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Defining Public Consumptive Rights in Virginia's Rivers, Streams, and Lakes: Is Legislative Reform Needed?

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DURING the seven-year period from 1977 through 1983, Virginia experienced three severe droughts that caused millions of dollars in damages.[1] Perhaps the most serious of the droughts occurred in 1983, when drought conditions persisted for months in eighty-two out of the state's ninety-five counties. During that summer most areas of the state received less than half the normal rainfall. By the end of the 1983 harvest season, the drought had caused an estimated $200 million in damages to the state's crops.[2]

Agricultural users were not the only ones detrimentally affected by the droughts. Many Virginia localities faced weeks of dangerously low water supplies. Drought conditions in 1980, for instance, decreased the groundwater table by as much as four feet in some areas and caused water reservoir levels to fall significantly.[3] The 1980 drought was so severe in southeastern Virginia that the Governor proclaimed a water resource emergency for the area.[4] Several localities imposed mandatory water use restrictions,[5] while the limited water supplies of two localities prompted them to adopt water rationing plans.[6]

Although the actual drought conditions have now abated, the droughts continue to have an impact in Virginia. One of their most important consequences is that they have focused attention on the degree to which Virginia law adequately provides for the consumptive needs of the public. Because of rapid population growth in several of Virginia's water-poor areas, interest in this issue should remain strong until the water supply problems of those areas are alleviated.[7] This article will examine the nature of public consumptive rights in Virginia's rivers, streams, and lakes. It will begin by discussing the legal principles presently governing use of Virginia's watercourses. Then, after evaluating how well those principles accommodate the public interest, it will briefly discuss several proposed legislative reforms to determine whether they provide a more acceptable accommodation.

An Introduction to the Riparian Doctrine

Most of the legal rules governing consumptive use of Virginia's rivers, streams, and lakes are from the common law. Although the General Assembly has enacted some statutory modifications, the vast majority of these amendments supplement the common law rather than replace it.[8] Under Virginia's common law each water resource is classified according to its place in the earth's "hydrologic," or water circulation, cycle and separate legal rules are developed for the major classifications. Those principles governing use of natural watercourses, one of the main classifications, collectively are known as the riparian doctrine. The basic tenet of that doctrine is that a party owning land abutting a watercourse has the right to make reasonable uses of the watercourse for the benefit of his riparian land.[9] Because these use rights arise as incidents to ownership of land bordering the watercourse, they generally are considered to be vested property rights[10] which cannot be impaired arbitrarily or taken without just compensation by the state.[11]

Under the riparian doctrine two key principles define and limit consumptive interests in Virginia's watercourses. First, a riparian proprietor can exercise his rights only for the benefit of riparian land. Second, the riparian's use must be reasonable. Developed in an era when most riparians were private parties, these two principles reflect assumptions and policies that limit their ability to accommodate the public's consumptive needs.

The Riparian Land Limitation: Restricting the Area to be Benefitted

The riparian land limitation serves an important function under Virginia law: it restricts the area that can benefit from use of surface waters and thus offers some protection for present users. To qualify as riparian land, a tract naturally must have physical contact with a watercourse. Because this standard, though, fails to indicate how much land is riparian, the courts

have developed several other tests for identifying riparian land.

One additional standard applied by the Virginia courts is the watershed test. Under this standard land must be within the watershed, or natural drainage area, of a watercourse to qualify as riparian to that watercourse.[12] As explained by one court, this limitation ensures that any water withdrawn, but not fully used, by one riparian will remain in the watershed and thus be able to return to the watercourse for use by other riparians in that watershed.[13]

A further refinement to the definition of riparian land provides that land not abutting a watercourse must have been acquired in the same transaction as the portion touching the watercourse to qualify as riparian land.[14] The courts apparently developed this limitation to prevent abuse by riparian owners. Because this qualification restricts riparian status to land acquired in a single transaction, a riparian proprietor cannot enlarge his tract of riparian land by purchasing land contiguous to his original tract of riparian land but not contiguous to the watercourse.[15] Although the restriction thus achieves a more equitable distribution of consumptive rights, it limits the area within the watershed that can be benefitted. For a riparian locality steadily growing in size, this limitation can have serious consequences.

