

SECOND EDITION



Water Law

William Goldfarb



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For my parents, Ilse, and Catherine

WILLIAM GOLDFARB

A graduate of Yale Law School, William Goldfarb is Professor of Environmental Law at Cook College, Rutgers University, the State University of New Jersey, and is the regular "Litigation and Legislation" columnist and Law Contributing Editor of *Water Resources Bulletin*, journal of the American Water Resources Association.

Goldfarb taught environmental law courses for engineering and science students at Stevens Institute of Technology from 1970 until 1974, when he became Professor of Environmental Law at Rutgers. He now teaches environmental and water law courses to graduate and undergraduate students mainly in engineering, science, planning, and natural resources management. He also participates in multidisciplinary water resources research teams.

Earlier, the author practiced corporate law in New York City, earned a doctorate in English and comparative literature from Columbia University, and taught in that field several years.

As a longtime special consultant to the New Jersey Department of Environmental Protection, he drafted many of the water pollution control laws for that state. He has also served on the New Jersey Governor's Science Advisory Committee and as president of the New Jersey Environmental Lobby.

In addition to the book *Water Law*, Dr. Goldfarb has written numerous articles and book chapters on various aspects of environmental law.

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ACKNOWLEDGMENTS

I would like to express my appreciation to the New Jersey Agricultural Experiment Station, which has provided financial support for my research and writing. Thanks also to Ed Lewis for his courtesy and professionalism; to my colleagues in the Department of Environmental Resources, Cook College, Rutgers, the State University of New Jersey, for their patience and multidisciplinary assistance; to Rich Schiafo for his invaluable aid; and to my graduate students in Water Law for their provocative ideas and esoteric information.

My most heartfelt thanks go out to my wife, Ilse Economou Goldfarb, who provided encouragement, support, ideas, and constructive criticism when they were most needed.

PURPOSE AND SCOPE OF THIS BOOK

Law is a critical framework for all water resources decisionmaking. State engineers allocate water based on their state's law of water diversion and distribution. Water quality scientists perform research according to priorities established by law. Planners develop water plans and evaluate proposed projects affecting water resources in the context of federal, state, and local law. Corporate executives order water pollution control equipment to meet requirements contained in their discharge permits. Environmental activists participate in governmental water-related processes under applicable public participation regulations. Consultants submit realistic proposals that presuppose an awareness of relevant legal principles. Whether they realize it or not, all professionals, citizen activists, and students concerned with water resources—be they in the public sector, private sector, academia, or consulting firms—would be more effective if they possessed a fundamental knowledge of water law.

This is especially true because solutions to modern water resources problems are becoming increasingly multidisciplinary and comprehensive. For example, design of a water resources development project might require the participation of engineers, scientists, economists, planners, archeologists, sociologists, political scientists, public administration specialists, and communication experts, as well as lawyers. In order to achieve the optimum result, these individuals should perform as a team, with each team member providing insights and contributing to the formulation of solutions. This process entails a high degree of mutual understanding.

FOR UNDERSTANDING BY ALL DISCIPLINES

Unfortunately, our educational and professional systems overemphasize specialization based on disciplinary orientations. My motive for writing this book has been to counteract the disciplinary myopia that is all too common in water resources education and management. As I remarked in the Preface to the first edition, the most formidable obstacle to rational water resources management is the failure of communication among water resources professionals and among students in the water resources field. Narrow specialization generates esoteric jargon that impairs effective cooperation in pursuit of desirable policy goals. When scientists, engineers, lawyers, planners, social scientists, and management specialists speak intelligibly only to their disciplinary colleagues and students, the results are misunderstanding, chauvinism, and frustration. This book intends to reduce these barriers and to help improve understanding among disciplines.

This book is primarily intended for nonlawyers. Attorneys and law students seeking a broad introduction to water law will also find it useful. But my approach has been to translate and explain legal concepts for people without formal legal training.

Thus, readability has been my guiding principle in writing *Water Law*. Chapters have been kept short and, I hope, to the point. This facilitates using the book either as a text or as a reference work. "Legalese" has been avoided. All legal terms are explained as soon and as thoroughly as possible after their use. In this edition, I have included a Glossary of Acronyms to help the reader digest the "alphabet soup" of nicknames. The Glossary supplements the Index, which is as complete as I could reasonably make it. References have been kept to a minimum, and are placed at the end of each Part where they will be least distracting. Readers who wish to consult the treatises, law review articles, statutes, cases, and administrative regulations cited as references are encouraged to enlist the aid of librarians in their nearest law libraries.

THE SECOND EDITION

Water Law was originally published in 1984. Since then, meaningful trends in water law have intensified, and significant changes in statutory and case law have taken place. For example, both the trend away from riparianism and toward statutory permit systems (administrative allocation) in the East, and the trend toward removing the legal obstacles to agricultural water conservation in the West, have become more pronounced. As for changes in the law, cost-sharing for Corps of Engineers development projects has finally become a reality with the Water Resources Development Act of 1986. In addition, the Clean Water Act, Safe Drinking Water Act, Resource Conser-

vation and Recovery Act, and the Comprehensive Environmental Response, Compensation, and Liability Act have been substantially amended since 1984. In light of these developments, this is an opportune time to introduce a revised and updated edition of *Water Law*.

