Water Laws

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A thorough discussion of water laws is impossible in a brief treatment because the subject is complex and there are many variations involved. It is difficult to say what the present law is in many instances and making prediction of the future water laws is mere guess work.

To introduce this subject, let us consider first some general aspects of law. Many people are fairly familiar with terms such as injunction, common law, and statutory laws, but let me stop and make a few definitions so that we will all be together.

There are two sources of law in Indiana, or any state. One is the statutory law, which is the law passed by various sessions of the General Assembly. It is written out: what the rights are as between one person and another, and how one person may use his property in relation to another person. This is always rapidly understood.

The second source of law is the case law, or common law of the state. This is an accumulation of previous decisions. Every appellate court in the state writes down its decision, and in the decision states the facts, what the controlling law is, and the reasoning by which it reached the decision which it did. These decisions accumulate over the years, and whenever a new problem comes up, the lawyers and the judge familiarize themselves with similar cases in the past; sometimes, not too often, these older cases will give a definite answer as to what should be done with the case before the Court but usually they only offer help. The facts between cases will differ enough that a slightly different decision must be reached. This case law is really the more important law of the state.

What are the remedies of a person who believes he has been damaged? I am considering now civil law and not criminal law. If a person believes that someone else’s action has damaged him he has two choices. He can go into court and say, “This man downstream of me placed an illegal obstruction in the stream and it has back-flooded me and has cost me $5000 damage.” And if he proves his case he is awarded $5000 or whatever the evidence shows the actual damage to be. This is a suit for damages and the man is made whole again by an action for damages.
The other remedy that an injured person has available is a suit for injunction, the purpose of which is to stop another man from what he is doing. This may or may not be coupled with a request for damages. Or, the request to the court may be to make the other man do something: a mandatory injunction. In the illustration of the illegal dam, the prayer would be that the court make the defendant tear it down so it will not back-flood any more and the court may so order it. This is the remedy of an injunction.

Now to proceed to the question of water laws. There are two basically different theories of water laws in the United States: the riparian rights doctrine and the appropriation doctrine. The riparian rights doctrine is the basic law of England, of all states east of the Mississippi and, until very recently, all of the states bordering the Mississippi River on the west. The appropriation doctrine is the basic law of the 17 arid and semi-arid states of the West. As it is my intention to discuss the riparian doctrine and particularly the water laws of Indiana which follows the riparian doctrine, it appears proper to first discuss the appropriation doctrine so we can see what is not the law of Indiana, before we examine what the law of Indiana is.

The appropriation doctrine is essentially a first-come first-served method of allocating water. It is found in these dry Western states and in those parts of Europe where there is not sufficient water for each owner of land to develop the resources of his land. If the limited available water had to be shared as is required by the riparian doctrine, no user would have sufficient water to develop the mineral resources of his land nor provide the supplemental irrigation which crops in such climates require. In the West, as long as a man does not waste water, he is allowed to take all the water he can beneficially use; if he takes all the water from someone downstream, he still is entitled to it if he was the first one to settle on the stream and use the water and thus appropriate it to his own use.

In contrast to this appropriation doctrine is the doctrine which most people in Indiana are familiar with. Basically, the riparian doctrine provides that all the owners of the land bordering the stream, river, or lake have an equal right to use that water. This doctrine is applicable to the parts of the country where excess rainfall is the rule rather than the exception. Historically speaking, the riparian doctrine was introduced into American law from the French civil code in the early 19th Century. It fits well into the America of that time which had ample stream flow and comparatively small population.

There has been, however, considerable confusion in the application
of the riparian doctrine. Because within it are two different theories, one termed “reasonable use” and the other termed “natural flow.” The natural flow theory, stated simply, is that every man who owns land abutting any body of surface water is entitled to have the water flow to his land unimpaired in quality and quantity. This is a beautiful idea, it appeals to the artists, but it is only practical in the wilderness—not in a developed society. If the owner of the land bordering the stream is entitled to have the water flow to his land unimpaired, he can then prevent by injunction any upper land owner from using any material amount of water. This theory results in water flowing to the sea without man having a chance to use it. Unfortunately in the old court decisions in Indiana and other midwestern states, we find language of this nature, and these old cases have never been specifically overruled.