A final qualification developed by the Virginia courts restricts riparian status to tracts that are unitary in a physical sense, as defined by reasonable community standards and location in the watershed.[16] This limitation helps to define the priority status of riparians and to ensure that an unreasonable burden is not imposed on them. For instance, under the unitary tract standard, a party owning a tract consisting of two main sections connected by a thin strip could not claim that the lower section should receive the same priority of use as the upper section.[17] Also, if the unitary tract requirement were not imposed, a riparian landowner would have to review periodically the deeds of his neighbors to protect his riparian rights from fraudulent conveyances that had included his land within the boundaries of neighboring land.

The Reasonable Use Limitation: Imposing Quantitative Limits to Resolve Conflicts

The reasonable use limitation also serves an important function under Virginia's riparian doctrine: it defines the quantitative use rights of each riparian and thus provides a standard for resolving conflicts among users. Whether a use is reasonable depends on the facts and circumstances of a particular situation. Factors affecting the reasonableness of a use include the normal conditions of a watercourse (such as size and flow), the purpose of the use, the compatibility of the use with other uses, and the status of the user as an upper or lower riparian.[18] Although the importance of a use is not determinative, domestic uses such as drinking, bathing, cooking, and watering livestock tend to receive a higher priority.[19]

The judicial preference for domestic uses suggests that a riparian locality meeting the domestic needs of its inhabitants would have priority over most other users. In applying the reasonable use standard, though, the Virginia courts have taken a narrow perspective, defining the standard primarily in the context of an individual private riparian.[20] This approach may have been responsive to the demands of riparians in the 1800's when many of them were private persons who supplied their own consumptive needs. Today, however, it fails to reflect modern water

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use patterns, primarily because local governments have assumed responsibility for many of the domestic uses previously conducted by private riparians. Despite this change in roles, the courts in Virginia and many other riparian jurisdictions continue to define the reasonable use restriction from their traditionally narrow perspective and appear reluctant to broaden the scope of their inquiry.

Public Consumptive Rights under the Riparian Doctrine

The Virginia courts use the same riparian principles to define public consumptive rights as they do to determine the nature and extent of private rights. As explained above, many of these principles assume that the user is a private party who is supplying most of his needs. Although this assumption may have been sensible when the riparian doctrine first developed, it seriously limits the water supply options of localities attempting to satisfy their inhabitants' needs.

To operate a public water supply system effectively, local governments often need to divert water from a river or lake and store it for future use. Under Virginia's traditional riparian principles, a riparian generally cannot divert water from a watercourse for use beyond his riparian land.[21] No exception is made where the riparian is a local government. A city or town does not acquire greater rights just because of its status as a governmental entity.[22] Nor does it acquire consumptive rights because of the location of water resources within its boundaries. Although jurisdiction over water resources may provide sufficient justification for regulating those resources, it does not confer riparian rights upon a locality.[23] Thus, to be entitled to consumptive rights, a locality generally must be a riparian proprietor.

Two principal explanations have been proffered by the Virginia Supreme Court as justifications for its no-diversion rule. The first is alluded to by the Court in a 1942 decision where it describes a diversion to nonriparian land as "an extraordinary and not a reasonable use"[24] and thus suggests that it views all diversions to nonriparian land as per se unreasonable. This approach is not followed in most other riparian jurisdictions, which appear unwilling to declare a diversion to be unreasonable without looking at the surrounding facts and circumstances.[25]

The second, suggested by a 1921 Virginia Supreme Court decision, is that use of diverted water beyond a riparian's tract of land violates the riparian land restriction.[26] This rationale poses a more serious obstacle to localities attempting to create public water supplies. Most diversions for public use would require transfers to nonriparian land, often to areas in another part of the watershed and sometimes to areas outside the watershed. Yet, to be theoretically consistent, the courts must prohibit diversions that directly conflict with the key definitions of riparian land. As long as the riparian land requirement remains an essential part of the riparian doctrine, substantial violations of the requirement must be unlawful. Any other approach would seriously undermine the policies being furthered by the riparian land restriction.

