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Water Withdrawal Rights

Water Withdrawal Rights An Overview of Ohio Water Withdrawal Law, 2nd Edition

by
James Hanson, Arthur Woldorf, and Leonard Black, 1991

PREFACE

The introduction to the 1959 publication *Principles of Water Rights Law in Ohio*, authored by the late Charles C. Callahan, began:

"If the supply of water at various times and places always matched the need for it, there would be no occasion to consider the type of property interest commonly referred to as water rights; the lack of competition would relegate these rights to the category of pure speculation. Of course, such an ideal condition does not exist. Indeed it is likely that water supply and demand are seldom, if ever, exactly balanced."

During the 1988 drought, water supply and demand were considerably more out of balance than usual. Crops suffered extensively from lack of rainfall, and many farmers searched for irrigation water. The generally abundant flows in many perennial streams were inadequate to supply both offstream and instream uses. Normally dependable wells went dry due to inadequate recharge over a period of several years. And many Ohioans who never before considered it asked questions concerning their water rights.

The answers to some of these water rights questions have changed considerably due to a major Ohio Supreme Court decision in 1984 and passage of state legislation in 1988 and 1990. It is the intent of this publication to provide a brief overview of the current status of water withdrawal rights in Ohio. It certainly does not provide a comprehensive analysis, but rather attempts to clarify the basic framework of water rights.

INTRODUCTION

The law of water withdrawal rights in Ohio can be found stated essentially in two cases: *City of Canton v. Shock*, 66 OS 19 (1902), for streams and rivers, and *Cline v. American Aggregates Corporation*, 15 OS 3d 384 (1984), for ground water. Both describe a "riparian" system of water rights--that is, the right to use water is associated with the ownership of the land beside or within which the water flows.

STREAMS AND RIVERS

In *Canton v. Shock*, the Ohio Supreme Court broadened the concept of riparianism beyond all common-law precedent by declaring that a municipality was a riparian proprietor in its corporate capacity if a stream flowed through its corporate limits. It did not have to own land along the stream. This holding gives Ohio cities the same advantages in water control held by traditional riparian proprietors. It permits a riparian municipality, like any riparian owner, to use all the water it needs for its own "proper purposes," returning to the stream all that is not consumed, without liability to a downstream riparian owner. The city's proper purposes include the domestic use of its inhabitants as well as water for "extinguishing fires and other public purposes." Domestic use includes household uses, the watering of domestic animals normally kept about the home or farmyard (but not large herds), and the irrigation of gardens supplying food for family use (but not large-scale irrigation of commercial crops--agricultural irrigation would fall in this category).

Where upper and lower riparian users on a stream both use water for manufacturing or commercial uses (including such uses supplied by a riparian municipality) and the quantity of water is insufficient to supply both, *Canton v. Shock* held that each has a right to "the reasonable use of the water, considering all the circumstances." Each proprietor in such a case has to bear his fair proportion of the loss.

Land in Ohio is considered riparian regardless of its history of ownership if, at the time of one's claim, there is no intervening ownership between one's land and the stream. In the case of a stream flowing through a municipality, riparian rights extend throughout the corporate limits but not beyond them. A riparian municipality has no right to materially diminish the flow in the stream to the injury of a downstream riparian owner by supplying water to persons outside the municipality or by transporting the water away. A city which is a riparian proprietor by virtue of owning a tract of land along a stream outside its corporate limits has no right to materially diminish the flow in the stream to the injury of a downstream riparian owner by diverting water out of the stream into its corporate limits in

another watershed. However, to enjoin such uses or diversions, a downstream riparian owner would need to be able to demonstrate that he was being significantly damaged by a material diminution of the flow of the stream.

An Ohio statute allows the director of the Ohio Department of Natural Resources (ODNR) to issue permits for diversions from the Ohio portions of the Lake Erie and Ohio River watersheds, and Section 1501.32 ORC prohibits diversions in excess of 100,000 gallons per day without such a permit. Several such permits have been issued.

Riparian rights do not extend to those who own land along the Ohio canals and canal feeder lakes, the waters of which are under the direct jurisdiction of the ODNR. Withdrawal of these waters is allowed only by sale or lease as authorized by Section 1520.03 ORC, which allows the department to sell or lease water "only to the extent that the water is in excess of the quantity that is required for navigation, recreation, and wildlife purposes."

GROUND WATER

Until 1984, the rule in Ohio had been that of *Frazier v. Brown*, 12 OS 294 (1861), which held that one had no right to ground water. One did have a right to use one's land, including the pumping of water from it, no matter how it affected another's water supply. In the *Cline v. American Aggregates* case, the Ohio Supreme Court junked this rule, substituting therefor a rule of "reasonable use." The court referred specifically to Section 858 of the Restatement of Torts, a scholarly legal work which attempts to describe the accepted law in the United States. That section in turn refers to Section 850A, which describes reasonableness of use. It states:

"The determination of the reasonableness of a use of water depends upon a consideration of the interests of the riparian proprietor making the use, of any riparian proprietor harmed by it, and of society as a whole."
The following factors are then listed:

