Where Will the Water Go? A National Comparison of Surface Water Rights and the Future of Water Allocation Under the Eastern Riparian Model

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Introduction

Uncertainty surrounding the nation's water supplies continues to motivate lawmakers to find methods for greater efficiency and better allocation of these vital resources.[1] Caused by the increased demand from rising populations and unprecedented climate change, present water scarcities and future uncertainties are clear throughout the country.[2] Droughts and high temperatures in the West have already resulted in decreased river flows and early snowmelts.[3] In the East, where rainfall and water resources are historically abundant, erratic climate patterns are creating new droughts.[4] To deal with the rising demand of commercial centers, many states are already shifting water allocation away from traditional agricultural and hydroelectric usages toward growing urban centers.[5]

In the past, lawmakers lacked a scientific understanding of the water cycle and its connection between ground and surface water sources.[6] As a result, common law doctrines concerning surface water are more developed and refined than those for

[1] ADAM SCHEMPP, WESTERN WATER IN THE 21ST CENTURY: POLICIES AND PROGRAMS THAT STRETCH SUPPLIES IN A PRIOR APPROPRIATION WORLD 1 (Env't L. Inst. ed., 2009), *available at* http://www.elistore.org/reports_detail.asp?ID=11349.
[2] *Id.*
[3] *Id.*
[4] Olivia S. Choe, *Appurtenancy Reconceptualized: Managing Water in an Era of Scarcity*, 113 Yale L.J. 1909, 1910 (2004).
[5] Caitlin S. Dyckman, *Another Case of the Century? Comparing the Legacy and Potential Implications of Arizona v. California and the South Carolina v. North Carolina Proceedings*, 51 Nat. Resources J. 189, 192 (2011).
[6] R. Timothy Weston, *Harmonizing Management of Ground and Surface Water Use Under Eastern Water Law Regimes*, 11 U. Denv. Water L. Rev. 239, 253 (2008).

groundwater usage.[7] For purposes of this report, only water rights within the context of surface water will be discussed.

The eastern and western regions of the United States take different approaches to surface water allocation despite facing many of the same challenges in today's climate. Western states typically implement the prior appropriation doctrine in which surface water rights belong to the first party to divert or otherwise use a water source regardless of the ownership of adjacent lands.[8] Eastern states, however, have traditionally adhered to a riparian model in which surface water rights are allotted to adjacent land's owners, with various exceptions discussed below.[9] Further, some jurisdictions have implemented a third dual system that blends the two doctrines.[10] For example, the California Doctrine used in California, Nebraska, and Oklahoma incorporates elements of riparianism to determine an appropriative allotment of surface water.[11]

Overall, the differing approaches to water rights law across the nation is important to outline because water shortages are creating interstate conflict between parties attempting to use the same resource, such as a stream or river. Lawsuits traditionally seen in the West between appropriative interstate right holders now test the riparian models of neighboring states in the East. For example, the Supreme Court heard a significant case concerning allocation of the waters of the Catawba River in North and

[7] *Id.*
[8] Shelley Ross Saxer, *The Fluid Nature of Property Rights in Water*, 21 Duke Envtl. L. & Pol'y F. 49, 54 (2010).
[9] *Id.*
[10] Robin Kundis Craig, *Defining Riparian Rights As "Property" Through Takings Litigation: Is There A Property Right to Environmental Quality?*, 42 Envtl. L. 115, 117 (2012).
[11] Saxer, *supra* note 8.

South Carolina.[12] While the federal government leaves the governing of water rights primarily to the states,[13] Congress and the federal courts are nevertheless becoming more prominent in water dispute resolution when states fail to use interstate compacts to create uniform systems of regulation between one another.[14]

The Western Prior Appropriation Model

The western prior appropriation doctrine maintains the "first in time, first in right" ideology of the early frontier in states like Colorado and Wyoming.[15] Whoever holds the most senior water right has priority of allocation, while subsequent holders essentially wait in line until the rights holders before them have fulfilled their need.[16] Appropriative rights holders are restricted to beneficial use requirements that allow most domestic, agricultural, and industrial activities.[17] These requirements theoretically prevent speculation, water hoarding, and other non-beneficial diversions of water.[18] Most western states also require rights holders to obtain permits approximating the quantity of their usage and to divert their apportionment away from its natural course of flow.[19] Diversion structures, like a ditch or pipeline, allow the amount of water being removed from a river or stream to be monitored.[20]

