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## Introduction

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## INTRODUCTION

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Abundance of water is the most significant distinction between the humid East and the arid West.<sup>1</sup> Historically, the East took for granted this gift of abundant water. Except for sporadic local conflicts, the East had water sufficient to satisfy all major consumptive uses and to allow use of rivers and aquifers for waste disposal. Due to public concern over pollution and steadily increasing competition among water users, the gift no longer is being taken for granted. Popular, apocalyptic literature predicts crises, and academicians, federal and state officials, and citizens speak of the need to manage water resources wisely.<sup>2</sup>

This Symposium reflects increasing concern in the East about water management. The Articles discuss a number of important issues, including legislative modification of common law water allocation rules, acquisition of environmentally sensitive lands near water, and recognition of public rights to use tidelands for recreation. The Symposium highlights some of the distinctive features of water management in the East and some of the hard issues still to be addressed in formulating appropriate water resources manage-

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1. For purposes of this Introduction, the humid East is roughly the area east of the hundredth meridian.

2. F. ASHWORTH, *NOR ANY WATER TO DRINK: WATER THE FORGOTTEN CRISIS* (1982). See also J. WRIGHT, *THE COMING WATER FAMINE* (1966).

ment strategies. This Introduction sketches the broader context into which this excellent group of Articles fits to suggest the deeper lessons of their scholarship.

Lawyers often have looked at eastern water problems through western eyes. They have praised the abundance of the resource, but regretted that lack of conflicts over water has left the region without a developed body of water allocation cases. In contrast, water law developed in the West because water is scarce; consequently, water law played an important role in promoting economic development throughout the West.<sup>3</sup> Water law is relatively undeveloped in the East because the existing, though incomplete, common law supplemented by modest statutory reform accommodates the few allocation problems that have arisen. Absence of conflicts puzzles lawyers; thus, they view the present state of affairs as temporary and await a time when competition for water intensifies and the law matures accordingly. Lawyers often assume that as water law develops in the East, it will inevitably follow the western water rights model either by adopting the doctrine of prior appropriation or by adopting the central feature of the doctrine which is a system of relatively secure private property rights. Two Articles in this Symposium particularly reflect this view — Professor Richard Ausness' *Water Rights Legislation in the East: A Program For Reform* and Professor Robert Abrams' *Interbasin Transfer in a Riparian Jurisdiction*.

### *Distinctive Features of Eastern Water Problems*

Attempts to apply the western model to the East are misguided because they fail to appreciate distinctive features of eastern allocation problems. Some statutory modification of common law rights may be necessary to address the problem associated with in-

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3. The doctrine of prior appropriation allocates the right to use water according to temporal priority. The first person who beneficially uses water obtains a permit with a priority date relating back to the date when the user first manifested an intent to apply, provided that the subsequent use commences with due diligence. Today, in all states except Colorado, administrative permit systems that incorporate the features of temporal priority allocate surface streams. Officials, however, have limited discretion to refuse to issue a permit even when unappropriated water is available. Additionally, a right under a prior appropriation system may be diminished or terminated through abandonment, forfeiture, or lack of beneficial use. See C. MEYERS & A. TARLOCK, *WATER RESOURCE MANAGEMENT* (2d ed. 1980).

terbasin transfers. In other contexts, statutory reform may be unnecessary. In contrast to the West, eastern water allocation problems do not center exclusively on allocating scarce supplies among competing private parties or public entities. Of course, these problems exist in the East, as is illustrated by recent ground and surface water competition in Virginia,<sup>4</sup> as well as the controversy over allocating the flow of the Delaware River.<sup>5</sup> My point, however, is simply that eastern water allocation problems contain features that demand more than traditional western allocation strategies, and the existing though incomplete law of water allocation may be desirable.

Historically, most water problems in the East have been water quality problems. These problems continue today, but water quantity issues are also becoming important. Legislators formulating any water management strategy must recognize several distinctive features of eastern water quality law. Three features, detailed below, stem from the relative abundance of water and the fact that much of the competition for water is among nonconsumptive uses that do not diminish the water flow.

