WATER RIGHTS LAW IN VIRGINIA: TIME FOR REFORM?

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Virginia, as an historically rural and agrarian state in the humid East, has only recently been forced to face the legal and institutional issues involved in managing and allocating water, a finite natural resource. Laws which have altered the basic common law principles governing water rights have been passed in response to rapid urban growth in Northern and Southeastern Virginia, several recent droughts in the state, and intergovernmental conflicts arising from localities' refusal to share their access to water resources. For the most part, Virginia enacted water rights legislation in the aftermath of water crises, and subsequently has been interpreted and adapted so that it has little effect on the underlying problems which it was meant to address.

This article will outline Virginia's common law of water rights, which is applicable to most of the state, discuss statutory law in its current state, and discuss the possibility of future legislative proposals.

Water rights in Virginia, absent statutory law, are governed exclusively by the common law; thus the only enforcement mechanism is the private lawsuit.[1] The courts have retained the historic common law distinction between surface water and groundwater rights.

Surface water rights in streamflow are called riparian rights, while those in lakes are littoral rights. These two surface water rights doctrines are basically the same, but conflicts more often arise in connection with riparian rights. Riparian rights are incident to the ownership of land bordering or crossed by a stream.[2] However, "riparian land is...limited in

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1 For several more detailed discussions of the common law governing water rights in Virginia, see W.E. Cox, Water Supply Management in Virginia, 61 **Institute of Government Newsletter,** 57 (1985); L.L. Butler, Defining Public Consumptive Rights in Virginia's Rivers, Streams, and Lakes: Is Legislative Reform Needed? VA. B.A.J. 14 (1985); W.E. Cox and L. A. Shabman, Institutional Issues Affecting Water Supply Development: Illustrations from Southeastern Virginia, **Virginia Water Resources Research Center Annual Allotment Project A-076** (1982).

2 Town of Purcellville v. Potts, 179 Va. 514, 521, 19 S.E.2d 700, 702 (1942).

its extent by the watershed of the stream; in other words, lands beyond the watershed cannot be regarded as riparian, though part of a single tract, held in a common ownership, which borders on the stream."[3] As a further restriction, only those parcels which are owned by one person, acquired in one transaction, and bordering a stream are riparian to that stream.[4]

A riparian landowner's use of water must be for the benefit of the riparian land and the use must be reasonable. "Reasonable use" is defined in the context of the needs of all other riparian landowners: "A proprietor may make any reasonable use of the water of the stream in connection with his riparian estate and for lawful purposes within the watershed, provided he leaves the current diminished by no more than is reasonable, having regard for the like right to enjoy the common property of other riparian owners."[5] Historically, there has been a hierarchy of reasonable uses:

> First, the primary use is for natural and domestic purposes, in order to supply the wants of man and animal, and each owner of the land, through or by which the stream flows, is at liberty to take as much as may be necessary for these purposes, even if it be thereby entirely consumed in the use. Second, he may also use the same for agricultural purposes such as irrigation, and for manufacturing purposes, but for these purposes he shall use the same in a reasonable manner, so as not to destroy or render useless or materially diminish the flow, so as to affect the application of the water by the riparian proprietors below, and if...he temporarily diverts a part of the stream, he must cause same to be returned to the channel below.[6]

Virginia ascribes to the reasonable use theory, whereby "in an action for damages or suit for injunction by a lower against an upper riparian landowner for wrongful diversion of water by the latter,...the plaintiff in order to prevail must show some substantial actual damage occasioned by the diminution of the quantity of the water which the plaintiff has the right to use."[7] "The only question is whether there is actual injury to the lower estate for any present or future reasonable use. The diversion alone, without evidence of such damage, does not warrant a

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[3] Town of Gordonsville v. Zinn, 129 Va. 542, 551, 106 S.E. 508, 511 (1921).

[4] Id. at 553, 106 S.E. at 512.

