquired at different times
- (10) *drainway* -- depression or place where drainage water concentrates and flows away after rains and snowmelts