First, most eastern water use problems are land use problems.<sup>6</sup> While this fact also is true to some extent in the West, the East recognizes it more explicitly and thus has a chance to avoid some of the mistakes made in the West. Professor Brion's article, *The Unresolved Structure of Property Rights in the Virginia Shore*, Professor Livingston's article, *Public Access to Virginia's Tidelands: A Framework for Analysis of Implied Dedications and Public Prescriptive Rights*, and Mr. Owen's article, *Land Acquisition*

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4. M. HREZO, *NORFOLK v. SUFFOLK: PROPOSED AGREEMENT LEAVES IMPORTANT ISSUES UNSETTLED* (Va. Water Resources Research Center, Special Report No. 14, Nov. 1981).

5. New York City is allowed to divert 800 million gallons a day from the Delaware River under the Supreme Court decree in *New Jersey v. New York*, 347 U.S. 995 (1954). In 1961, the four basin states of the Delaware River — Delaware, New Jersey, New York, and Pennsylvania — entered into an interstate compact to administer the decree. Delaware River Basin Compact, P.L. 87-328, 75 Stat. 688 (1961). The 1965 drought induced all parties to the contract to agree to reduce New York City's diversions. See J. SAX, *WATER LAW, PLANNING & POLICY*, 172-78 (1968). In 1983, the four basin states and New York City agreed on a supply augmentation plan that expands four existing reservoirs and abandons plans for a proposed reservoir five miles north of a scenic Delaware Water Gap area. *The New York Times*, Feb. 24, 1983, at 14, col. 1.

6. See W. COX, *VIRGINIA'S MOST IMPORTANT WATER RELATED PROBLEMS* (Va. Water Resources Research Center, Special Report No. 13, Aug. 1981).

*and Coastal Resource Management: A Pragmatic Perspective* all illustrate the close connection between land use and water use in the East.

A second feature peculiar to eastern water law is that nonconsumptive uses are at least as important as consumptive uses, whereas nonconsumptive uses in the West occupy a new and somewhat uncertain position on the priority schedule.<sup>7</sup> This feature has important implications for directing water rights reform. A law of vested water rights such as that existing in the West and endorsed by Professor Ausness, primarily protects consumptive uses. Although permit programs recognize nonconsumptive uses, they may undervalue uses for which no one is likely to apply for a permit, including aesthetic enhancement, fish and wildlife protection, pollution abatement, and recreation.

Finally, because the East has an abundance of water, problems arise in the exercise of managerial discretion only minimally constrained by the need to protect private water rights. Controls over management discretion usually involve agency action, such as environmental impact analysis or public and private bargaining processes rather than litigation.

Recognizing these three features suggests two conclusions. First, the need for a new law of private eastern water rights is only an untested hypothesis. An equally plausible hypothesis flowing from the distinctive features of water issues is that eastern water law is adequate to support development, and its flexibility is a strength, not a weakness. Second, the recognition of public use rights may be the most needed law reform in the East. Plentiful supply and the power of eminent domain assure that most consumptive use demands will be met. If nonconsumptive uses are worth preserving, then the law should promote public access and enjoyment of water to an extent consistent with maintaining environmental quality. Professors Brion and Livingston make important contributions to this thesis, as does Mr. Owens.

### *The Merits of Statutory Reform*

Eastern states face occasional droughts, to which legislators

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7. See Tarlock, *Appropriation for Instream Flow Maintenance: A Progress Report on "New" Public Western Water Rights*, 1978 UTAH L. REV. 211.

often respond by creating a water resources task force. Legal reform is always on the task force agenda, and experts often advise making the common law of riparian rights more certain by creating a water code administered by an agency with the power to grant use permits. Western-oriented lawyers urge the adoption of a prior appropriation doctrine, which allocates water by creating fixed property rights in water. Other lawyers charge that prior appropriation encourages waste, and instead favor a permit system that allocates only in times of shortage and then by administrative discretion. The debate between these two approaches has been fully aired, and Professor Ausness has long been in the second camp.<sup>8</sup>

What is significant is that both reform proposals proceed from the assumptions that the common law of riparian rights is too uncertain to promote investment that depends on water use, and that such investment should be promoted by making water rights more certain. Working under these assumptions, Professor Ausness' article, *Water Rights Legislation in the East: A Program for Reform*, concludes that legislation represents a significant improvement over common law, making water available for more productive uses, establishing an orderly system of water rights, and providing some protection for public welfare. Similarly, he concludes that more reform is desirable so that current legislation becomes comprehensive.

