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RIPARIAN RIGHTS

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Water Resources Allocation:
Laws and Emerging Issues
University of Colorado
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I. INTRODUCTION

A. Summary

The riparian doctrine of water allocation predominates in eastern United States. It also controls some residual water rights in Pacific Coast states. The riparian doctrine assumes a surplus of water. It provides that each abutting landowner is entitled to two somewhat contradictory rights. First, he is entitled to have the natural flow of the stream come down to him. Second, he is entitled to make a reasonable use of that water. Since the end of the 19th century, the courts generally have emphasized the right of each riparian to share the available water supply. Hence, reasonableness is determined by comparing the riparians' various uses. The riparian doctrine is modified somewhat by a preference for domestic and livestock watering uses over other consumptive uses, and, in some states, by a preference for existing mills.

Historically, the riparian doctrine is American in origin, not English as is usually assumed. The doctrine was disseminated to the remainder of the common law world by the middle of the 19th century.

Some eastern states have enacted diversion permit statutes as a result of existing or perceived future water shortages. In the face of heavy demands for water, the relatively uncontrolled entry of new water users under the riparian doctrine was considered to destabilize existing investments in water facilities and expectations about the availability of water. To date, 12 states have enacted diversion permit statutes, out of a possible 31 states. All but one of the statutes give the state agency authority to grant or deny permits and renewals without reference to date of first use. Only Mississippi has followed the western pattern of prior appropriation.

B. Research Sources

1. Maloney, Frank E. et al, A Model Water Code (1972).
2. Ellis, Harold H., Water-Use Law and Administration in Wisconsin (1970).
3. 2 Hutchins, Wells A., Water Rights Laws in the Nineteen Western States, c. 10 U.S.D.A. Misc. Pub.

- No. 1206, 1974).
4. Davis, Clifford, The Right to Use Water in the Eastern States, in 7 Water and Water Rights 27-185 (R.E. Clark, ed. 1976).
 5. Ziegler, Wilbert L., Water Use Under Common Law Doctrines, in Water Resources and the Law 49-72 (W.J. Pierce, ed., 1958).
 6. Ausness, Richard C., Water Use Permits in a Riparian State: Problems and Proposals, 66 Ky. L.J. 191-265 (1977-78).
 7. Davis, Peter N. et al, Missouri Instream Flow Requirements: A Physical and Legal Assessment, c. 7: Diversion Permit Statutes in the Eastern States, at 195-232 (Mo. Off. of Budget & Planning, mimeo Apr. 1980).
 8. Davis, Peter N., Australian and American Water Allocation Systems Compared, 9 B.C. Indus. & Com. L. Rev. 647, 675-88, 697-705 (1968).

II. ELEMENTS OF THE RIPARIAN DOCTRINE

- A. Landmark decision: Tyler v. Wilkinson, 4 Mason 397, 24 Fed. Cas. 472 (No. 14,312) (C.C.D.R.I. 1827), per Story, J.

The modern formulation of the riparian doctrine was announced in this decision. The litigation was between the owners of adjacent mills. The court rejected the English "prior use" doctrine in vogue since Blackstone's era and held that the earlier user must allow the later user to share the water flow.

- B. Elements of the riparian doctrine announced in Tyler
1. The right to water is a usufruct; the water itself is incapable of ownership.
 2. The right to use water is an incident to the title of land abutting the watercourse. Hence the term "riparian."
 3. The right of use is common to all riparians. This coequality requires existing users to share the water with new users.
 4. Each riparian is entitled to natural flow, in terms of both quantity and quality.
 5. Each riparian is entitled to make a reasonable use of the water. Diminution of flow is contemplated as a result of such reasonable uses.

- C. Those principles have been reiterated in a host of subsequent cases too numerous to mention.

Case citations for specific states can be found in: Dewsnut, Richard L. et al, A Summary-Digest of State Water Laws (Nat'l Water Comm'n 1973).

See also, water law books on the law of selected eastern states.

- D. Additional principles which have evolved since Tyler include:

1. Reasonableness of any given water use is determined by comparing it with the uses by other riparians.
2. Domestic and livestock watering uses are preferred over all other uses if case of conflict. (This is the so-called natural use/artificial use distinction.)
3. Lawful uses include those which occur within the banks of the watercourse.
4. Riparian rights attach to watercourses, those with beds, banks and a substantially continuous flow. They do not attach to intermittent streams, drainways, or diffused surface water.
5. The rights of riparians are subject to rights acquired by prescription: adverse uses continued for the period of the Statute of Limitations.
6. Water may be used only on riparian land. The location and extent of riparian land is explored in a later section.
7. In some states, prior mills are preferred over later mills. This vestige of the English "prior use" rule does not apply anywhere to other types of uses.
8. Diffused surface water and water in drainways, even if it is tributary to a watercourse, is not subject to the rights of riparians. Diversions and activities affecting the flow of such waters may be done without regard to the effects on flow within the watercourse.

