WATERS AND WATER RIGHTS

1991 EDITION

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Robert E. Beck
Editor-in-Chief

VOLUME SIX

PART XI - STATE SURVEYS

PART XII - GLOSSARY

THE MICHIE COMPANY
Law Publishers
CHARLOTTESVILLE, VIRGINIA

Library of Congress Catalog Card No. 91-67264
ISBN 0-87473-753-2

CONTRIBUTORS

Owen L. Anderson
Jack F. Maddox Professor
Texas Tech University
School of Law

Robert E. Beck
Professor
Southern Illinois University
School of Law

Michael C. Blumm
Professor
Lewis and Clark
Northwestern School of Law

John Henry Davidson, Jr.
Professor
University of South Dakota
School of Law

Joseph W. Dellapenna
Professor
Villanova University
School of Law

Harrison Case Dunning
Professor
University of California at Davis
School of Law

C. Peter Goplerud III
Professor
Southern Illinois University
School of Law

Douglas L. Grant
Professor
University of Idaho
College of Law

Amy K. Kelley-Pittman
Associate Professor
Gonzaga University
School of Law

Elizabeth Slusser Kelly
Librarian and Associate Professor
University of Pennsylvania
Law School

Earl Finbar Murphy
C. William O'Neill Professor of
Law and Judicial Administration,
The College of Law; Courtesy
Professor of Natural Resources,
The College of Agriculture;
The Ohio State University

Pauline M. Simmons
Attorney
Carson City, Nevada

Albert E. Utton
Professor; Director,
International Transboundary
Resources Center; Editor,
Natural Resources Journal
University of New Mexico
School of Law

ADVISORY COMMITTEE ON ORGANIZATION AND SCOPE

George A. Gould, Chair
Professor
University of the Pacific
McGeorge School of Law

Robert H. Abrams
Professor
Wayne State University
Law School

Ralph W. Johnson
Professor
University of Washington
School of Law

SUMMARY TABLE OF CONTENTS

VOLUME 1

VOLUME 2

VOLUME 3

VOLUME 4

VOLUME 5

VOLUME 6

TABLE OF CONTENTS

PART XI. STATE SURVEYS

PART XII. GLOSSARY OF WATER RELATED TERMS

PART XI
STATE SURVEYS

The goal for this portion of the treatise was to locate an expert in the water law of the particular state who would do two things. First, although asked to cover certain topics, the author would present an overview of the water law of the state, but exercise judgment about what to include or not include on the basis of that author's perception of what it was important for practitioners to know generally about the law of that state. Furthermore, it was expected that the author would be aware of nuances and aspects of law in practice that do not show up in the books. Second, the author would present appropriate references for those who need to find out more about the water law of that state either generally or on a particular aspect. As a result, forty-nine state experts were located who expressed willingness to undertake this assignment. Only for Rhode Island was a local expert not located and Professor Binder from Western New England School of Law, who did the survey for Massachusetts, agreed to do the one for Rhode Island. Forty-five of those persons who had committed to doing their state's survey miraculously did so and those surveys are set forth below. However, four state surveys are missing. It is expected that substitute authors will be found and that those state surveys will be included in the first annual supplement.

Authors were told that an average manuscript should be about 10 double-spaced pages. Many went considerably beyond that.

In view of the nature of the expertise sought for each state, the editing for each survey has been minimal, basically only as to style. However, because these surveys are not presented for comparative purposes, the authors were given freedom to organize and develop the topics generally as they chose. Many used the organizational format of the checklist that had been provided to them. In some instances, additional information was asked for and obtained.

The only previous general survey of the water law of all fifty states was done for the National Water Commission study. It was published separately as: A SUMMARY-DIGEST OF STATE WATER LAWS (R. Dewsnup & D. Jensen eds. 1973). Its coverage is through "the end of 1972." *Id.* at vii. Robert Swenson, who did the Utah survey for this treatise, served as Associate Editor for the National Water Commission study. A detailed summary of the water law of nineteen western states is included in III W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 141-649 (H. Ellis & J. DeBraal eds. 1977).

ALABAMA

By Harry Cohen
Marc Ray Clement Professor of Law, University of Alabama

I. Using Surface Water in Alabama.

In the earliest reported Alabama case involving riparian rights, the Alabama Supreme Court in *Hendricks v. Johnson,* 6 Port. 472 (Ala. 1838), refused to accept the prior appropriation doctrine. Although the court talked in terms of both reasonable use and natural flow, no clear choice was made. In a subsequent pair of cases, *Stein v. Burden,* 24 Ala. 130 (1854); *Stein v. Burden,* 29 Ala. 127 (1856), both involving two tracts of land situated on a watercourse near Mobile, the court adopted the absolutistic natural-flow doctrine. The controversy involved, in effect, land of the city of Mobile and another riparian owner. The city, through a lessee of the land, wished to consume the water for what it called the "domestic needs" of its inhabitants. Each riparian landowner was said to have a property right in the "stream" but not in the water as such. The court held that a landowner could consume all water necessary to satisfy domestic needs, but could not do so for other reasons such as supplying the inhabitants of an "artificial" entity.

