

L&S Water Power v. Piedmont Triad Regional Water Authority: The Evolution of Modern Riparian Rights in North Carolina

Kathleen McConnell

It is difficult to determine who owns the water in North Carolina's lakes, streams, and ponds¹ because of the State's numerous and intricate court decisions that establish riparian owners' rights to use surface waters.² Resolving this intricate common law is increasingly important as North Carolina now sees an end to what once seemed an inexhaustible water supply.³

Riparian rights are vested property rights that arise out of ownership of land bounded or traversed by navigable waters.⁴ Lower riparian owners are entitled to use the water of a stream as it comes to their land in its natural state for any purpose, without material injury to the rights of others.⁵ However, riparian rights for lower riparian users are also qualified by the rights of upper riparian owners to make a reasonable use of the water as it passes through their land, which can include retaining water for a time, or temporarily obstructing the usual flow of the stream.⁶ Reasonable use is not limited to domestic use and includes industrial, domestic, and agricultural uses.⁷ North Carolina courts also assert that riparian rights are not hierarchical and

¹ Daniel F. McLawhorn, *Where Will You Go When The Well Runs Dry? Local Government Ownership and Water Allocation in North Carolina*, 32 Campbell L. Rev. 51, 51 (2009).

² GLENN DUNN, OVERVIEW OF LOCAL GOVERNMENT SURFACE WATER RIGHTS IN NORTH CAROLINA (August 2009), available at <http://www.iog.unc.edu/programs/attorneyconferences/docs/city%20summer-09-dunn-water%20overview.pdf?q=programs/attorneyconferences/docs/city%20summer-09-dunn-water%20overview.pdf>.

³ McLawhorn, *supra* note 1.

⁴ L&S Water Power, Inc. v. Piedmont Triad Regional Water Authority, 712 S.E.2d 146, 150 (N.C. Ct. App. 2011).

⁵ Dunlap v. Carolina Power & Light Co., 212 N.C. 814, 817, 195 S.E. 43, 45 (1938). The North Carolina Supreme Court heard arguments concerning the appeal and decided on Dec. 14, 2012, that discretionary review had been "improvidently allowed." No. 198PA11, at 2 (Dec. 14, 2012), available at <http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8xOTkxQTEuLTEucGRm>.

⁶ Annotation, *Extent of Detention or Retardation of Water Incident to Riparian Rights*, 70 A.L.R. 220 (1931).

⁷ DUNN, *supra* note 2, at 3.

have held that no reasonable use is granted more important than another.⁸ Another component of the reasonable use doctrine is a balancing of harms among users, which North Carolina refers to in terms of material damage.⁹ A riparian right does not include a right to be free of any and all injury resulting from the use of water.¹⁰ This allows a right of action to arise from the taking of water in any unreasonable quantity that would materially and substantially injure the lower proprietor in some legitimate use he has for the water.¹¹

This paper examines the differences between a traditional water law case, *Dunlap v. Power & Light Co.*¹² and the modern case by which it is distinguished, *L&S Water Power, Inc. v. Piedmont Triad Regional Water Authority*.¹³ It will also discuss the potential role of Senate Bill 907, had it been approved,¹⁴ in North Carolina's modern water law as well as the effect of the Takings Clause of the Fifth Amendment of the United States Constitution. Lastly, this paper will discuss the implications of the court's deviation in *L&S Water Power, Inc.* from the *Dunlap* precedent.

The reasonable use doctrine has prevailed in riparian rights law in North Carolina since *Dunlap* in 1938.¹⁵ This case held that an upper riparian owner could divert a portion of the available water in a stream as long as it was in reasonable use, even if the water flow was augmented or diminished slightly.¹⁶ In the past, this common law doctrine worked well for North Carolina, perhaps because of the State's bountiful water supply.¹⁷ However, some

⁸ *Id.* (citing *Pernell v. Henderson*, 220 N.C. 79, 82, 16 S.E.2d 449, 455 (1941)).