Professor Ausness' article is accurate and thoughtful within its assumptions, but several reasons suggest preserving the riparian system, or using an incremental approach. Western water law arose because the users themselves needed firm rules governing water rights. Eastern water law, by contrast, usually arises when the government perceives a problem. The absence of well-defined water laws, rather than being a deficiency, may indicate that water is being allocated efficiently without them.<sup>9</sup>

The eastern experience with permit systems does not suggest

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8. Professor Ausness was one of the drafters of the MODEL WATER CODE, which provides for administrative allocation in times of scarcity. F. MALONEY, R. AUSNESS & J. MORRIS, A MODEL WATER CODE § 2.09(1)-(6) (1972). The standard argument against discretionary allocation can be found in Trelease, *The Model Water Code, The Wise Administrator and the Goddam Bureaucrat*, 14 NAT. RESOURCES J. 207 (1974).

9. Demsetz, *The Exchange and Enforcement of Property Rights*, 7 J. LAW & ECON. 11 (1964).

that permits contribute significantly to water allocation. The argument favoring permit systems rests on standard criticisms of the common law of riparian rights: that a subsequent use can wholly or partially frustrate a prior use, and that the balancing test used to allocate water among competing users is unfair and inefficient. Section 850A of the Second Restatement of Torts takes some of the sting out of these criticisms by introducing a modified theory of priority. Under Section 850A, "[t]he protection of existing values of water uses, land, investments" should be considered in determining the reasonableness of a new use.<sup>10</sup> This formulation may make the common law adequate for settling private disputes, and may protect the small user from large-scale projects undertaken by public authorities to a greater extent than would permit legislation.

As riparian rights become vested, the cost to management of exercising options increases. Because vested private rights must be protected, the very fluidity and lack of precision of riparian rights may allow managers more flexibility in implementing desirable plans and projects than would a permit system or a prior appropriation system. Additionally, the incomplete nature of riparian rights gives legislatures considerable discretion to modify the common law in implementing plans and projects without incurring liability for unconstitutionally taking private property.

Professor Abrams' article, *Interbasin Transfer in a Riparian Jurisdiction*, examines an important problem that is narrower than comprehensive permit legislation. That problem is the restrictions on the place of use imposed by the common law of riparian rights, which could frustrate solving water shortage problems through interbasin transfers. Case law exists in almost every riparian state, including Virginia, limiting water use to lands adjacent to a stream, and, as the article indicates, the cases are quite flexible. Additionally, in an interstate context, state allocation choices may be constrained by the federal doctrine of equitable apportionment. Professor Abrams, however, urges legislative action addressing interbasin transfers not simply to confirm the right to export, but also to facilitate a searching inquiry into the wisdom of large-scale

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10. RESTATEMENT (SECOND) OF TORTS § 850A (1979). See *Ripka v. Wansing*, 589 S.W.2d 333 (Mo. Ct. App. 1979) (applying § 850A).

interbasin water transfers.<sup>11</sup> This specific call for further legislation is sensible and consonant with the distinctive nature of eastern water law. Water law develops best when it responds to a perceived problem. Legislatures may respond effectively to concrete problems such as the need to accommodate interbasin transfers without addressing hypothetical problems that necessitate a complete shift in a state's approach to water law. The multiplicity of consumptive and nonconsumptive uses that must be accommodated favors ad hoc legislation rather than comprehensive but un-specific legislation necessarily delegating considerable discretion to an administrative agency.