- E. Factors for determining comparative reasonableness

1. rainfall, climate, season of the year
2. customs and usages
3. size, velocity and capacity of the watercourse
4. nature and extent of improvements on the watercourse
5. amount of water taken
6. place and method of diversion
7. place of use
8. previous uses

9. object, extent and type of use
 10. necessity and important of use to society
 11. uses, rights and reasonable needs of other riparians
 12. suitability of the use to the watercourse
 13. extent and amount of harm caused by the use
 14. practicality of avoiding the harm by adjusting the use or method of use of one riparian or the other
 15. practicality of adjusting the quantity of water used
- See generally, Restatement of Torts 2d, § 850A.

F. Place-of-use Restrictions

1. Water can be used only on abutting riparian lane.
2. Riparian land has been defined in different states by one or the other of two rules
 - a. Source of title test: water may be used only on land which has been held as a single tract throughout its chain of title. Any nonabutting portions of original tracts which have been severed forever lose their riparian status.

Commentators have presumed this to be the common law position.

However, the only cases following this doctrine are in the western states (which have followed a general policy of restricting residual riparian rights in favor of prior appropriation rights).

See, e.g., *Boehmer v. Big Rock Irrigation Dist.*, 117 Cal. 19, 48 P. 908 (1897); *Yearsley v. Cater*, 149 Wash. 285, 270 P. 804 (1928).

- b. Unity of title test: any tracts contiguous to the abutting tract are riparian if all of them are held under single ownership regardless of the times when they were acquired.

Commentators have stated that this is a minority rule.

However, there are just as many states following this rule as follow source-of-title. Furthermore, the only eastern decisions defining riparian land have followed unity-of-title.

See, e.g., *Consolidated Water Supply Co. v. State Hospital*, 66 Pa. Super. 619 (1917), *aff'd* 267 Pa. 29, 110 A. 281 (1920); *Slack v. Marsh*, 11 Phila. 543 (Pa. C.P. 1987); *Jones v. Conn*, 39 Ore. 30, 64 P. 855 (1901)[Oregon was a riparian state at that time].

- c. Conclusion: Most eastern states have not defined riparian land. States sympathetic to the riparian doctrine have followed unity-of-title.

3. Water cannot be used outside the watershed.
4. Nonriparian uses are unreasonable per se and may be enjoined. Prescriptive rights will be acquired by the nonriparian if not enjoined.
 - a. But see *Stratton v. Mt. Hermon Boys' School*, 216 Mass. 83, 103 N.E. 87 (1913), which allows a nonriparian use if downstream riparians do not suffer any injure to their flow.
5. Riparian rights cannot be transferred by grant to nonriparians.
 - a. Such transfers are enforceable as between grantor and grantee, but not enforceable against third party riparians.
 - b. Except in a minority of states. See *Lawrie v. Silsby*, 82 Vt. 505, 74 A. 94 (1909).
6. Upon severance of a nonriparian portion of an original riparian tract, riparian rights can be preserved for the nonriparian portion by express reservation.
 - a. But see *Thompson v. Enz I*, 379 Mich. 667, 154 N.W.2d 473 (1967).

III. ORIGIN AND DISSEMINATION OF THE RIPARIAN DOCTRINE

- A. The first modern formulation of the riparian doctrine containing all of its essential elements was in: *Tyler v. Wilkinson*, 4 Mason 397, 24 Fed. Cas. 472 (No. 14,312)(C.C.D.R.I. 1827)(per Story, J.).
- B. All but one earlier English case following the "prior use" rule which favored earlier mills over later ones. See, e.g., *Bealey v. Shaw*, 6 East. 208, 102 Eng. Rep. 1266 (K.B. 1805); *Williams v. Morland*, 2 B. & C. 910, 107 Eng. Rep. 620 (K.B. 1824).
- C. One earlier English case recognized a right to natural flow and a coequal right of use, but did not recognize the right to make a reasonable use if a diminution of flow were involved. *Wright v. Howard*, 1 Sim. & St. 190, 57 Eng. Rep. 76 (Ch. 1823).
- D. The early English prescription cases do not state the nature of the water right prescribed against.
- E. However, one very early case, never cited before by any English or American case or by any commentator, does state that later mills must be allowed to share water flow if the flow to the earlier mill is not affected. Y.B. 22 Hen. VI, f. 14 (C.P. 1444).