As was the case generally in many eastern states at that time, the natural-flow theory was adopted because flowing waterways were a necessity for powering the grist, flour, and cotton mills of the day. Farmers also depended on stream integrity, and adoption of the natural-flow theory encouraged a consistent quality and flow of the water.

Although early Alabama cases adopted the riparian natural-flow doctrine, the *Ulbricht v. Eufaula Water Co.,* 86 Ala. 1587, 6 So. 78 (1889), decision began a quest for a reasonable-use doctrine. The court held that there was a cause of action for the diversion or unreasonable obstruction of a watercourse, but trivial injury would not be protected except as an interruption of the period necessary for gaining a prescriptive right. Later cases seemed to almost authorize pollution of streams by mining and iron and steel industry interests. Cohen, *Water Law in Alabama—A Comparative Survey,* 24 ALA. L. REV. 453, 460 (1972). For example, in *Elmore v. Ingalls,* 245 Ala. 481, 17 So. 2d 674 (1944), the court acknowledged that "modifications of individual right must be submitted to, in order that the greater good of the public must be conserved and promoted," but added that "there is a limit to this duty to yield, to this claim and right to expect and demand. The watercourse must not be diverted from its channel, or so diminished in volume, or so corrupted and polluted, as practically to destroy or greatly impair

its value to the lower riparian proprietor." *Id.* at 484, 17 So. 2d at 676. The riparian owner still must be able to show substantial injury, that the damages occurred within the preceding year, and that the defendant caused at least a portion of the injury. The riparian owner also must contend with the defenses of prescriptive right and estoppel. Even so, in some instances, the riparian succeeds; for example, cities have been enjoined from dumping sewage into a stream. Because statutes of limitation and prescription do not run against the state, state officials can seek to enjoin so-called "public nuisances," and polluted streams are public nuisances. Cohen, *supra* at 461.

In the early 1900s, the Alabama legislature passed a number of statutes dealing with "nuisances" and these statutes could become important insofar as riparian rights and pollution are concerned.

The statutes allow municipalities to abate or enjoin "public nuisances" but manufacturing or industrial plants may not become nuisances "by changed conditions in and about the locality" and after they have been in operation for more than one year they may not become a nuisance unless they have been guilty of negligence or "improper operation" of their plants. ALA. CODE § 6-5-122 to 127.

Aside from the pollution cases, the courts have consistently held that diversion of streams or the backing up of water to the detriment of neighboring riparians is actionable, regardless of how the act was accomplished. This is true whatever the identity of the diverter, whether a railroad or industry.

Although little is said about the question in Alabama, the cases seem to assume that water can be used only on riparian lands and generally cannot be conveyed off the premises for use on non-riparian lands. Cases like *Ulbricht v. Eufaula Water Co.,* however, imply that such can happen under the reasonable-use doctrine. But, a riparian landowner must convey the water; a stranger to the title has no right to take water, except by prescription. Cohen, *supra,* at 462.

As a consequence of these cases, a right to use water from water courses is acquired by purchasing riparian land. The decisions on the transfer of water rights in Alabama imply that this can be accomplished only by riparian land transfer. There is no permit system and there are no state agencies involved in the situation. If there is a diversion of water, a prescriptive right may be acquired. The prescriptive period to acquire a right to take water may be either ten or twenty years. Older cases mention a ten-year period but the latest case holds that the right to utilize a right to increase the flow of water in a drainage ditch is twenty years. *City of Mountain Brook v. Beatty,* 292 Ala. 398, 295 So. 2d 388 (1974).

Insofar as determining rights to use water beds and their surfaces, the courts have used the concept of navigability to determine

the controversies that have arisen. "Navigability in fact" has been the standard. *Rhodes v. Otis,* 33 Ala. 578 (1859). Alabama holds title to lands underlying navigable rivers and the tidewaters. *Pollard's Lessee v. Hagan,* 44 U.S. 238, 3 How. 212 (1845). However, the courts have held that the state owns only to the low-water mark on navigable rivers, although on rivers subject to the ebb and flow of the tide ownership extends to the high-water mark. Comment, *Title to Subaqueous Lands in Alabama,* 11 ALA. L. REV. 271, 281 (1959).

