

WATER ALLOCATION IN KENTUCKY: LEGAL AND INSTITUTIONAL FRAMEWORKS

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INTRODUCTION

Water rights in Kentucky may be characterized as a complicated mixture of statutory and common law rights, which Richard Ausness reviewed in a 1977 Kentucky Law Journal article ("Water Use Permits in a Riparian State: Problems and Proposals," 66 Kentucky Law Journal 191 (1977)). Despite some fundamental problems, however, superimposing statutory rights on older common law rules has served to make water rights available to more users than under common law exclusively.

COMMON LAW-Introduction

Common law rights in Kentucky have their foundation in the Riparian Doctrine: a collection of judicially-developed principles used by courts in deciding water use cases. The basic concept of the Riparian Doctrine is that water rights are directly linked to ownership of land bordering a natural watercourse. Riparian rights are not absolute. Rather, they are correlative in nature: requiring each riparian land owner to consider the needs of other riparian proprietors.

COMMON LAW-Surface Water

Even before statutory rights were enacted, the water rights picture in Kentucky was not sharply focused. Case law offered mixed support for both the "Natural Flow" and "Reasonable Use" rules. Under the Reasonable Use rule, a riparian owner may withdraw water for "ordinary" domestic purposes (e.g. bathing, drinking, household purposes and animal watering). Further, the riparian owner may withdraw water for "artificial" uses (i.e. non-domestic uses such as irrigation, manufacturing, power generation, mining, commercial stock watering and other activities which are said to "increase man's comfort and prosperity", even past the point of altering the natural flow of the watercourse, as long as these artificial uses do not interfere with existing beneficial uses by other riparian owners. This is the primary difference between Reasonable Use and Natural Flow; any material interference with the natural flow of the stream is strictly disallowed under the Natural Flow rule. The latter, of course, does not allow for riparian uses or consumptive non-domestic, riparian uses. The Reasonable Use rule, on the other hand, seeks to promote the fullest beneficial use of the resource while protecting existing users. Considerations for the determination of the reasonable nature of a use, as developed through case law, include rainfall, climate, size and capacity of the stream, amount place and method of withdrawal and other uses. The necessity of the use is balanced with the potential harm ensuing from the use. Reasonable use, then, is a question of fact which can often be resolved only by litigation. Only current uses are considered, not potential uses. For this reason,

reasonableness is determined under the specific existing conditions of each case and may change as the existing uses change.

COMMON LAW-Groundwater

Groundwater rights are ruled by the American or Reasonable Use rule. The presumption is that all subterranean waters are percolating. However, once a subterranean stream is shown to exist, it is presumed to have a fixed and definite course and channel, and related rights follow surface water law. The provisions of this American rule for percolating waters are similar to the more restrictive Absolute Ownership rule in that the right is proprietary and based on land ownership. However, where the Absolute Ownership rule assigns liability only for wasteful or malicious use, water use under the American rule must be reasonably related to the natural use of the overlying land. Malicious or wasteful uses may be enjoined without a demonstration of damages, and sale or use on distant lands, even if beneficial, is unreasonable and sufficient cause for legal action if it impairs the supply of another landowner. This American rule is more enlightened than the Absolute Ownership rule, but still fails to account for the physical nature of groundwater. Large users with deep wells and large pumps are favored under these two proprietary ownership rules. The Correlative Rights rule is more equitable, protects small users, and takes into account physical considerations of the hydrologic system. Rights under this rule are usufructuary only, not proprietary. Each land owner over a common pool has an equal and correlative right to make beneficial use of the water on the overlying land. If the supply is not sufficient to meet all needs, the uses must be prorated.

COMMON LAW-Other Rules and Definitions

Two tests may be used to determine riparian ownership. The stricter of the two, the Source of Title test limits riparian rights to the smallest tract held under one title in a chain of title leading to the present owner. Although there is no Kentucky case specifically adopting either rule, the Kentucky courts would likely follow the more reasonable Unity of Title test. Under this test, any tracts contiguous to a riparian tract are riparian as long as they are under common ownership. The history of the sale of purchasing of tracts is not an issue.

Non-riparian uses (i.e. use by non-riparian owners or use on non-riparian land) of surface water are not wrongful uses *per se* under the Reasonable Use rule as they would be under the Natural Flow rule. Damages must be demonstrated before a non-riparian use may be enjoined.