Even under Virginia's traditional riparian principles, several exceptions to the no-diversion rule exist. Two exceptions based on related theories, the actual injury requirement and the surplus water doctrine, could enable localities to divert significant quantities of water. The first exception, using the actual injury requirement, arises because Virginia law requires a riparian to establish injury before it can obtain relief for an unlawful use.[27] Although there is some confusion among the Virginia courts about the meaning of injury,[28] economic and equitable policy considerations support this exception. As long as the diversion for public use involves a reasonable share of water and does not interfere with other riparians' reasonable use rights, they should not have reason to complain about the unfair effects of the diversion. Furthermore, allowing such diversions would increase the number of people benefitting from the watercourse at minimal cost to other riparians and would reduce the percentage of water in the watercourse not being used.

The second exception, based on the surplus water doctrine, focuses on whether a diversion involves excess or surplus water. If a locality is diverting surplus water—that is, water in excess of the natural flow of the watercourse—then the locality could argue that its conduct is not interfering with the rights of other riparians. A riparian generally is entitled to receive only the natural flow of a stream after reasonable use by upper riparians.[29] Once again, although Virginia has given conflicting signals about the validity of the surplus water doctrine,[30] an exception based on it can be justified for the same policy reasons as the first exception.

Even if the surplus water or actual injury exceptions are accepted in Virginia, they do not provide permanent solutions to a locality's water supply problems. By definition, diversions based on these exceptions can continue without legal repercussion only as long as surplus water exists or injury does not occur. Furthermore, a locality conducting diversions under either exception probably could not seek judicial protection of its uses against unlawful conduct by others. Both theories permit the diversions because other

riparians cannot sue, and not because the diverter has acquired a legally protected riparian right.

If a locality desires a more permanent, but generally more costly, solution to its water supply problems, it can pursue several other exceptions to the no-diversion rule. For instance, as the Virginia Supreme Court recognized, a locality could acquire the necessary rights and interests entitling it to divert by prescription, purchase, or condemnation.[31] Acquisition by prescription, though, requires long, continuous, wrongful use, while acquisition by purchase or condemnation is feasible only if a locality has sufficient financial resources and purchasing powers to acquire the necessary interests.[32]

If a watercourse is navigable, a locality also may attempt to justify a diversion for public use by relying on another important common law doctrine known as the public trust doctrine. Developed to a significant extent by the United States Supreme Court, this doctrine is based on the principle that a state holds certain resources, principally navigable waters and the beds underneath them, in trust for its citizens.[33] Although the doctrine has enabled governments in other jurisdictions to make consumptive uses of watercourses not otherwise permitted by the riparian doctrine,[34] it probably will not help local governments in Virginia. Given the state Supreme Court's reluctance to recognize the doctrine as authorizing even more traditional public uses,[35] it is unlikely that the Court will extend the doctrine to consumptive uses of navigable watercourses.

Proposed Legislative Reforms

In recent years the General Assembly has considered, but not enacted, several different legislative proposals to reform Virginia's water law. Perhaps the most significant of these proposals is the Virginia Water Law Bill, which calls for comprehensive revision of the riparian doctrine. Introduced as a bill in 1981, the comprehensive proposal seeks to establish a permit system to regulate consumptive use of Virginia's surface and ground waters.[36] Under the bill's proposed permit system, any person making a "withdrawal, diversion, impoundment, or consumptive use" of regulated waters must obtain a permit to do so, unless the use does not exceed 5,000 gallons per day.[37] Nonregulated waters include "coastal waters,"[38] or "waters of the Atlantic Ocean and the Chesapeake Bay within the jurisdiction of the state."[39] Unless otherwise exempted, existing users must obtain a permit from the agency administering the system to continue their use.[40] However, those existing users that apply should receive a permit automatically as long as their uses qualify as reasonable-beneficial uses.[41] Where an existing user is denied a permit, the agency must award reasonable compensation.[42]

In evaluating permit requests, the agency administering the system would have to grant a permit to an applicant, generally for ten years, unless it found that the proposed use was not a reasonable-beneficial use, interfered with existing legal uses, or was inconsistent with state water planning or policy objectives.[43] As a condition of the permit, however, the agency may require the permittee to preserve certain minimum flows.[44] Also, like the permit systems adopted in other jurisdictions, the Virginia Water Law Bill would allow the regulatory agency to authorize diversion of surface or ground waters by the holder of a use permit, provided that the agency determined that the diversion was "consistent with the public interest."[45]