Although the basic structure of the first edition has been retained, important structural modifications have been made. The Introduction, explaining the nature of law and the relationships among water law, science, water uses, water rights, and water resources management, has been revised and expanded. Material in Part III on recreational use of waterbodies has been rearranged and retitled. Chapters on the public trust doctrine and regional land-use control to safeguard water quality have been added.

Throughout the book, more attention has been devoted to the law relating to groundwater allocation and protection. With all these changes, this edition is considerably longer than its predecessor.

For the Second Printing, a new Part, entitled "Mediation of Water Resources Disputes," has been added. This reflects the recent emergence of mediation as an important mechanism for resolving disputes over water resources.

My labors in writing this volume will be amply rewarded if its availability improves, in whatever small measure, the quality of water resources problem solving in the United States.

WILLIAM GOLDFARB

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INTRODUCTION:

Water Law in Context

WHAT DO WE MEAN BY LAW?

For our purposes, "law" is a precept that is written, formally issued by one or more branches of government, and enforceable by governmental sanctions against violators. The function of law is to maintain social cohesion by forestalling disputes—or resolving them once they have arisen—in fair and predictable ways.

Law creates legally enforceable expectations ("rights"), duties to respect those rights, and means of redressing violations of rights ("remedies"). We typically distinguish between "civil" and "criminal" remedies.

Most civil lawsuits ("actions") involve one person "suing" (instituting court proceedings against) another for monetary compensation, "injunction" (a court order to cease an action or perform another), or both. Occasionally, a governmental unit will be the one suing ("plaintiff") or sued ("defendant"). The law treats corporations as "artificial persons" for purposes of suing or being sued. Civil law is invoked when a property owner sues a water polluter for an injunction and compensation for depressed property values ("compensatory damages"), when a pollution control agency sues the polluter for a civil fine, and when a state engineer sues a junior appropriator to enjoin excessive diversions.

In contrast to civil law, which emphasizes financial compensation and cessation of illegal acts, criminal law aims at punishment, deterrence of similar conduct by the violator or others, and rehabilitation. A crime is an illegal act so potentially disruptive to social harmony that, although perpetrated against an individual, it is considered to be an offense against society itself.

Thus, governmental units are always plaintiffs in criminal actions. Monetary penalties ("fines") are sometimes exacted in criminal cases, but the most formidable remedy in criminal law is imprisonment. In civil law, on the other hand, imprisonment has realistically been unavailable for over a century. Because of the social stigma and potential deprivation of liberty entailed by a criminal conviction, criminal defendants are almost always entitled to trial by jury; civil juries can only be empaneled where plaintiff seeks damages without an injunction. Moreover, in a criminal case government must prove that a defendant is guilty "beyond a reasonable doubt" in order to obtain a conviction. In a civil case, plaintiff need only prove defendant's liability "by a preponderance of the evidence." Criminal law is becoming increasingly important in water pollution cases where the polluting acts have been heinous, reckless, or repetitive.

There are five major sources of law in the American legal system: (1) constitutions; (2) statutes and ordinances; (3) administrative regulations; (4) executive orders; and (5) common law court decisions ("cases"). Each of these has contributed to the development of water law.

Constitutions are referred to as "fundamental law," meaning that they contain basic principles of justice that underlie other legal principles and procedures. There are a Constitution of the United States, applicable to all American citizens, and state constitutions that afford rights only to citizens of particular states. The federal Constitution and its state counterparts are similar but not identical. For example, like the federal Constitution, most state constitutions contain "takings clauses," forbidding the taking of private property for public use without just compensation. It will be seen that the definition of "taking" is central to a determination of whether, and to what extent, government may legally regulate water-related land use. An unusual provision is the clause in some western state constitutions that all unappropriated surface waters are available for appropriation. Because constitutions are generally phrased in broad terms, the role of courts as final constitutional interpreters is a critical one. State supreme courts, with regard to state constitutions, and the United States Supreme Court, where the federal Constitution is concerned, are responsible for applying ambiguous constitutional terms such as "taking" and striking down statutes and regulations that violate constitutions (e.g., that are unconstitutional takings without just compensation).

Statutes, or "acts," are bills that are passed ("enacted") by appropriate votes of state legislatures or Congress. On the county and municipal levels, legislative enactments are referred to as "ordinances." However, a statute does not achieve the force of law until it is signed by the president or governor, as the case may be, or until the chief executive's veto is overridden by the required legislative vote. Both the federal Clean Water Act of 1972 and the Water Quality Act of 1987 became law when Congress overrode a presidential veto. In an increasing number of states, water law is primarily