[5] Virginia Hot Springs Co. v. Hoover, 143 Va. 460, 467, 130 S.E. 408, 410 (1925), citing Stratton v. Mt. Hermon Boys' School, 216 Mass. 83, 85, 103 N.E. 87,89 (1913).

[6] Norfolk & W. Ry. Co. v. Graham Land & Improvement Co., 10 Va. L. reg. 983, 984 (Cir. Ct. 1904).

[7] Town of Gordonsville, 129 Va. at 560, 106 S.E. at 514.

recovery even of nominal damages."[8]

Riparian rights are separable from the underlying land and may be conveyed through sale,[9] condemnation,[10] or prescription.[11] It is a well settled doctrine that there may be a conveyance of water or water rights separate and apart from the land thereunder, and that such a conveyance is a conveyance of a property right.[12] These separable riparian rights can only be used in conformance with the reasonable use doctrine; however one Virginia case indicates that diversion to non-riparian land is "an extraordinary and not a reasonable use."[13]

Rights in groundwater can take two forms: absolute ownership or reasonable use. The Virginia Supreme Court has not indicated which doctrine prevails in Virginia: in Clinchfield Coal Corp. v. Compton,[14] the court discussed both forms of ownership, and finally refused to take a position, as the defendants' use of the land in coal mining operations qualified as either type of ownership.

The court said:

> [T]he fee-simple owner of the land [is] the owner of everything above and below the earth, expressed in the maxim, [c]lajus est solum, ejus est usque ad coelum et ad inferos... This doctrine allows a landowner to make any use he pleases of underlying percolating waters; he may even cut them off maliciously without liability to his neighbor.[15]

Of reasonable use the court said:

> The "reasonable use" rule does not forbid the use of percolating water for all purposes properly connected with the use, enjoyment, and development of the land itself, but it does forbid maliciously cutting it off, its unnecessary waste, or withdrawal for sale or distribution for uses not connected with the beneficial enjoyment of the land from which it is taken.[16]

This definition of reasonable use allows any use beneficial to the land; this differs from the definition of reasonable use of surface water, which compares on riparian user to all others

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[8] Virginia Hot Springs Co., 143 Va. at 467. See also supra note 5.

[9] Hite v. Town of Luray, 175 Va. 218, 224, 8 S.E.2d 369, 371 (1940).

[10] Potts, 179 Va. at 525, 19 S.E.2d at 704.

[11] Town of Gordonsville, 129 Va. at 560, 106 S.E. at 514.

[12] Thurston v. Town of Portsmouth, 205 Va. 909, 913, 140 S.E.2d 678, 681 (1965); Hite v. Town of Luray, 175 Va. at 224, 8 S.E.2d at 371.

[13] Potts, 179 Va. at 521, 19 S.E.2d at 704.

[14] 148 Va. 437, 454, 139 S.E. 308, 313 (1927).

[15] Id. at 451, 139 S.E. at 313.

[16] Id. at 452, 139 S.E. at 313.

using the same source.

Although the common law has governed water rights in the Commonwealth since the colonial period, the various doctrines continue to be refined, clarified and adapted to meet contemporary needs. This has created both confusion and an unusual opportunity for creative advocates to shape the primary body of law relating to Virginia water rights.

Virginia's present statutory system of groundwater control is codified in Code of Virginia sections 62.1-44.83 et. seq., the Groundwater Act of 1973. It provides that any area declared by the State Water Control Board to be a "groundwater management area" is subject to the provisions outlined in the Act. Only two areas were declared in 1973 to be "groundwater management areas": Southeastern Virginia, south of the James River, including the counties of Prince George, Sussex, Southampton, Surry, Isle of Wight, and the cities of Norfolk and Virginia Beach; and the Eastern Shore of Virginia. Any locality or the State Board itself may initiate proceedings to have any area of the state declared a "groundwater management area", however, no additional areas have been established since 1973.

Generally, the Act requires a user to obtain a permit for withdrawal of groundwater or an increase in groundwater use, and the State Water Control Board approves or disapproves increased use based on statutory criteria specified in the Act.