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[12] Order Granting Motion for Leave to File Complaint, South Carolina v. North Carolina, 128 S. Ct. 349 (2007) (mem.) (No. 06-138), *available at* http://www.mto.com/sm/docs/5245735_1.pdf; Dyckman, *supra* note 5, at 197.
[13] Ann E. Drobot, *Transitioning to A Sustainable Energy Economy: The Call for National Cooperative Watershed Planning*, 41 Envtl. L. 707, 764 (2011).
[14] Dyckman, *supra* note 5, at 202-203.
[15] Craig, *supra* note 10.
[16] SCHEMPP, *supra* note 1, at 3.
[17] Jill Sacra Hoffman, *The Status of Surface Water Rights in Texas: A Comparison to Other Prior Appropriation States*, 39 Tex. Envtl. L.J. 167, 169 (2009).
[18] Saxer, *supra* note 8, at 63.
[19] Hoffman, *supra* note 17, at 169-170.
[20] *Id.*

The flexibility of laws regulating prior appropriation rights differs greatly from state to state.[21] Both the difficulty of accurately measuring water amounts and the necessity to maintain strict allocation orders result in bodies of law resistant to change.[22] In some states, lingering doctrines of abandonment and forfeiture pose an obstacle to sustainability.[23] Essentially, the combination of these two statutory systems often empowers states to revoke water rights if they go unused for certain amounts of time.[24] This logically creates incentives among water rights owners to use their full allotment of water, regardless of actual need, to protect a future right.[25]

Yet in response to extreme droughts in the arid western deserts, many states are changing laws to encourage senior rights holders to employ a sustainable model of usage and management.[26] Experimentation among the states has provided two potentially effective models of reform: (1) the commodification and privatization of leftover water resources for sale in the markets and (2) an expedited process for water rights transfers in situations dealing with either small amounts of water or those where rights holders need an immediate transfer.[27]

The Eastern Riparian Model

Eastern states, like Massachusetts and Virginia, have taken a decidedly different approach to water law by inheriting the English Common Law ideas of riparianism.[28] The traditional eastern riparian system bestows surface water rights primarily to the

[21] *Id.* at 171.
[22] SCHEMPP *supra* note 1, at 1–2.
[23] *Id.* at 3.
[24] *Id.*
[25] *Id.*
[26] *Id.* at 2.
[27] *Id.* at 33, 45.
[28] Saxer *supra* note 8, at 62.

owners of property adjacent to the water resource.[29] Thus, the basic riparian idea is that any property owner whose property line falls on a natural watercourse has an almost uninhibited right to use the water, subject to several limitations.

Initially, riparian doctrines used the "natural flow" theory in which riparian proprietors have a right to enjoy the natural flow of the surface water neighboring their land.[30] They share these rights with other riparian right holders owning land adjacent to the same water.[31] The natural flow riparian system allots proprietors unfettered consumption of water for domestic purposes, but they must prove that any further commercial or artificial usages are reasonable (those outside the scope of domestic uses drinking, bathing, watering of plants and animals, etc.).[32] Additionally, riparian owners are forbidden to transfer or direct any of the water to any location outside of the adjacent riparian land.[33]

Urban expansion and a decrease in agriculture and farming during the Industrial Revolution challenged the natural flow doctrine.[34] The burden of proving that specific commercial or artificial uses were reasonable seemed ill suited to face the demands of a quickly growing commercial society.[35] As a result, jurisdictions began adopting the reasonable use doctrine, or the American Rule.[36] Under this rule, riparian owners had a right to use adjacent waterways for any reasonable use as long as it did not interfere with

[29] *Id.* at 54.
[30] R. Timothy Weston, *Harmonizing Management of Ground and Surface Water Use Under Eastern Water Law Regimes*, 11 U. Denv. Water L. Rev. 239, 246-247 (2008).
[31] *Id.* at 247.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] Weston, *supra* note 6, at 247–248.

or harm any other's reasonable use.[37] This shift in law addressed the greater domestic water needs of a newly industrialized society.[38] Proprietors were required to weigh the situational factors and to balance their rights against the reasonableness of another's rights.[39] Usually, domestic uses were more likely to prevail over agricultural or commercial uses.[40]

Now, the riparian system faces yet another doctrinal shift. Since riparian right holders have an equal right to water under the American Rule, times of drought or water shortage require all proprietors to reduce their usage.[41] Disputes are likely to arise about whether one user's action or withdrawal hinders another's right.[42] Additionally, there is an increasing state interest in protecting biological diversity and productivity in surface waters during a time of uncertain climatic conditions.[43]