But, in the more recent cases the court has usually decided disputes involving the right to use water of a stream or lake by applying the reasonable use theory. The reasonable use theory permits the riparian owner to utilize water for any beneficial purpose in amounts reasonable in light of existing circumstances. The riparian owner may put the water to whatever use he thinks best and no lower riparian owner may stop him by injunction or sue for damages until the lower riparian owner is materially damaged: that is to say, the lower riparian owner no longer has sufficient water for his own reasonable and beneficial use. Should a lawsuit arise pursuant to the reasonable use theory, the rights between the upper and lower riparian owner are determined in relation to the volume of water available, the extent of the social benefit for which the upper owner is employing the water, and the gravity of the loss to the lower owner. Consequently, the rights are indefinite because changing circumstances may control the right to use.

However, this theory does foster maximum use of a resource because one owner can monopolize the entire supply until other riparian owners find a need.

This reasonable use theory is probably the present law of Indiana. I say probably because there are very few recent cases. I would like to see the old natural flow doctrine considered by the Supreme Court of Indiana, or at least by the Legislature, and have them clearly knock out any possibility that “natural flow” could be the law of Indiana. It is unsuitable today, but the sad fact remains that there is still such language that has never been specifically overruled.

Under the riparian doctrine, the law differentiates between domestic and artificial uses. The former includes the ordinary purposes and
gratifications of natural needs such as water for drinking, bathing, other household uses, and watering of livestock. Artificial uses include manufacturing, power generation, commercial sale off the land, and irrigation.

Domestic use is deemed reasonable and proper even if it interferes with the domestic use of a lower owner. This is something that may strike one as a little odd; however, if I am using water from a stream for my own drinking purposes or for my own animals, even if I dry up a stream by that use, I am entitled to do it. Any artificial use, however, may not deprive another of his domestic use. Where there is a conflict between two artificial uses, it is a question to be determined by a judge or jury as to what uses are reasonable.

It is interesting to note that municipal water companies located on streams may be riparian owners; and although the people supplied by the company may use the water for domestic purposes the use by the company is artificial since this involves the sale of water off the riparian land. Therefore, a city must exercise its power of eminent domain if it wishes to preserve its supply when its taking of the water damages lower riparian owners.

The theory behind the riparian doctrine is that of trespass. Only the owner of land joining the body of water may use the water because any other person attempting to use the water without the permission of one of the owners would be liable for trespassing since he must cross the land of one of the owners to get to the water. The courts of Indiana have regarded this right to use water by riparian owners as a property right of the owner. The term “property right” means a right to something that cannot be taken away from the man without payment to him.

I want to mention just in passing what the attitude of the riparian doctrine is to what is called “surface waters” or “vagrant surface waters.” These are the waters caused by falling rain or melting snow which follow no definite channel but just float vagrantly over the land. The rule of capture and avoidance applies to them. Any owner who may capture them may have them if he wishes. Anybody who wishes to avoid them by sloping, or leveling, or grading his land so that they run off on to his neighbor may do so without being liable to his neighbor. There is one exception to that: he may not, as the courts have said, gather them together into a channel in one place and cast them upon his neighbor, but he may grade his land so that these excess waters will run off.
The major interest in water law today is in the law that applies to bodies of surface water; however, the right to use of ground water is also important. In this area it is particularly difficult to state the law of Indiana because there have been few cases involving disputes as to the right to use ground water. Historically, the Indiana courts have said that a controversy involving underground water is not to be governed by the law that governs rivers and flowing streams, but rather it falls within the principle which gives the owner of the soil all that lies beneath the surface. In those cases of a century ago the courts have indicated that a man is free to dig upon his own land and if in doing so he drained away his neighbor's water in the process, there is nothing the neighbor could do about it. It is interesting to note the scientific basis for the early thinking of the Indiana courts. In 1864, when the courts were announcing such doctrine, in a dispute involving the rights to underground water, the court said the geologist has no knowledge which enables him to trace the channels. This is no longer true today, yet we have this precedent with that explanation behind it.

However, I do not believe that this reasoning would be applied today. Actually the most recent case in Indiana on the subject of rights to underground water was in 1904. In that case certain owners of the land surrounding the famous French Lick Springs Hotel in Orange County put down large pumps for the sole purpose of drying up the spring flow available to the hotel in order to ruin the business of the hotel. They succeeded in doing that, and the hotel owners secured an injunction against the persons from pumping and wasting the water. In examining the case the court placed great stress on the fact that those pumping were doing so maliciously, having no use for the water they pumped but only intending to hurt the hotel. The court granted the injunction in that case. I have read that case many times and tried to decide whether in a case today the fact that it was malicious and wasting was controlling, or whether the fact that by pumping one place, you dried up the well in another place was controlling. I don't know how an Indiana court would decide today between two neighboring landowners both putting the underground water to beneficial use. I am leaving the question up in the air as I cannot safely predict what a modern court decision would be when there has been proper evidence submitted by trained geologists as to the interrelation of underground water.