- a) The purpose of the use. (The use must be beneficial and fulfill some significant or worthwhile need or desire. Domestic uses are preferred. In times of drought, a householder need not reduce his withdrawals to accommodate users for other purposes. Hotels, apartment houses, and resorts do not get this preference, nor do large institutions like prisons, hospitals, or military camps.)
- b) The suitability of the use to the water resource. (Ill-planned uses may require more

water than the resource can deliver. Also, even though a use may have economic value, it may cause harm to recreational and environmental values which may render the use unsuitable, or it may otherwise disrupt existing uses.)

c) The economic value of the use. (A major consideration in determining reasonability of a use is the utility and value to the user, measured in economic terms, such as for irrigation or manufacturing. Another aspect of this is the user's investment in pumps, pipes, etc.)

d) The social value of the use. (A use has a social value if the general public good is in some way advanced or protected by making it. Here, economic benefit to the community is a value, as compared to the benefit to the user; weighed against this are adverse effects on private and public users.)

e) The extent and amount of harm the use causes. (This factor is not used unless the harm is significant. It is then used as a balancing factor--the benefit to the user as compared to the harm to the complainant and the social costs.)

f) The practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other. (The efficiency or wastefulness of competing uses are compared. Harm that can be avoided by trifling expense to the plaintiff may be ignored. Requirements of efficiency may change--a person may enjoy cheap use for a time, but when others develop the source, all must meet comparable standards of efficiency. Deepening a well would be an example of this. However, later users with superior economic capacity should not be allowed to impose upon smaller users costs that are beyond their economic reach or that will render their uses unprofitable.)

g) The practicality of adjusting the quantity of water used by each proprietor. (Wasteful use must be curtailed where there is competition for the resource. Where irrigators are competing, their fair share may vary according to the acreage of irrigable land owned by each, acreage actually irrigated, the character of the soil, and the nature of the crops. Permanent damage should be avoided, as

where fruit trees might die without a share of the water, or where a user would be put out of business. The foreseeability of drought could be a factor--justice might be served by placing the loss on the party whose use caused the shortage and who knowingly created a risk that the supply would be insufficient to serve all.)

h) The protection of existing values of water uses, land investments, and enterprises. (Without reasonable assurance that a continuing supply of water will be forthcoming, riparian proprietors might be discouraged from investing capital and labor in water-using ventures and projects. Pursuant to this policy, priority of use may prevail.)

i) The justice of requiring the user causing harm to bear the loss. (Protection of existing users need not result in freezing the pattern of water use. If a shift from one use to another can be characterized as progress, it should result in an overall increase of welfare. In economic terms, a desirable new use is one that produces benefits that exceed its costs, including the loss of the benefits of the old use. Still, a new use, if it will cause substantial harm by taking the water supply from an existing use, even one with less value, may be characterized as unreasonable unless compensation is paid.)

SUMMARY COMMENTS

A major policy underlying the law of riparian rights is that of accommodating as many reasonable riparian uses of a water resource as possible. With the passage of Sub. H.B. 476 in 1990, Ohio statutory law has been brought into accordance with the Restatement of Torts concerning determination of the reasonableness of a use of water. Section 1521.17 ORC states that such a determination depends on a consideration of the interests of the person making the use, of any person harmed by the use, and of society as a whole. It then lists nine factors to be considered, which are the same as those contained in the Restatement of Torts. These factors are, by passage of Sub. H.B. 476, applicable to a determination of reasonability not only with regard to ground water, but also in adjudication of stream water rights. Thus, any modern interpretation of *Canton v. Shock* should include consideration of these factors.

Section 1501.33 ORC, enacted by the passage of H.B. 662 in 1988, requires those making a new or increased consumptive use of water greater than an average of two

million gallons per day over a 30-day period to obtain a permit from the director of the ODNR (refer to Section 1501.30 ORC for the definition of consumptive use). This applies to surface water and ground water in all parts of the state.

Section 1521.16 ORC, also enacted by the passage of H.B. 662, requires a person who owns a facility capable of withdrawing more than 100,000 gallons per day of surface or ground water to register that facility with the ODNR, Division of Water. Existing facilities must register in calendar year 1990 and facilities completed after January 1, 1990 must register within three months after construction of the facility is complete. The information gathered by this registration will establish a chronology for the facility and thereby assist in resolving future water use conflicts. Sub. H.B. 476 modified this law by granting the chief of the Division of Water authority to designate "ground water stress areas" and to require water withdrawal registration in these areas for users of volumes less than the threshold level of 100,000 gallons per day.

The law of riparian water rights, where the rule is one of "reasonability," is based on fairness and equity among competing users. Its vice is in its unpredictability. Competing water uses may all be considered reasonable if the water resource is sufficient to supply them all. Thus, what are reasonable uses in most years may not be reasonable during a drought when supply is less than normal. Traditionally reasonable uses may become unreasonable as the number of users of a water resource increases and the total quantity of water demanded surpasses the supply. The system works best where water is abundant, and is followed only in states so blessed.

CONCLUSION

The ODNR, Division of Water is available to assist individuals, agencies, and organizations to understand water rights as commonly accepted, and to gather technical information and make recommendations for resolving water rights conflicts under certain conditions. However, no agency has authority to issue orders or citations or otherwise resolve conflicts or violations of such common law water rights.

For further assistance, or to order copies of this tri-fold brochure, please contact the division at:
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