In an attempt to streamline the administration of water usage, many eastern states are shifting toward regulated riparianism by establishing water permit systems.[44] These regulations say that any direct usage of riparian water requires a permit from the state.[45] The permits generally allow a specific usage for limited time periods, and can be renewed by the designated administrative agencies.[46] Permitting systems are changing the allocation of water rights by broadening the reasonableness test.[47] Instead of water rights

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[37] Saxer *supra* note 8, at 62.
[38] *Id.*
[39] Weston, *supra* note 6, at 248.
[40] *Id.*
[41] Craig, *supra* note 10, at 152.
[42] Weston, *supra* note 6.
[43] *Id.* at 240.
[44] Olivia S. Choe, *Appurtenancy Reconceptualized: Managing Water in an Era of Scarcity*, 113 Yale L.J. 1909, 1912 (2004).
[45] *Id.*
[46] *Id.*
[47] Dyckman *supra* note 5, at 217.

determined by reasonable use on one's own land, they are now also determined by reasonability weighed against social policy and community concerns.[48]

Yet as more eastern states adopt a regulated riparian model, it is becoming clear that permitting systems fail to solve many of the problems associated with traditional water rights doctrines.[49] For various reasons, many riparian users are exempt from regulations,[50] providing little legal certainty under the doctrine.[51] Additionally, there is an absence of any clear criteria in the allocation of permits, and distribution tends to unequally favor larger water uses with greater conventional economic value.[52]

Dual Systems: The California Model and Redefining Water Rights

In response to the limitations inherent in the prior appropriation and riparian systems, some jurisdictions have adopted dual systems that blend elements of both doctrines.[53] Under the California Model, which is used primarily in the West, water rights are obtained first through a permit outlining conditions that must be satisfied before the state will convert the permit into a license for use.[54] Water rights in California are limited to reasonable, beneficial uses that may be replaced by a new appropriation if they become unreasonable or wasteful.[55] Thus, systems like the California Model increase efficiency and promote sustainable practices by incorporating elements of the

[48] *Id.*
[49] Choe, *supra* note 44.
[50] *Id.*
[51] J. Blanding Holman IV, *The Advent of Modified Riparianism in South Carolina*, 16 SOUTHEASTERN ENVTL. L.J. 291, 315 (2008).
[52] *Id.* at 313–315.
[53] Craig, *supra* note 10, at 117.
[54] Saxer, *supra* note 8, at 55.
[55] *Id.* at 63.

riparian doctrine, including permits and reasonable use tests, into a prior appropriative system in which senior rights holders have the first opportunity to obtain permits.

As states blend doctrines and experiment with changing regulations, several legal questions are starting to shape the direction of amendment. One crucial question primarily affects eastern riparian areas: should water usage be a property right or are water rights governed by a public trust doctrine? As water becomes a scarce resource, viewing water usage as a property right could allow for more governmental regulation of water quality and environmental concerns.[56] The prevailing argument, however, is for aligning water rights under the public trust doctrine. This ideology requires that the right to water be held in a public trust by state or federal governments, allocated to individuals or entities under a method that protects the public interest in the water.[57]

One reason why state reforms of surface water riparian doctrines are crucial in the current environmental climate is the fact that, as water resources become strained, interstate allocation disputes arise between upstream and downstream parties. Since water law is primarily created and enforced at the state level, the need for definitive and predictable water rights between states is more important than ever.

Water Shortages and Allocation Issues in Eastern Riparian States

Since riparian rights of eastern water sources are equally shared among relevant riparian owners, transfer considerations haven't traditionally been relevant in the East.[58] Yet under the American Rule reasonable use doctrine and regulated permitting systems, water shortages now prompt a reallocation of water rights from traditional agricultural

[56] Craig, *supra* note 10, at 155.
[57] Saxer, *supra* note 8, at 111.
[58] Craig, *supra* note 10, at 145.

and hydroelectric industries to growing commercial centers.[59] These reallocations typically occur through interbasin water transfers or the restoration of environmental flows (in complying with regulations to protect endangered species).[60] Often, transferring water from basins or diverting rivers and streams can negatively impact a downstream party. In some instances, such as the conflict involved in *South Carolina v. North Carolina*,[61] the injured party may be a sovereign state with alternative laws for regulation of such a diversion.