Statutes were passed concerning underground water in 1951. Alarmed by the lowering of underground water levels, the General Assembly passed the Ground Water Conservation Act which authorized
the Department of Conservation to designate certain areas of the state as restricted. If the withdrawal in a given area exceeds, or threatens to exceed, the natural replenishment, action by the Department may be taken if the Department finds that the withdrawal rate is too high. In such a restricted area, any user other than a water utility may not increase his usage more than a 100,000 gal. per day without a permit. This has been on the books now for about 12 years. It has never been used, consequently, never tested to see whether a man has as one of his property rights the right to use all of the underground water he needs. Some day soon, another drought will come and this law will be tested.

In the last 10 years many of the Eastern states have become alarmed over the prospective shortage of water. Indiana and others suffered a prolonged drought in 1954. This drought caused the legislature in practically every Eastern state to set up water study committees to determine whether the riparian doctrine was adequate to meet the future needs of the state or if a modification were needed. Kansas, and probably Iowa, decided that they should adopt the appropriation doctrine of the Western states and set up permit system and allocations of water. The University of Michigan began an elaborate study of water laws and prepared a model water rights bill for enactment by the midwestern and eastern states. This, too, followed the doctrine of allocations and permits. I cannot say what all the states east of the Mississippi River have done, but Indiana has decided that the appropriations system is to be avoided if possible because it is essentially a rationing system and involves further administrative control over the ordinary lives of the citizens of Indiana.

Legislatively, Indiana has taken the viewpoint that the problems of conflicting claims of rival users of water can best be avoided by providing more adequate water supplies. The Indiana Water Rights Act of 1955 encouraged the expansion of storage of water supplies by declaring that those who build reservoirs and stored excess flood water in them should have the exclusive right to use the increased flowage resulting from the release down stream of the waters thus impounded. There is an important illustration of that in Indiana in Marion County. The Indianapolis Water Company built the Geist Reservoir in the northeastern corner of Marion County. From Geist Reservoir, they bring water down Fall Creek, not by pipes, but by letting water out of the reservoir which augments the stream flow of Fall Creek; the Water Company takes it into their normal receiving station in Indianapolis. The Water Company was worried about the Town of Lawrence which was also having a water shortage about this
time. They were afraid that Lawrence would just avail itself of the money spent by the Water Company in augmenting the flow of Fall Creek and help itself in times of low flow from this increased flowage of water in Fall Creek. This law protecting investments in reservoirs was passed in 1955 and in such a case as I have illustrated, it is important to protect the investment of any company or persons or group that would wish to spend money to impound excess water.

In this 1955 Act, a Water Study Committee was established which is still functioning and one of the reasons I am interested in water laws is because I have been the Indiana State Bar Association’s advisor to this Committee for some time. Another thing that was written into this Act, but which has never been implemented, is a warning to all riparian owners that if they put the water to any artificial use that was new, or increased any artificial use after the passage of the Act, such use could be subject to further regulation. However, there has been no attempt at control because since 1954 the eastern part of the United States experienced good to ideal rainfall conditions, and some of the pressure for changes in water rights law, consequently, has abated.