Several less ambitious reform measures also were introduced in the General Assembly in 1981 and 1982. Based on the premise that Virginia's riparian doctrine probably does not permit diversions, these measures attempt to eliminate or clarify those aspects of the riparian doctrine that restrict or impede diversion to nonriparian land. One bill, for example, seeks to minimize the possibility that a riparian would try to enjoin a diversion even though the use was "harmless." It provides that any "beneficial use of state waters is lawful as against any person unless such use causes harm to such person."[46] "Harm" is defined as existing where there is interference with valid existing uses or a reduction in market value of riparian land.[47] The bill also clarifies that a use is not unlawful just because it benefits nonriparian land or is conducted by a local government, but rather is to be evaluated on the basis of its reasonableness.[48] Criteria to be considered in making this evaluation include "the social utility of the proposed nonriparian use," the existence of "practicable alternative sources" of water, the degree to which the proposed use impacts on other water uses such as maintenance of in-stream flows for preservation of fish and wildlife, and the social utility of other uses that would be adversely affected by the proposed use.[49]

Another partial reform bill deals with the diversion issue more directly, affirmatively authorizing the issuance of permits for diversions from one watershed to another found to be "in the public interest."[50] Factors to be considered in making this finding include the effect of the transfer on such existing and future uses as recreational, private, public, industrial, and water quality uses, the "beneficial impact" of the proposed transfer on the state and its cities and counties, the applicant's ability to "implement effectively its responsibilities under the requested permit," and the extent to which the proposed transfer affects the

rights of other states to use the waters of the affected stream.[51] More comprehensive than the "harmless use" proposal, this bill also requires a permittee to meet certain requirements after a permit is issued, including the payment of user fees and the observance of specified minimum flows or levels.[52] Significantly, forty percent of the compensation paid by the permittee is to be disbursed to the jurisdiction where the intake structure and appurtenant conduits are located, while the remaining sixty percent is to be divided among the regulatory agency and the localities adjoining the situs jurisdiction.[53]

Both the comprehensive and partial reform measures have caused considerable controversy. The comprehensive proposal, for instance, has been criticized because it would alter, and perhaps even take away, the use rights of present riparians.[54] Also, besides requiring substantial revenues to implement the new permit system, the comprehensive bill would place all regulatory power at the state level. Although the bill authorizes the state regulatory agency to appoint local advisory boards, this power is discretionary.[55] In a state with a long tradition of local rule, such a centralized approach understandably raises misgivings among local governments.

If the goal of reform is to facilitate creation and expansion of public water supplies by allowing diversions and other public consumptive uses, then the partial reform proposals seem to achieve this goal just as well as the comprehensive bill at far less cost. The partial reform measures, though, have one serious disadvantage. Because the primary goal of these proposals is to facilitate diversions within the general framework of the riparian doctrine, they generally do not impose sufficient limitations on the diversions to protect the interests of water-rich jurisdictions. The harmless use proposal, in particular, attempts to allow diversions with as little disruption to the common law as possible. By failing to provide specific protections for water-rich localities, it fails to recognize the important equitable concerns of water-rich jurisdictions.[56] These jurisdictions, many of which are low-density rural areas, understandably fear that water-poor areas will rob them of important development opportunities by attempting to divert some of their abundant water resources. The anger and sense of injustice felt by the water-rich jurisdictions is intensified by a belief held by many of them that they own the waters within their boundaries, or at least have the right to use the resources for the benefit of their inhabitants. Although this belief is not legally justified,[57] it does seem to reflect a legitimate concern: a fair distribution of resources would seem to require giving a water-rich jurisdiction some priority over other jurisdictions in using resources within its boundaries.