### *Recognizing and Protecting Public Rights to Shores and Beaches*

Affluence has given many people the luxury of worrying about leisure. Numerous recreation areas, such as state and national parks, are publicly owned. Many recreation areas, however, especially along coasts, are private. The enclosure movement in England played a substantial role in narrowing the concept of public rights in common resources.<sup>12</sup> Because of the physical nature and functions of rivers and lakes, however, public rights remain an important part of the law of water resource management. Courts and legislatures recognize public rights of navigation and pleasure boating under the theory that the state holds navigable waters and their beds in trust for the public.<sup>13</sup> As a result of Professor Joseph Sax's pioneering article in 1970,<sup>14</sup> the public trust doctrine has become a somewhat elastic concept used to recognize public rights in resources that private claimants and the public at large have shared in fact if not in law. Professor Sax recently argued that courts may expand public rights "by looking at the history of pub-

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11. Abrams, *Interbasin Transfer in a Riparian Jurisdiction*, 24 WM. & MARY L. REV. 591 (1983).

12. Between the late 1600's and the early 1800's, much of England's agricultural lands were transformed from common fields to enclosed fields by private agreements and acts of Parliament. See G. TREVELYAN, *ILLUSTRATED ENGLISH SOCIAL HISTORY* 135-56 (1964 ed.) (summarizing the impact of the enclosure movement).

13. See generally Brion, *The Unresolved Structure of Property Rights in the Virginia Shore*, 24 WM. & MARY L. REV. 727, 729-30 (1983).

14. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).



lic rights" and by recognizing that a right not significant when created but which later becomes significant, however ancient, does not generate expectations in the same manner as rights contemplated and paid for by the property owner.<sup>15</sup> Longstanding public uses, says Professor Sax, are important.<sup>16</sup> Although there is something inconsistent from an environmental standpoint about creating commons soon to be spoiled through unrestricted access, Professor Sax's thesis is meritorious and has important lessons for water resource management in the East. As our recognition of the recreational value of coastal areas increases, we must confine vested property rights as narrowly as is constitutionally possible.

The Virginia Supreme Court recently so construed private property rights in *Bradford v. The Nature Conservancy*.<sup>17</sup> The Nature Conservancy, a non-profit environmental group, owned a barrier island on Virginia's Eastern Shore and tried to exclude its only neighbor, a hunting and fishing club, from the tidal marshes. Relying on the state's 200-year history of recognizing common rights in the foreshore and marshes, the court in the first prong of the decision held that the public has rights in tidal areas seaward of the high-tide line on property not patented in 1780 and in certain marshes that remained ungranted in 1888.<sup>18</sup> In the second prong of the decision, however, the court preserved The Nature Conservancy's exclusive control over its dry land by refusing to recognize public easements based on implied dedication because there was no formal acceptance by the public.<sup>19</sup>

Professor Brion's article addresses the first prong of the decision and is an impressive piece of legal archeology that is consistent with Professor Sax's thesis. Careful historical research revealed common rights in lands once thought not worth developing, including land between the high and low water marks. In light of Virginia's history of reserving commons along its coastline, *Bradford* is defensible because expectations of private property owners in

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15. See MARVEL, PUBLIC RIGHTS OF RECREATIONAL BOATING, FISHING, WADING, OR THE LIKE IN INLAND STREAM THE BED OF WHICH IS PRIVATELY OWNED (1981).

16. Sax, *Liberating The Public Trust From Its Historic Shackles*, 14 U.C.D. L. REV. 185, 194 (1980).

17. 224 Va. 181, 294 S.E.2d 866 (1982).

18. *Id.* at 197, 294 S.E.2d at 870.

19. *Id.* at 198, 294 S.E.2d at 875.

the tidal area should not have crystallized. Given the uncertain nature of these rights, however, future litigation may further elucidate what property owners' expectations really are.

*Bradford* has two important lessons for coastal zone management planning. First, it illustrates that common law rules are important in resolving coastal access issues. Second, it shows the dangers of having a liberal access policy, whether created through litigation, regulation,<sup>20</sup> or condemnation, without corollary land use controls. If public rights are to displace private rights, the public's rights must be limited to prevent overuse of sensitive coastal areas.