The farmers of Indiana are not as interested in irrigation as they were seven or eight years ago. However, some time in the near future Indiana will experience another season of drought. Then, with increased interest in irrigation coupled with the increased use of water by households, businesses, and industry, sharp conflicts as to the right to use water may arise. Emergency situations may force Indiana to resort to the appropriation doctrine or modification of it. I personally hope that Indiana will never adopt such a system of allocations, permits, and detailed controls over the use of water. Such a procedure is cumbersome, and it will involve extraordinary legal fights over whether this question of the right to use underground water and reasonable amounts of surface water are property rights which can only be taken away from the owner of the land by the power of eminent domain and the payment to the owner of compensation. The riparian system is workable if the users of water will just exercise foresight. If those interested in water management see to it that water is not wasted and that in periods of flood and heavy rainfall, the excess water is stored in reservoirs, there should be enough water for everybody to enjoy beneficial use of the water within the framework of the riparian doctrine. Perhaps, as a lawyer I ought to want the appropriation doctrine adopted—there would be lots more legal fights, etc.—but I do think fights could be avoided.
It is important that the Legislature of Indiana continue to provide enabling legislation such as the Conservancy Act of 1957. Within the framework of this law, any community can plan for future water conditions and provide for them. Discussion of conservancy district law is a task in itself, but briefly stated a conservancy district is a special taxing district which can be formed anywhere in the state of Indiana, crisscrossing any existing political boundaries, that is, townships, counties, cities, towns. It may be established wherever the problem exists: whether it is a problem of flood control, drainage, water supply, sanitation or other things relating to water. It is begun by a petition in which those desiring the district must show, for a small area, that a majority of the land owners are for it and if it is a large area, a substantial number of land owners are for it. There follows a series of hearings and court procedures to ascertain the need and the correct boundary. When established by order of the court, the district has broad powers to correct the situation that caused its establishment. The directors of the district prepare a final plan, which must be properly approved and then within this framework of this final plan, the directors may let contracts to construct improvements necessary for flood control, drainage, channel improvement, or storage of water supply. The district has the power of eminent domain, if necessary, to obtain any needed land. It has taxing power to raise the money; it has special assessment power; it has bonding power. A district can also be organized for water supply and irrigation purposes. Storage can be made multi-purpose so that not only the damage of excess water will be avoided but also that there will be available supplies in the community when there are periods of deficient rainfall.

Most people are aware of the limitations of a multi-purpose dam, but on occasion you might hear some comment on a multi-purpose dam, and say, "Isn't that wonderful. You can have flood control; you can have recreation; you can have water supply all in the same structure." Some people do not realize that the ideal flood control dam has no water in it whatsoever. And when floods come you build to an absolute peak and then let it all out so that you can catch more of the next flood. On the other hand, the water level of the ideal water supply dam is kept at the absolute peak so that the maximum amount of water will be available for use in drought periods. The ideal recreational dam has an absolutely constant level at all times. Few people outside of those who work with water realize the mutual incompatibility of multi-storage structures. However, we do know that multi-purpose dams are usually more economical than single-purpose dams.
The recent session of the legislature passed several bills affecting water laws. The state of Indiana, municipalities, and water supply utilities can condemn reservoir sites which they know they will need in future years. They can purchase or take these sites now when the land is relatively inexpensive because it is not built-up with houses or does not have a superhighway running through it. This is somewhat of an experimental bill: it provides that the state, etc., can take a site now which may be used any time up to 20 years and the state, etc., pay only an actually determined proportional amount for such site. In a related act the state of Indiana is given the specific power through the Flood Control Water Resources Committee to sell water to communities or different persons as may be needed. It is surprising that there has been no authority until now for the sale of water from many of these reservoirs such as the Monroe reservoir now being constructed. Such authority was certainly needed. Another bill was passed in which surveyors should be interested. Our ditch laws are inadequate. This new act is not a new ditch act but rather an act which appropriates $34,000 for the preparation of a new, comprehensive ditch bill. I understand that the surveyors have formed a committee to work with the Water Study Committee to assist in the preparation of these new ditch laws. Certainly their suggestions will be most important because they have closer contact with the problem than any other group.

There is another act regarding water which makes available to rural communities (communities of 1000 population or less) a loan up to $100,000 from the state of Indiana for construction, development, modernization, or enlargement of rural water supply systems. This will be, I think, a very helpful act.

Generally speaking, I think our Indiana riparian water law is adequate. I have heard it said many times—"We are running out of water. It's a fixed supply, we have no more water than we did a hundred years ago, and look at the increasing usage." I have also heard "We are running out of land." The people who say this can prove to you that God has created no more land and yet look at the tremendous increase in production of food. In a sense, we doubled the amount of productive farm acres when we doubled the corn yield by hybrid seeds and heavy fertilization programs. In a sense, 23,000,000 acres of productive farm land were created in the United States by tractors replacing horses. In a sense, many acres of farm land are created by the construction of a synthetic fiber plant. Actually, we
are not running out of land; we are increasing the supply of farm land tremendously.

And, I think the same thing applies to water. We are not going to get any more rain, on the average, than we have in the past, but by using, re-using, and storing excess supplies, we can increase our available supply tremendously. The problem is not in the law. Generally speaking, the law is adequate. The problem is to avoid future conflict by working now to conserve and build reservoirs for water storage so that neighbors may not have to go into the law courts to fight over a dwindling supply. Instead we will find that there is sufficient water for any reasonable beneficial use.