Prescriptive rights, those rights which are sanctioned by long-standing usage, may be obtained through ("visible, open, adverse, notorious, continuous and uninterrupted use" for the 15-year prescrip-

tive period. The adverse use itself, however, is not sufficient as in Natural Flow states. There must be an actionable wrong involving damages. The scope of the right is judged by the use made during the prescriptive period. Initiation of a suit or concession of title in the true owner at any time ends the adverse character of the use. In addition, the right may be lost through abandonment, although non-use does not constitute abandonment.

STATUTORY RIGHTS

In 1954, after years of confusion, the Kentucky legislature rejected the more restrictive doctrine of Natural Flow by officially adopting the Reasonable Use rule (KY Acts, Ch. 247 Sec. 2). The Act provided that the use of water by a riparian owner for domestic purposes would have priority over other uses. Further, the Act declared that the owners have a right to the reasonable use of water for artificial purposes provided these uses do not interfere with existing beneficial uses.

This Act was repealed in 1966 (KY Acts Ch. 23 Sec. 39), and replaced by KRS 151, a broadly-based water resources statute, administered by the Kentucky Natural Resources and Environmental Protection Cabinet. The new statute regulates water use, dams, water resources planning, construction for flood control and water resources development. While no specific "Reasonable Use" language is incorporated, the intent is clear. Specific mention is made of beneficial use and of balancing the interests of existing and future users; a clear indication that the Reasonable Use rule is still established. The courts support this interpretation.

Regulation is achieved by requiring permits of anyone desiring to withdraw, transfer, or divert public water except for certain exempted uses. Public water is defined in KRS 151.120, and includes all "water occurring in any stream, lake, groundwater, subterranean water or other body of water in the Commonwealth which may be applied to any useful and beneficial purpose." The only exceptions to this are (1) diffused water which flows vagrantly over the surface of the ground and (2) water left standing in natural pools in a natural stream when the flow of the stream has ceased.

Each permit must be specific in terms of quantity, time, place and rate of withdrawal, and represents a limited usufructuary right of use only. The permit does not vest ownership or any absolute right of withdrawal or use. The successful applicant must meet three criteria: 1) the proposed withdrawal must not be detrimental to the public interests or the rights of other public water users, 2) the respon-

sible applicant must establish a need for a useful purpose and 3) the requested amount must be available.

Permits have no expiration date. They may, however, be amended at any time when use is substantially different from the permitted amount. Permits may be issued for less than requested if it is deemed in the public interest or in the interest of other water users.

Domestic and agricultural uses are exempted by statute (KRS 151.140) as are steam generating plants whose retail rates are regulated by the Public Service Commission and the use of water injected underground in conjunction with operations for the production of oil or gas. Regulation (401 KAR 4:010) identifies users withdrawing 10,000 gpd or less as an additional user group not subject to permitting. Instream flow uses such as wastewater dilution, navigation, recreation, scenic, cultural or aesthetic uses are neither permitted nor specifically exempted. Regulations currently protect minimum instream flows, but do not consider the need to protect enhanced flows for purposes of recreation or outstanding natural resources. All permitted water users must keep records of all water withdrawn, transferred or diverted and report to the Cabinet.

No specific mention is made in the statutes distinguishing groundwater from surface water in the context of permitting withdrawals, diversions, or transfers. In addition, no specific mention of the consumptive use concept is made. Regulation addresses withdrawals diversions or transfers only, with no active consideration of returns or net losses for the system (although KRS 151.200 does provide for permitting of interbasin transfers of water). There is no fee associated with either the application or permitting process.

COMMON LAW/STATUTE INTERACTION

Table 1 shows the interaction between users. State statute prevents new permitted users from interfering with existing users of public water (both permitted and exempted) by requiring a permit which will not be issued if the use is found to be detrimental to the public interests or the rights of other public water users. Existing permitted users, however, do not enjoy the same security against new exempted users. Conflicts between permitted and exempted users would have to be resolved by the courts, and no case law is available to indicate what weight the courts might place on the rights of permit holders versus the rights of exempted users under common law. The one exception to this is emergency allocation by the Commonwealth. Under the provisions of KRS 151.200 the department may, with the approval of the Governor, temporarily allocate the available public water supply among water users in the best interests of the public.

	NEW PERMITTED	NEW EXEMPTED
EXISTING PERMITTED	State statute does not allow new permitted users to interfere with existing claims of other public water users.	Existing users who hold statutory water rights are not protected against new common law uses except in the case of emergency allocation by the Commonwealth.
EXISTING EXEMPTED	State statute does not allow new permitted users to interfere with existing claims of other public water users.	The interaction between new and existing exempted users of public water is determined by the common law rules of water rights.

Table 1: Summary of interaction between permitted and exempted users