Interstate compacts can be very attractive to neighboring states that share a water resource. Compacts between states become federal law, and usually provide guidelines and remedies for relief outside of litigation if an issue arises.[62] Because lawsuits between states are usually lengthy, expensive, and dispositive, a mere threat of litigation often prompts states to form compacts with one another.[63] On the other hand, some argue that the lengthiness of such suits makes them attractive to state leaders who have limited terms of office.[64]

A Case of Riparian Dispute

South Carolina v. North Carolina arose out of a dispute over the fair allocation of the waters of the Catawba River.[65] Despite being in preliminary interstate compact negotiations, South Carolina filed suit against North Carolina in the Supreme Court for,

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[59] Dyckman *supra* note 5.
[60] *Id.*
[61] 558 U.S. 256, 130 S. Ct. 854, 876, 175 L. Ed. 2d 713 (2010).
[62] Holman, *supra* note 51, at 306.
[63] *Id.*
[64] *Id.*
[65] Kristin Linsley Myles, South Carolina v. North Carolina-*Some Problems Arising in an East Coast Water Dispute*, 12 Wyo. L. Rev. 3, 6 (2012).

among other things, improperly transferring water from the Catawba River to other basins.[66] North Carolina's state water statutes, however, allow such interbasin water transfers.[67] South Carolina filed for equitable apportionment of the Catawba River to seek an injunction prohibiting further transfers by their northern neighbor out of the river's waters.[68]

As riparian states, both theoretically had an equal right to the river. At suit, South Carolina would need to prove that the statute allowing North Carolina's transfers out of the Catawba was a significant encroachment to its rights.[69] In the end, the States settled before the Court could make a precedent-setting decision in which general federal law would have been used to settle the interstate dispute.[70]

Such a decision regarding apportionment of an interstate river would have had major implications for other riparian states without interstate compacts. Ironically, should the Court have ruled in favor of South Carolina, Georgia would in turn have been able to use the precedent of equitable apportionment to capitalize in a suit against South Carolina over allocation of the waters of the Savannah River.[71]

In riparian states, interstate disputes are perhaps more favorable to downstream parties than in western prior appropriation states because riparian systems theoretically weigh one user's right against all other users' rights of the same water source.[72] Thus upstream states would be required to respect a downstream state's water rights, whereas under prior appropriation, if the upstream party was "first in right" the state's usage

[66] *Id.* at 5.
[67] *Id.*
[68] *Id.*
[69] Dyckman, *supra* note 5, at 210.
[70] Myles, *supra* note 65, at 4.
[71] Dyckman, *supra* note 5, at 223.
[72] *Id.* at 217.

would be uninhibited by a subsequent right holder downstream.[73] In both systems, these disputes are based upon whether a downstream state would be negatively affected in the future by expanded upstream water rights.[74]

In a similar historical case over the Colorado River, *Arizona v. California,*[75] the Supreme Court ruled for the smaller, downstream state of Arizona.[76] On its face, the judges should have ruled in California's favor because California had a senior water right at the time and both states used the "first in sight, first in right" methodology of prior appropriation. [77] Yet the court created significant precedent by ruling that a federal dam built on the river gave Congress superior ability to determine its allocation.[78]

Overall, these cases indicate a significant need to improve management of water resources and environmental protection between and within neighboring states.[79] Without effective interstate compacts, potential interstate litigation in the Supreme Court presents the possibility for federal common law to set more precedent surrounding water rights, a concept that runs contrary to traditional concepts of state sovereignty in water law.

[73] *Id.*
[74] *Id.* at 201.
[75] 373 U.S. 546 (1963).
[76] Dyckman, *supra* note 5, at 189.
[77] *Id.* at 192.
[78] *Id.* at 194.
[79] *Id.* at 227, 230.

Conclusion

As population, water demand, and climate patterns change, so must state-determined approaches to regulating water resource allocation. Western and eastern areas of prior appropriation and riparianism face different challenges in determining and defining water rights within their boundaries. Furthermore, all jurisdictions, regardless of doctrinal disparities, must look beyond state boundaries to effectively negotiate with neighboring water users.

The western prior appropriation and the eastern riparian doctrine are both slowly, but also effectively, evolving. Across the board, all state governments must realize the potential of interstate water disputes and take the necessary steps to prevent expensive and time-consuming litigation. Faced with a future characterized by scarcity in the West and environmental unpredictability in the East, reformation of water law must not only create sustainability incentives for users but must also focus on conservation of this vital resource.