The common law approach certainly provides for this concern better than the proposed reforms. As previously explained, under the common law a water-poor jurisdiction generally cannot divert water from a water-rich area. The common law approach, however, fails to recognize the competing concerns and interests at stake. By prohibiting diversion of watercourses for public use, Virginia's riparian doctrine seriously limits the options of water-poor localities. Because this situation exists in a state generally rich in water resources, it leads to frustration and resentment among localities searching for water. Jurisdictions poor in water resources are forced to bargain with parties willing to sell surplus water, often on unfavorable terms, or resort to their own diversion plans. Because these self-help schemes typically involve the diversion and transfer of water from one watershed to another, challenges from private riparians and water-rich areas affected by the plans are likely to result.[58]

If the self-help scheme involves acquisition of the right to divert by purchase and condemnation, then it may survive a challenge. The courts generally permit agreements that purchase, restrict, or alter riparian rights[59] and, where voluntary transactions are not feasible, localities with sufficient eminent domain powers can condemn the property interests affected by the plan.[60] Not all water-poor localities, though, could afford to pursue this option.

Where, however, the self-help scheme relies on possible exceptions to Virginia's no-diversion rule instead of acquisition of necessary interests by purchase or condemnation, then it could survive a challenge only if the Virginia courts were willing to recognize the need to modernize the riparian doctrine, interpret the exceptions broadly, and assume an active role in defining public consumptive interests. Even then unrestrained diversions probably would not be allowed under the riparian doctrine because of conflicts with key principles, unless the courts chose to rely on the public trust doctrine to justify the diversion plan. Given the propensity of the Virginia judiciary to follow precedent and apply traditionally accepted legal principles, it is highly unlikely that such a situation would occur. Legislative reform thus would seem to be the only viable alternative for protecting and providing for the public's consumptive interests in Virginia's watercourses. To be politically acceptable, though, a proposal would have to achieve a better balance between the competing interests and policy concerns than that reflected in the reforms proposed so far.

FOOTNOTES

This article summarizes, and relates to Virginia, portions of another more comprehensive article entitled "Allocating Consumptive Water Rights in a Riparian Jurisdiction: Defining the Relationship Between Public and Private Interests" (currently unpublished manuscript available at Marshall-Wythe School of Law, College of William and Mary, Williamsburg, Virginia).

1. *See generally* State Water Study Comm'n, Report to the Governor and the General Assembly of Virginia, S. Doc. No. 15, at 5-6 (1981) (describing 1980 drought); State Water Study Comm'n, Interim Report to the Governor and the General Assembly of Virginia, S. Doc. No. 21, at 5 (1979) (describing 1977 drought); Va. Water Resources Research Center, 14 *Water News*, No. 10, at 1-2 (Oct. 1983) (describing 1983 drought) [hereinafter cited as *Water News*]; *id.*, No. 9, at 1-2 (Sept. 1983) (describing 1983 drought).

2. 14 *Water News*, *supra* note 1, No. 10, at 1 (Oct. 1983). More specifically, the 1983 drought caused an estimated $13 million loss in sales to the state's potato and commercial vegetable farmers, $30 million in corn sales, $25 million in soybean sales, and $20 million in tobacco sales. *Id.*, No. 9, at 1 (Sept. 1983). During the 1980 and 1977 droughts, Virginia sustained crop losses totaling $232 million and $292 million, respectively. *Id.*, No. 10, at 1 (Oct. 1983).

3. *See* M. Hrezo, *Norfolk* v. *Suffolk: Proposed Agreement Leaves Important Issues Unsettled* 1 (Va. Water Resources Research Center, Special Report No. 14, Nov. 1981). *See generally* U.S. Geological Survey, Dept. of the Interior, *Water-Data Report VA-81-1, Water Resources Data: Virginia Water Year 1981* (1982).

4. Gov. of Va., Emergency Executive Order No. 45 (80) (Oct. 22, 1980).

5. *E.g.*, Chesapeake, Va., Ordinance No. 80-0-0188 (Aug. 19,1980); Portsmouth, Va., Ordinance No. 1980-67 (Aug. 12, 1980).

6. Norfolk, Va., Ordinance No. 30, 737 (Jul. 25, 1980); Virginia Beach, Va., An Ordinance to amend Section 37-11(b) of the Code of the City of Virginia Beach, Virginia (Oct. 13, 1980).