Although the Alabama Constitution states that navigable waterways are public highways and that no "toll" or "wharfage shall be demanded ... for the use of the shores or any wharf erected ..." (ALA. CONST. art. 1, § 24 (1901)), and statutes regulate the use and kinds of structures that may be placed in navigable waterways (ALA. CODE §§ 33-7-50 to -53), the courts have upheld conveyances of the beds of navigable streams to private owners with the condition that the rights of the public be continued. Comment, *Title to Subaqueous Lands in Alabama, supra,* at 284-85. These cases are consistent with classic English decisions holding that navigable waterways are held in "trust" for the public good. However, no Alabama cases mention the "public trust" doctrine as such, although a statute (ALA. CODE § 9-11-80) states that all waters of the state are "declared to be public waters." The statute says that any impounded waters are "public waters." Yet it also declares that waters on private lands that are nonnavigable are "private waters." *Id.* Although adverse possession and prescription do not run against the state, one Alabama case held that the state was "estopped" to demand that a private use of a navigable waterway bed for a long period be discontinued. *Sullivan Timber Co. v. City of Mobile,* 110 F. 186 (S.D. Ala. 1901).

The courts have held that fishing without permission on lands that are entirely within a landowner's property lines is a trespass. Although the private right of fishing is subject to the "right of the state to regulate fishing so as to preserve the fish for the good of the public in general," nevertheless, fishing in nonnavigable waters on private land is solely within the province of the landowner. *Hood v. Murphy,* 231 Ala. 408, 165 So. 219 (1936). A municipality is entitled to the same rights insofar as nonnavigable waters within city-owned lands is concerned. *City of Birmingham v. Lake,* 243 Ala. 367, 10 So. 2d 24 (1942).

II. Underground Water.

Early Alabama cases concerning the use of percolating water arose from mining controversies. Many of the cases dealt with the drying up of water wells and subsidence or cracking of the surface

caused by mining operations. It was said that a miner is not liable for any incidental damages necessarily occasioned by the ordinary and careful operation of a mine "not injurious to the surface, such as the loss of springs or wells fed by subterranean streams." *Corona Coal Co. v. Thomas,* 212 Ala. 56, 59, 101 So. 573, 675 (1924).

Henderson v. Wade Sand & Gravel Co., 388 So. 2d 900 (Ala. 1980), overruled earlier cases and held that where one uses groundwater, whether for consumption or for support, and that use is interfered with by another's diversion of the water, the law of nuisance will apply. *Henderson* seems to be saying that while competing uses of groundwater will be solved by utilizing reasonable-use ideas, the use of explosives in mining with resulting injury to underground water deposits is the basis for a nuisance action. In 1989, the supreme court in *Adams v. Long,* 553 So. 2d 89 (Ala. 1989), reiterated the idea that where there are competing uses of water, the reasonable-use rule will apply.

There are no statutes controlling the taking of groundwater. There is a statute concerning the licensing of water-well drillers. ALA. CODE § 22-24-1 et seq. However, it sets no water standards.

III. Diffused Surface Water.

Generally, and with little consistency in application, the Alabama courts have applied a civil-law rule (natural flow) where diffused-water controversies arose in rural areas, while applying the common-law rule (common enemy) in urban areas. *Dekle v. Vann,* 279 Ala. 153, 182 So. 2d 885 (1966); Cohen, *supra,* at 483-84. The strict attitude in urban areas was modified in 1950 when the court held that an upper owner cannot collect the surface water in a channel and cast it in volume onto the lower owner, even though the land is located in a city or town. *Kay-Noojin Dev. Co. v. Hackett,* 270 Ala. 212, 116 So. 2d 609 (1960). It is very difficult to generalize about recent Alabama cases on diffused surface water. There seems to be a trend toward protecting lower land owners where the volume of water cast on them is unnecessarily great. *Mitchell v. Mackin,* 376 So. 2d 684 (Ala. 1979). Whether the property is in a city or town or in a rural area, an upper proprietor is liable where surface water that had been diffused and scattered is channelled. *Johnson v. Washington,* 474 So. 2d 651 (Ala. 1985). The court recently said that a modified civil law rule—a reasonable-use rule—is being applied where the burdened land is outside of a city and the upper land is within the municipality. The duty in such a case is not to unduly burden the lower property by causing "substantial damage." *Street v. Tackett,* 483 So. 2d 392 (Ala. 1986).

Special rules apply also to certain transportation companies. Where a railroad or other track-laying line has interfered with the