Recent California cases creating new public rights in land long thought to be severed from the public trust illustrate a careless recognition of commons.<sup>21</sup> Where the public has never had access rights, fairness dictates that private property interests be extinguished through condemnation or voluntary purchases. Mr. Owens' article presents a fascinating case study that illustrates use of land acquisition in a creative environmental preservation program. Mr. Owens provides a refreshing break from the bankrupt idea that private landowners must recognize public rights in valuable resources because public entities simply cannot afford to pay for such resources.

Professor Livingston examines the second prong of *Bradford*, the refusal to recognize public easements to the Conservancy's dry land. As Mr. Owens' article emphasizes, controlling access to environmentally sensitive coastal areas is an important management tool. Until recently, the legitimate expectation of private property holders was that unless private owners voluntarily created public access rights, courts would recognize public rights in private property only under limited circumstances. In many states, the common law rule that the public cannot take by grant precluded the courts from recognizing public prescriptive easements. The pre-

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20. Compare *Georgia Pacific Corp. v. California Coastal Comm'n*, 183 Cal. App. 3d 395 (1982) (Coastal Commission constitutionally may require the dedication of beach access easements) with *Pacific Legal Foundation*, 129 Cal. App. 3d 44 (1982) and *Mackall v. White*, 445 N.Y.S.2d 486 (Sup. Ct., App. Div. 1981) (mandatory dedication of beach access unconstitutional).

21. See *City of Los Angeles v. Venice Peninsula Properties*, 31 Cal. 3d 288, 182 Cal. Rptr. 599, 644 P.2d 792 (1982); *City of Berkeley v. Superior Court of Alameda County*, 26 Cal. 3d 515, 162 Cal. Rptr. 327, 606 P.2d 362, cert. denied, 449 U.S. 840 (1980).

sumption that public use of open lands was permissive similarly precluded courts from finding prescriptive easements that require adverse use by the claimant.<sup>22</sup> As claims increased that the public was excluded from public waters, especially oceans, courts began to adapt theories of custom and implied dedication to recognize new public rights. These cases upset traditional private expectations, rejected the doctrinal foundations of the law of implied dedication, and created the potential for environmental disruption because resource agencies have little control over the scale or scope of judicially created public access.

Professor Livingston's article is a thoughtful analysis of these expanded theories of common access. It starts from the premise that the coastal lands public easement cases are unlike the previous cases that recognized private roadways and pathways. The article reaches beyond the conventional analysis offered by courts to reveal the factors that are relevant to the results in each case. Her discussion of the public's expectation of public access and the costs and benefits of recognizing public easements to accomplish a variety of resource management objectives is a perceptive analysis of the deeper policy questions raised by this developing law. Although somewhat skeptical of judicially created easements, Professor Livingston finds that riparian owners "should anticipate that some public rights-of-way may have been established by prescription or implied dedication, even if these interests are not of record."<sup>23</sup>

Judicially created public easements are an unsatisfactory means for controlling coastal development, and further restrictions than those advocated by Professor Livingston on the recognition of such easements are necessary to avoid environmental management problems. Public rights in surface waters, rivers, and lakes are appropriate because the public has long had an expectation that most of these resources are open to the public. The public has less of a legitimate expectation of access rights to water-related land, as *Bradford* properly recognized. Judicial attempts to compel private

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22. See, e.g., *The Nature Conservancy v. Machipongo Club, Inc.*, 419 F. Supp. 390 (E.D. Va. 1976), *rev'd in part*, 571 F.2d 1294, *modified on rehearing*, 579 F.2d 873 (4th Cir.), *cert. denied*, 439 U.S. 1047 (1978).

23. Livingston, *Public Access to Virginia's Tidelands: A Framework for Analysis of Implied Dedications and Public Prescriptive Rights*, 24 WM. & MARY L. REV. 669, 705 (1983).

property owners to share their land may generate substantial social and environmental costs that the courts have no way of minimizing. Professor Livingston's article raises some of the hard issues to be faced before expanded public access to public waters and coastal areas can be reconciled with other water resource management objectives.