7. The City of Virginia Beach, for instance, has experienced a 52% increase in population within the last ten years and now has about 6% of the state's population, yet does not have a substantial source of fresh surface water within its boundaries. U.S. Bureau of the Census, Dept. of Commerce, *1980 Census of Population, Characteristics of the Population—Number of Inhabitants, U.S. Summary* 1-43, 1-177.

8. *But see* Ground Water Act, *Va. Code* §§ 62.1-44.83 to -44.107 (Repl. Vol. 1982).

9. *See* Virginia Hot Springs Co. v. Hoover, 143 Va. 460, 467, 130 S.E. 408, 410 (1925). *See generally* 2 H. Farnham, *The Law of Waters and Water Rights* § 465 (1904). Although the doctrine of littoral rights, and not the riparian doctrine, technically governs consumptive uses of lakes, the principles of the littoral rights doctrine are virtually identical to those of the riparian doctrine. *See* 6A *American Law of Property* §28.55 (A. Casner ed. 1954).

10. *See* Hite v. Luray, 175 Va. 218, 226, 8 S.E.2d 369, 372 (1940).

11. *See* Grinels v. Daniel, 110 Va. 874, 877, 67 S.E. 534, 536 (1910). The rights of a riparian are not absolute, though, for other riparian landowners along the same watercourse also have a correlative and equal right to make a reasonable use of the watercourse. Hite v. Luray, 175 Va. 218, 225, 8 S.E.2d 369, 371, 372 (1940).

12. *See, e.g.*, Gordonsville v. Zinn, 129 Va. 542, 551, 106 S.E. 508, 511 (1921).

13. *Id.* at 552, 106 S.E. at 511 (quoting explanation of Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P. 978 (1907)).

14. Although the Virginia Supreme Court has not expressly adopted the single transaction standard, it has discussed the standard in favorable terms. *See* Gordonsville v. Zinn, 129 Va. 542, 553, 555-57, 106 S.E. 508, 512-13 (1921).

15. *See generally* 2 H. Farnham, *supra* note 9, § 463(a).

16. *See* Gordonsville v. Zinn, 129 Va. 542, 106 S.E. 508 (1921).

17. In *Gordonsville v. Zinn, id.*, a conflict developed between the town of Gordonsville, which owned a one-acre lot abutting a nonnavigable stream, and an individual riparian landowner, who had separately purchased two tracts of land, located above and below the town's lot and connected by a strip of land. The land above the town's lot was approximately 25 feet in width and abutted the stream. The town sought an injunction to prevent the individual landowner from withdrawing water from the streams at a point located on her upper property and pumping it to her dwelling on the lower section.

In considering the status of the defendant's land, the Court concluded that although the lower property was riparian to the stream, it could at best be regarded as lower riparian land in relation to the town's lot. As explained by the Court, the lower section was not within the watershed of the upper section and therefore could not be considered to be riparian to that part of the stream abutted by the upper property. Thus, the Court focused on physical location within the watershed in defining riparian status.

18. *See* Davis v. Harrisonburg, 116 Va. 864, 869, 83 S.E. 401, 403 (1914); Arminius Chemical Co. v. Landrum, 113 Va. 7, 13, 73 S.E. 459, 462 (1912).

19. *See* Norfolk & Western Ry. Co. v. Graham Land & Improvement Co., 10 Va. L. Reg. 983, 984 (Cir. Ct. 1904). Water planning and policy provisions enacted in Virginia generally reaffirm the common law preference for domestic uses, especially human consumptive uses. *See, e.g., Va. Code* § 62.1-44.36(2) (Repl. Vol. 1982).

20. *See, e.g.*, Panther Coal Co. v. Looney, 185 Va. 758, 765, 40 S.E.2d 298, 301 (1946) (pollution of stream by mine water held not to be a reasonable use); Purcellville v. Potts, 179 Va. 514, 521, 19 S.E.2d 700, 703 (1942) (municipality diverting water for the domestic use of its inhabitants found not to be making a reasonable use).

21. Carpenter v. Gold, 88 Va. 551, 14 S.E. 329 (1892). A riparian, however, may be able to divert a watercourse if he returns the watercourse to its original channel before it leaves his land and other riparians are not injured. Cook v. Seaboard Airline Ry., 107 Va. 32, 35, 57 S.E. 564, 565 (1907).