⁹ DUNN, *supra* note 2, at 3 (citing *Williamson v. Lock's Creek Canal Co.*, 78 N.C. 156 (N.C. 1878)).

¹⁰ DUNN, *supra* note 2, at 3.

¹¹ *Id.*

¹² 212 N.C. 814, 195 S.E. 43 (N.C. 1938).

¹³ 712 S.E.2d 146 (N.C. App. 2011).

¹⁴ S.B. 907, 2009 Gen. Assem., Reg. Sess. (N.C. 2009);

(<http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2009&BillID=H1101>)

¹⁵ 212 N.C. 814 (N.C. 1938).

¹⁶ *Dunlap*, 212 N.C. at 819, 195 S.E. at 47.

¹⁷ McLawhorn, *supra* note 1, at 52-58.

researchers project that North Carolina's population will grow by nearly fifty percent by 2030, which will culminate in a greater demand for water.¹⁸ To combat the uncertainty of the reasonable use doctrine and allow municipalities to withdraw water for public drinking, Senator Daniel G. Clodfelter proposed Senate Bill 907 to North Carolina's General Assembly in 2009.¹⁹ One purpose of this bill was to allocate water in the state, based on efficiency, productivity, and environmental and societal good.²⁰ Although *L&S Water Power, Inc.* was decided after this new bill was proposed and rejected,²¹ the case shows that with a rigid system for water allocation not being implemented, lower riparian rights are still an important aspect of water law and must be compensated by the government when they are taken permanently and cannot be restored.²² Had Senate Bill 907 been approved, it could have discontinued North Carolina's common law of water in favor of a system designed to meet modern water demand.²³

I. *Dunlap v. Carolina Power & Light Co.*

Dunlap v. Carolina Power & Light Co. held that every riparian owner has a right to the reasonable use of running water.²⁴ In this case, the plaintiff, Carl W. Dunlap, owned a piece of land at the intersection of the Yadkin River and Rocky River that he used for recreational fishing and planting of crops.²⁵ The defendant, Carolina Power & Light Co. (CP&L), had a dam and plant (the Tillery Hydroelectric Generating Station) upstream from Dunlap on the Yadkin River. Dunlap filed a complaint that CP&L's dam prevented the customary flow of the stream to his

¹⁸ *Id.* at 72.

¹⁹ *Id.*

²⁰ *Id.* at 68.

²¹ S.B. 907, 2009 Gen. Assem., Reg. Sess. (N.C. 2009), available at <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2009&BillID=H1101>.

²² *L&S Water Power, Inc.*, 712 S.E.2d at 149.

²³ McLawhorn, *supra* note 1, at 69.

²⁴ *Dunlap*, 212 N.C. at 814, 195 S.E. at 149; DUNN, *supra* note 2, at 8.

²⁵ *Dunlap*, 212 N.C. at 814, 195 S.E. at 49.

property, according to the prior natural and usual flow.²⁶ Due to the Yadkin River's impoundment, the Pee Dee River became dry at times and rose to the level of a flood stage at others.²⁷ Dunlap alleged that the augmented levels of water caused flooding on his land, forcing the banks to break, which deprived him of the pleasure and profit of both fishing and farming.²⁸ The court affirmed that it has become a well-established principle of North Carolina law that any substantial diversion of waters or the pollution of waters of a stream gives rise to a cause of action for all riparian owners affected.²⁹ In this case, however, the court ruled that Dunlap's riparian rights were not taken because CP&L used the waters of Yadkin River in a lawful manner and the plaintiff could not show an unlawful, wrongful, or unreasonable use, only an augmentation in the water level throughout the day.³⁰ In forming its opinion, the court asserted that there could be a "diminution in quantity or a retardation or acceleration of the natural flow indispensable for the general valuable use of the water perfectly consistent with the existence of the common right and this may be done so long as the retardation and acceleration is reasonably necessary in the lawful and beneficial use of the stream."³¹

II. *L&S Water Power, Inc. v. Piedmont Triad Regional Water Authority* Overview

L&S Water Power, Inc. v. Piedmont Triad Regional Water Authority involved a dispute between a public water authority and a hydroelectric power plant over the latter's alleged diminished riparian rights.³² The defendant, Piedmont Triad Regional Water Authority (PTRWA), was formed in order to develop a public water supply to fulfill the projected water

²⁶ *Id.* at 814, 195 S.E. at 44.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Dunlap*, 212 N.C. 814, 195 S.E. at 47.