Initially, the Act was criticized for its broad exemptions from the permitting system, which included agricultural uses, use for human consumption or domestic purposes, and certain industrial and commercial uses.[17] These exemptions, coupled with an opinion of the Attorney General, which stated that withdrawal of water by municipalities for mixed domestic, industrial and commercial purposes falls within the exempted use category, rendered the Act virtually ineffective in controlling groundwater use within the "groundwater management area."

In the last session of the General Assembly, it was proposed that all categorical exemptions be eliminated and that a very narrow general exemption for water withdrawals of less than 10,000 gallons a day be imposed.[18] The agricultural lobby opposed the elimination of the agricultural use exemption, thus, the legislature retained the exemption, with the condition that agricultural users of more than 300,000 gallons per month may be required to report the amount of their withdrawals.

Subsequently, the General Assembly passed a resolution giving agricultural water use reporting responsibilities to local Virginia Tech Extension Service agents. The bill's proposed

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[17] VA. CODE ANN. §62.1-44.87, (19).

[18] H. 561 1986 Sess.

10,000 gallons per day use limitation for exemption from permit requirements was amended before passage, to 300,000 gallons per month, and an exemption was added for uses by groundwater heat pumps, which fall under a separate permit requirement of Virginia Water Control Law. Thus, the amended section reads:

> No certificate of groundwater right, permit or registration statement... shall be required for any water withdrawal of less than 300,000 gallons a month or for groundwater withdrawn for agricultural or livestock purposes.... [T]he Board may be regulation require persons in any groundwater management area who withdraw more than 300,000 gallons of water per month for agricultural and livestock purposes to report the amount of such withdrawal. Nor shall any certificate of groundwater right, permit or registration statement be required for the withdrawal of groundwater for use by a groundwater heat pump for which a permit has been issued by the Board....[19]

The effect of this 1986 amendment is to eliminate the exemption of municipalities from permit requirements; its effectiveness in increasing state control over conflicts arising from use of limited groundwater in the southeastern portion of the state has yet to be seen.

The 1986 Session of the General assembly also enacted the Private Well Construction Act,[20] which generally requires application for and receipt of a permit from the State Department of Health prior to construction of any well in the Commonwealth.

Thus, the role of the state in groundwater management remains limited in areas of the state not declared "groundwater management areas." In the majority of counties of the state, the common law governs allowable withdrawal of groundwater.

Legislative reform of water rights in Virginia is desperately needed; yet the General Assembly has not been able to effect a workable solution to water allocation problems, which become more acute with each drought that the state suffers. Legislators from the eastern portion of the state, which has been hit most hard by recent droughts, are eager to implement some type of permitting or other allocation system. On the other hand, legislators from the western part of the state do not perceive the problem as one which requires an immediate solution.

This legislative standstill has prompted the State Water Control Board to introduce bills to the General Assembly over the past several years. Prior to the 1986 session of the General Assembly, the State Water Control Board held statewide public hearings on its legislative proposals and fond public sentiment strongly against implementation of a statewide water use permitting system. Legislative reception to the State Board's initiative has also been less than enthusiastic; only the previously

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[19] VA. CODE ANN. §62.1-44.87, (1986).

[20] VA. CODE ANN. §32.176.1, <u>et. seq.</u>, (1986).

mentioned legislation, extremely limited in its scope, was passed by the General Assembly in 1986. Thus the State Water Control Board will limit its legislative initiative in the upcoming 1987 session of the General Assembly. The Board's only anticipated introduction of legislation is a bill which would modify the newly implemented agricultural water use reporting system to make reporting mandatory. Although such a proposal, if 6ti is passed, may aid the state in monitoring one type of water use in other than "groundwater management areas", it is a far cry from needed use control reform.

Until a statewide permitting system or other use control system is implemented, the state of Virginia will be forced to deal with its seasonal water crises on an ad hoc basis. The inefficiency of this type of response to resource management calls for legislative reform of Virginia water rights law.