22. *See* Gordonsville v. Zinn, 129 Va. 542, 106 S.E. 508 (1921).

23. Under recent statutory amendments, jurisdiction over water resources also gives a local political subdivision the power to approve or disapprove of various water projects proposed by another subdivision when the projects are to be located within the boundaries of the locality having jurisdiction. *See, e.g., Va. Code* §§ 15.1-37, -332.1, -456, -875, -1250.1 (Repl. Vol. 1981 & Supp. 1984).

24. Purcellville v. Potts, 179 Va. 514, 521, 19 S.E.2d 700, 703 (1942). Another rationale, also suggested by *Purcellville*, is that a diversion by a local government for the purpose of creating a public water supply is an unreasonable use. *See id.*

25. *See, e.g.*, Elliot v. Fitchburg, 64 Mass. (10 Cush.) 191, 193, 194 (1852); Gillis v. Chase, 67 N.H. 161, 31 A. 18, 19 (1892); Lawrie v. Silsby, 76 Vt. 240, 56 A. 1106, 1109 (1904).

26. Gordonsville v. Zinn, 129 Va. 542, 558-59, 106 S.E. 508, 514 (1921).

27. *See id.* at 560, 106 S.E. at 514.

28. *Compare* Panther Coal v. Looney, 185 Va. 758, 765, 40 S.E.2d 298, 301 (1946) (holding that only those interferences

that "impart to the water such impurities as substantially impair its value for the ordinary purposes of life, and render it measurably unfit for domestic purposes" are actionable) *with* Purcellville v. Potts, 179 Va. 514, 524, 19 S.E.2d 700, 704 (1942) (stating that "a diversion of a natural watercourse, though without actual damage to a lower riparian owner, is an infringement of a legal right and imports damage").

29. Virginia Hot Springs Co. v. Hoover, 143 Va. 460, 465-67, 130 S.E. 408, 410 (1925). *But see* Gordonsville v. Zinn, 129 Va. 542, 558, 106 S.E. 508, 514 (1921) (suggesting that Virginia might follow the more restrictive English version, which gives riparians the right to the normal flow of a stream, undiminished by nonriparian uses regardless of how reasonable).

30. *Compare* Gordonsville v. Zinn, 129 Va. 542, 562, 106 S.E. 508, 515 (1921) (apparently recognizing the doctrine) *with* 1971-1972 Op. of the Att'y Gen. of Va. 80 (1972) (dismissing the doctrine as questionable).

31. Gordonsville v. Zinn, 129 Va. 542, 563, 106 S.E. 508, 515 (1921).

32. Acquiring the right to divert would involve purchasing or condemning the flow and reasonable use rights of all riparians below the point of diversion who would sustain injury because of the diversion. If injury is defined broadly to include potential harm, these acquisitions could be costly. It also would require purchasing or condemning easements from riparians and nonriparians owning land between the diversion site and the destination area to permit transport of the diverted water.

33. *See* Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892).

34. *See* Minneapolis Mill Co. v. Board of Water Comm'rs, 56 Minn. 485, 58 N.W. 33 (1894), *aff'd*, 168 U.S. 349 (1897).

35. *See* Commonwealth v. Newport News, 158 Va. 521, 164 S.E. 689 (1932).

36. The Virginia Water Law, H.B. 1420, 1981 Va. Gen. Assem., Reg. Sess.

37. *Id.* § 62.1-231.

38. *Id.* § 62.1-233.

39. *Id.* § 62.1-198.2.

40. *Id.* § 62.1-237.

41. Under the bill existing users filing their initial permit requests would not have to follow normal permit procedures as long as their uses were reasonable-beneficial uses. *See id.* §§ 62.1-237, -238, -243.

42. *Id.* § 62.1-240.

43. *Id.* § 62.1-234. The regulatory agency, for example, may restrict uses that are inconsistent with environmental protection, public recreational needs, or procreation of fish and wildlife. *Id.* § 62.1-217.