³² *L&S Water Power, Inc.*, 712 S.E.2d at 148.

demand for the next fifty years in the Piedmont Triad region of North Carolina.³³ On August 18, 1988, PTRWA petitioned the North Carolina Environmental Management Commission (EMC) to divert water, using eminent domain powers, from the Deep River basin to construct Randleman Lake.³⁴ The EMC approved the petition on February 21, 1992, and PTRWA received permission to divert, via inter-basin transfer, up to 30.5 million gallons of water per day from the Deep River Basin to the Haw and Yadkin River Basins.³⁵ In accordance with the EMC's approval PTRWA began filling the Randleman Lake in April of 2001.³⁶

On May 29, 2008, L&S Water Power, Inc. filed a complaint for inverse condemnation, claiming that PTRWA decreased the water flow in the Deep River, and sought compensation for their diminished riparian rights.³⁷ On October 26, 2009, the trial court determined that PTRWA had violated L&S Water Power, Inc.'s riparian rights because they: (1) used eminent domain to build the Randleman Lake without just compensation; (2) had and will continue to reduce the rate of water flow in the Deep River; and (3) negatively impacted L&S Water Power, Inc.'s ability to produce electricity by reducing the natural stream flow of the Deep River.³⁸

Upon review, the appellate court affirmed the trial court's decision that PTRWA took L&S's riparian rights and owed them compensation.³⁹ Their decision was based on three factors: (1) how this case is distinguished from the *Dunlap v. Carolina Power & Light Co.* precedent; (2) the Takings Clause of the Fifth Amendment of the United States Constitution; and (3) the difference between the reasonable use doctrine for private landowners and government

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *L&S Water Power, Inc.*, 712 S.E.2d at 148.

³⁹ *Id.*

condemnations.⁴⁰ The Appellate court distinguished the present case from the *Dunlap* precedent by declaring that PTRWA's actions caused a permanent disturbance to the water flow,⁴¹ since L&S Water Power, Inc. was able to present evidence that PTRWA's diversion of water had reduced and would continue to reduce the natural rate of flow in the Deep River.⁴² Because this was a permanent disturbance, L&S was entitled to compensation under the Takings Clause of the Fifth Amendment of the United States Constitution, which provides that when a government uses its power of eminent domain, the government must pay just compensation to the owner of the private property.⁴³ This Clause is transferred to states through the Due Process clause of the Fourteenth Amendment,⁴⁴ and while North Carolina does not prohibit the government from taking private property without compensation, it has never been denied as a part of North Carolina law due to the idea of natural equity.⁴⁵ Lastly, PTRWA argued that the trial court failed to properly apply the reasonable use doctrine. However, the appellate court asserted that PTRWA's claim was invalid because the reasonable use doctrine only applies to private landowners, not government condemnation cases.⁴⁶ Therefore, the holding of the court in this case is threefold: (1) riparian rights are taken when water flow is decreased permanently; (2) the reasonable use doctrine does not apply to eminent domain cases; and (3) private landowners are entitled to compensation when their water rights are taken through eminent domain.⁴⁷

⁴⁰ *Id.*

⁴¹ *Id.* (citing *Dunlap v. Carolina Power & Light Co.*, 212 N.C. 814, 821, 195 S.E. 43, 48 (1938)).

⁴² *L&S Water Power, Inc.*, 712 S.E.2d at 148.

⁴³ *Id.* (citing U.S. Const. Amend. V).