- F. The French Civil Code (the Code Napoleon) provides that riparians are those whose lands abut on a watercourse (art. 644) and that each riparian on a nonnavigable stream has a right to irrigate his land, provided the excess water is returned to the watercourse before it leaves his property (art. 644). The Code does not state what water rights exist on navigable streams, which are defined as those which can float a boat.
- G. Kent's citations in his 1828 Commentaries to French Civil Code provisions (art. 640, 641, 643) as support for the existence of the riparian doctrine under the Code in fact codify the law of diffused surface water.
- H. Only earlier American cases contain most of the elements of the riparian doctrine as announced in Tyler.
See, e.g., Ingraham v. Hutchinson, 2 Conn. 584 (1818) (natural flow); Merritt v. Parker, 1 Coxe 460 (N.J. 1795) (natural flow); Palmer v. Mulligan, 3 Caine 307 (N.Y. 1805) (coequality, some diminution, natural flow [dissent]); Platt v. Johnson, 15 Johns. 213 (N.Y. 1818) (common use, prior use rejected); Merritt v. Brinkerhoff, 17 Johns. 306 (N.Y. 1820) (common use, no unreasonable waste, use to reasonable extent, prior use rejected).
- I. Tyler was disseminated in 3 J. Kent, Commentaries 353-55 (1828); and J. Angell, Watercourses (2d ed. 1832).
- J. The riparian doctrine was not mentioned in England until the 1840's. Tyler was cited in the following cases:
See Acton v. Blundell, 12 M. & W. 324, 152 Eng. Rep. 1223 (Ex. 1843) (dictum) (a groundwater case); Wood v. Waud, 3 Ex. 748, 154 Eng. Rep. 1047 (1849) (natural flow); Embrey v. Owen, 6 Ex. 353, 155 Eng. Rep. 579 (1851) (relying on Tyler).
An 1830's case followed "natural flow" without citing Tyler. Mason v. Hill, 5 B. & Ad. 1, 110 Eng. Rep. 692 (K.B. 1833).
- K. The riparian doctrine was extended to all other British jurisdictions by decisions of the Privy Council in the 1850's.
See, Miner v. Gilmour, 12 Moo. P.C. 131, 14 Eng. Rep. 861 (1858) (Low. Can.); Lord v. Commissioners of the City of Sydney, 12 Moo. P.C. 473, 14 Eng. Rep. 991 (1859) (N.S.W.).
- L. Conclusion: The riparian doctrine is largely American in origin, not English or French, and spread to the remainder of the common law world by way of England.

IV. EASTERN DIVERSION PERMIT STATUTES

- A. Eleven eastern states have enacted nontemporal water diversion permit statutes. Mississippi has enacted a prior appropriative statute.

1. Purposes
 - a. allocating water among competing users
 - b. promoting beneficial and efficient uses of water
 - c. assuring the best use of water in the public interest
 - d. dealing with water shortages
 - e. protecting public water supplies
 - f. protecting minimum streamflows
 - g. promoting flood control
 - h. promoting water conservation
 - i. establishing state comprehensive water planning
2. Waters subject to Permit Requirements
 - a. surface watercourses alone: Arkansas (during droughts), Georgia, Wisconsin (agricultural diversions), Iowa.
 - b. surface watercourses and groundwater: Delaware, Florida, Kentucky, Maryland, Minnesota, New Jersey, North Carolina.
3. Activities subject to Permit Requirements: diversions, impoundments, wells.
 - a. Exemptions: domestic and livestock watering diversions
4. Several statutes empower the agency to require maintenance of minimum streamflows for recreational and wildlife habitat purposes. The formulae for determining the minimum flow vary.
5. Policy guidance for allocation decisions -- general guidance:
 - a. allocation of water in the public interest (not defined)
 - b. allocation based on comparative public benefits
 - c. allocation based on reasonable beneficial uses
 - d. fair share allocation
 - e. allocation based on state comprehensive water planning

Note: Georgia and North Carolina provide a more specific list of factors, which are similar to those cited in riparian rights cases and in the Restatement of Torts 2d, § 850A

See, Ga. Code § 17-510.1(5); N.C. Gen. Stat. § 143-215.15(h).

6. Allocation preferences based on time of first use are absent in all 11 statutes. That absence of time priorities permits the agencies to accommodate new uses in preference to existing uses. Historically, that authority has never been exercised, because no generalized water shortages have developed in those states.
7. Permit duration:
 - a. Fixed term: 7 states (between 10 and 25 years)
 - b. Perpetual: 4 states
8. Several states have forfeiture for lack of diligence provisions.
9. Permit Provisions (not previously mentioned):
 - a. specification of diversion location, volume, and flow rate; location and nature of water use
 - b. monitoring and reporting of diversions
10. Some statutes authorize nonriparian locations of use
11. No statute contains an adjudication procedure
12. Some statutes authorize temporary reductions in permitted diversions during water shortages.
13. Suggestions for improvements
 - a. integrate surface watercourses and groundwater permit systems
 - b. statutory guidelines for allocating water between competing applicants
 - c. require efficiency of use
 - d. authorize nonriparian and extra-watershed uses
 - e. provide an adjudication procedure
14. Citations

Ark. Stat. §§ 21-1301 et seq. (since 1957)
 Del. Code, tit. 7, §§ 6001 et seq. (since 1953)
 Fla. Stat. §§ 373.016 et seq. (since 1972)
 Ga. Code §§ 17-502, 17-510.1 (since 1977)
 Iowa Code §§ 455A.1 et seq. (since 1957)
 Ky. Rev. Stat. §§ 151.100 et seq. (since 1966)
 Md. Code Natural Resources §§ 8-101 et seq (since 1957)
 Minn. Stat. §§ 105.37 et seq. (since 1947)
 N.J. Stat. §§ 58: 1-2 et seq. (since 1963)
 N.C. Gen. Stat. §§ 143.215.11 et seq. (since 1967)
 Wis. Stat. § 30.18 (since 1935)

See Miss. Code §§ 51-3-1 (surface watercourses: Prior appropriation), 51-4-1 (groundwater) et seq.