If granted, a permit may last for ten years, unless the permittee is a public utility, in which case a fifty-year period is allowed. *Id.* §§ 62.1-244 to -245. Permits can be revoked for a number of reasons, including nonuse for two years or more. *Id.* § 62.1-247. Where competing applications are filed, the regulatory agency is directed to "allocate the water in a manner which best serves the public interest." *Id.* § 62.1-242. In the event that one of the competing applicants is a renewal, the agency is to prefer the renewal applicant. *Id.* § 62.1-243.

44. *Id.* § 62.1-216. Under § 62.1-215 the regulatory agency is required to establish minimum flows for surface watercourses and minimum levels for lakes and groundwater tables. In setting the flows and levels, the agency may consider and provide for "the protection of nonconsumptive uses." *Id.*

45. *Id.* § 62.1-235.A.

46. H.B. 1338, 1981 Va. Gen. Assem., § 6.21-11.2.A, Reg. Sess.

47. *Id.* § 62.1-11.2.B.

48. *Id.* § 62.1-11.3.A, -11.4.

49. *Id.* § 62.1-11.3.A.

50. Interbasin Transfer Act, H.B. 503, 1982 Va. Gen. Assem., § 62.1-200.A, Reg. Sess. The bill exempts some interbasin transfers, including those less than 500,000 gallons per day. *Id.* § 62.1-199.B.

51. *Id.* § 62.1-200.B.

52. *Id.* § 62.1-202.

53. *Id.* § 62.1-201.A.

54. It, for example, could limit the duration of a riparian's use. *See supra* note 43.

55. The Virginia Water Law, H.B. 1420, 1981 Va. Gen. Assem., § 62.1-211.11, Reg. Sess. The feasibility and effectiveness of comprehensive reforms also can be questioned. *See* Butler, "Commentary on the Proceedings of the Water Rights Symposium," 24 *Wm. & Mary L. Rev.* 767, 785-93 (1983).

56. The bill, however, does require all interbasin transfer requests in excess of an average daily rate of 100,000 gallons to be approved by the State Water Control Board. H.B. 1338, 1981 Va. Gen. Assem., § 62.1-11.3.B, Reg. Sess.

H.B. 503, the bill directly authorizing interbasin transfers, provides greater protection to water-rich localities than the harmless use proposal. Besides establishing a permit procedure for interbasin transfer requests not otherwise exempted, H.B. 503 also requires the diverting jurisdiction to pay a user fee to the situs jurisdiction. Interbasin Transfer Act, H.B. 503, 1982 Va. Gen. Assem., §§ 62.1-199 to -202, -204, Reg. Sess.

57. Although the question of ownership of flowing water has been debated for years, most property scholars now agree that no one owns flowing water while it is in its natural state. *See* 6A *American Law of Property* § 28.55 (A. Casner ed. 1954); 5 R. Powell, *The Law of Real Property* § 710 (1981); 1A G. Thompson, *Commentaries on the Modern Law of Real Property* § 261 (1980).

58. *See, e.g.*, North Carolina v. Hudson, No. 84-36-CIV 5 (E.D. N.C. Jan. 12, 1984); Virginia Beach v. Champion International Corp., No. 84-10-N (E.D. Va. Jan. 9, 1984); Virginia Beach v. Roanoke River Basin Ass'n, No. 84-11-N (E.D. Va. Jan. 9, 1984). The prospect of a change in the common law rules governing consumptive use of watercourses also raises an important fairness concern among private users. A significant departure from prior law would, at the very least, impair their expectancy interests and may even deprive them of valuable property rights without due process or just compensation. *See generally* Ausness, "Water Use Permits in a Riparian State: Problems and Proposals," 66 *Ky. L.J.* 191 (1977-1978).

59. *See, e.g.*, Ficklen v. Fredericksburg Power Co., 133 Va. 571, 596, 599, 112 S.E. 775, 783, 784 (1922). *See generally* 2 H. Farnham, *supra* note 9, § 470, at 1587-88.

60. Virginia case law permits the state government to condemn riparian rights separately from the respective riparian land or submerged bed. *See, e.g.*, Clear Creek Water Co. v. Gladeville Improvement Co., 107 Va. 278, 58 S.E. 586 (1907).