⁴⁴ *L&S Water Power, Inc.*, 712 S.E.2d at 148 (citing *Piedmont Triad Reg'l Water Auth.*, 154 N.C. App. at 592, 572 S.E.2d at 834 (2002)).

⁴⁵ *Id.* at 150 (citing *Department of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 4–5, 637 S.E.2d 885, 889 (2006)).

⁴⁶ *Id.* (citing *Eller v. Board of Education*, 242 N.C. 584, 89 S.E.2d 144 (1995)).

⁴⁷ *Id.* at 149-151.

III. Senate Bill 907 (2009)

In *L&S Water Power, Inc.* PTRWA had to get permission from the Environmental Management Commission (EMC) to divert water for Randleman Lake.⁴⁸ If Senate Bill 907 had been approved, it could have fundamentally altered North Carolina's water law by giving the State the power to plan, regulate, and control the withdrawal and use of North Carolina's water.⁴⁹ This would require entities to obtain a permit for each water withdrawal of over 100,000 gallons per day⁵⁰ as PTRWA had to.⁵¹ The riparian doctrine does not allow a local government to withdraw water for its citizens, and the only instance in which a riparian owner could be legally halted is when its use of the water was deemed unreasonable.⁵² Senate Bill 907 was proposed to control existing users and continued withdrawals under its dispensed permits and to establish a separate scheme for new or expanded withdrawals.⁵³ The bill's permanent allocation scheme would have allowed the North Carolina Department of Environmental and Natural Resources (DENR) to "modify allocations and permits to prevent or eliminate overallocation."⁵⁴ Senate Bill 907 was meant to "advance efforts to implement an effective and rational allocation system for the increasingly scarce uncommitted water" supply in North Carolina.⁵⁵

It is important to consider how *L&S Water Power Inc.* could have had a different outcome if Senate Bill 907 had been passed. In the case, PTRWA obtained a permit from the EMC to divert water from the Deep River Basin to fill Randleman Lake but was still held liable for taking L&S Water Power Inc.'s riparian rights.⁵⁶ Had Senate Bill 907 been implemented,

⁴⁸ *Id.*

⁴⁹ McLawhorn, *supra* note 1, at 68.

⁵⁰ *Id.*

⁵¹ *L&S Water Power, Inc.*, 712 S.E.2d at 148.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 71; S.B. 907, sec. 2.2, 2009 Gen. Assem., Reg. Sess. (N.C. 2009)).

⁵⁵ McLawhorn, *supra* note 1, at 70.

⁵⁶ *L&S Water Power, Inc.*, 712 S.E.2d at 151.

perhaps L&S Water Power Inc. would not have received judgment that its riparian rights had been taken, since PTRWA received a permit to withdraw that amount of water. This possibility demonstrates that even if North Carolina tries to solve its eventual water allocation problem with systematic water allocation methods, riparian rights would still need to be a factor in determining water allocation rules as water supplies in the state begin to diminish.

IV. The Takings Clause of the Fifth Amendment

L&S Water Power, Inc. also held that private riparian owners are entitled to compensation under the Takings Clause of the Fifth Amendment.⁵⁷ The Takings Clause states that private property will not “be taken for public use, without just compensation.”⁵⁸ This establishes a safeguard for property owners against government takings and limits the power of eminent domain.⁵⁹ The rationale behind this Clause is that the financial burden of public policy shouldn’t be placed upon a select few individuals, but rather the public as a whole.⁶⁰ It also imposes a specific cost limitation on the amount of private land that the government can seize for public purposes,⁶¹ allowing that the government can only seize land for which it can afford to pay. As in *L&S Water Power, Inc.*, companies can try to argue that the reasonable use doctrine negates the Takings Clause,⁶² and that because their use of the water is reasonable, they are not taking lower riparian owners’ rights and should not have to compensate lower riparian owners. However, as held in *L&S Water Power, Inc.*, the government must still compensate private landowners when they use eminent domain since the reasonable use doctrine can only be used

⁵⁷ *Id.* at 150.

⁵⁸ U.S. CONST. amend. V.

⁵⁹ James W. Ely, Jr., “*That Due Satisfaction May be Made*”: *The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1, 2 (1992).

⁶⁰ *Id.* at 3.

⁶¹ *Id.*

⁶² *L&S Water Power, Inc.*, 712 S.E.2d at 150–151.

for private landowners.⁶³ Thus, one can conclude that when the interference in water flow is caused by a government entity, eminent domain principles will determine the need for compensation.⁶⁴

V. Conclusion

L&S Water Power, Inc. v. Piedmont Triad Regional Water Authority is important to North Carolina's water law doctrine because it determines when the State must give compensation if the private property is taken by eminent domain affects water use.⁶⁵ The court's holding returns to the natural flow doctrine, which is significantly different from the direction that water law has taken in the rest of the country.⁶⁶ Water appropriations in the United States have become more stringent in the face of depleting resources.⁶⁷ Throughout the eastern United States, licenses specifying the volume of water that may be taken have become common.⁶⁸ In most western states, the prior appropriation doctrine (which considers water to be a public resource and allocates quantities of water based on beneficial use, not land ownership)⁶⁹ still applies when using groundwater, allowing individuals with relatively secure rights to the use of a specified amount of water.⁷⁰ In contrast to the rest of the country's changing attitude toward water law, this case held that even though PTRWA received permits to divert water away from the Deep River Basin, they could still be held liable for taking a lower riparian owner's rights.⁷¹

⁶³ *Id.*

⁶⁴ Jeri Gray, *Appeals Court Decision Puts Entities with Eminent Domain on Notice*, WRR1 1 (July-September 2011), http://www.ncsu.edu/wrri/pdfs/publications/WRRINews_375.pdf.

⁶⁵ *Id.* at 1.

⁶⁶ *Id.* at 2.

⁶⁷ STEPHEN HODGSON, DEVELOPMENT LAW SERVICE, MODERN WATER RIGHTS: THEORY AND PRACTICE 23 (2006), available at <ftp://ftp.fao.org/docrep/fao/010/a0864e/a0864e00.pdf>.

⁶⁸ *Id.* at 13

⁶⁹ *Id.* at 23

⁷⁰ *Id.* at 17

⁷¹ *L&S Water Power, Inc.*, 712 S.E.2d at 153.

While the reasonable use doctrine still applies to private landowners who interfere with the flow of surface water in an unreasonable manner that causes substantial damage, this case presents uncertainty for municipalities and other entities with the power of eminent domain.⁷² After this decision, these entities, which withdraw and do not return water, could be held liable to any lower riparian owner who can adequately show an injury from the permanent decrease in the flow of a river.⁷³ Lastly, this decision implies that those with the power of eminent domain do not have the right to prove reasonable use in claims of damages suits.⁷⁴ This case vastly impacts North Carolina water law by distinguishing its holding from that of *Dunlap* and asserting that the precedent does not stand for the proposition that a reduction of flow is not compensable, but rather you must prove that a diversion of water has reduced and will continue to reduce the natural rate of flow.⁷⁵ While this decision will impact North Carolina water law, it did not provide a way to determine both the natural flow of the river or the time frame in which a riparian owner can look to claim damages.⁷⁶ Thus common law issues of riparian rights and water law remain unpredictable.⁷⁷ Additionally, the North Carolina Supreme Court decided not to hear *L&S Water Power, Inc.* appeals, providing no chance solid answers in the near future.⁷⁸

⁷² *Id.*

⁷³ *See Id.*

⁷⁴ *See Id.*

⁷⁵ *Id.* at 150.

⁷⁶ Gray, *supra* note 61, at 2.

⁷⁷ *Id.*

⁷⁸ No. 198PA11, at 2 (Dec. 14, 2012), *available at*

<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8xOThQQTEuLTEucGRm;>

See L&S Water Power, Inc. v. Piedmont Triad Reg'l Water Auth., 726 S.E.2d 176, 2012 N.C. LEXIS 589 (N.C. 2012).