

Mahomet Aquifer Consortium – Regional Water Supply Planning Committee

Illinois Water Law and Water Rights: The Rule of Reasonable Use

Department of Natural Resources

Office of Water Resources

Gary R. Clark, P.E.



Basic Questions of Water Law

- Do you own property?
- Do you have a statute?
- Do you have to get a permit?

MAJOR SOURCES (types) OF LAW

- Constitutions
- Common Law - Court Decisions
- Statutes and Ordinances
- Administrative Rules and Regulations
- Others such as:
 - Treaties
 - Compacts
 - Executive Orders

Definitions - Water Law

- Defies precise definition!! Somewhat “*Mystic.*”
 - Overlaps other legal fields such as:
 - Environmental law
 - Natural resources law
 - Real property law
 - Tort law
 - Land use law
- General definition
 - “Water law is the doctrine on which we rely to provide enough water for those who need it.”
- Water law deals with “water rights” of various kinds.
 - A legal right is the assurance that an activity will be protected by the legal system.
 - Fundamental issue - are the social and economic gains produced by water use worth the costs of ecosystem change?

“Riparian Rights” - “Rule of Reasonable Use”

- Evans v. Merriweather, 4 Ill. 492 (1842)
 - following a drought, Evans diverted **all** of the stream to his mill
- Court stated:
 - “The property in the water.. by virtue of riparian ownership, is in its nature **usufructuary**...”
 - “There may be, and there must be, of that which is common to all, a **reasonable use**.”
 - The wants of man in regard to water are either:
 - **natural** - are absolutely necessary to be supplied, in order to his existence.
 - **artificial** - such only as, by supplying them, his comfort and propriety are increased.
 - After all natural wants along a natural water course are satisfied, the riparian proprietors may use the remaining water for artificial uses....but no more than their **just proportion**.

ILLINOIS' COMMON LAW ON GROUNDWATER

- Edwards v. Haeger (1899)
 - adopted English common law [absolute ownership doctrine](#)
- Behrens v. Scharringhausen (1959)
 - “...in a proper case Supreme Court might announce a doctrine of reasonable use..”
- Lee v. City of Pontiac (1981)
 - challenged the Court to overrule *Edwards* and reject the absolute ownership doctrine.
- Water Use Act of 1983
 - statutorily rejects the absolute ownership doctrine and adopts the rule of reasonable use for groundwater as defined in *Evans v. Merriweather*.
- Bridgeman v. Sanitary District of Decatur (1987)
 - affirmed that Water Use Act of 1983 unified water law in ILL.

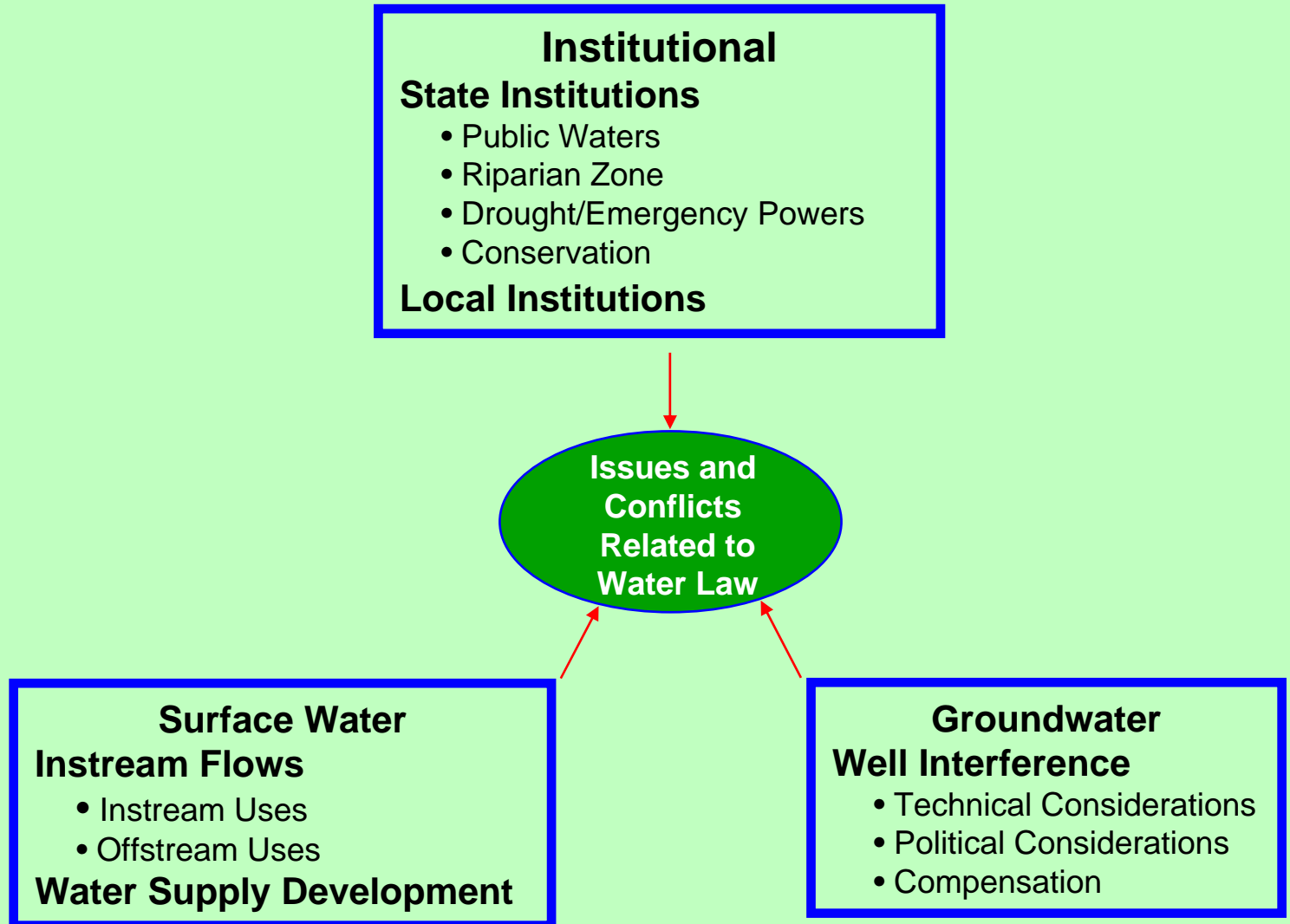
CALL FOR A CHANGE

- Prepare a comprehensive water resources act to replace the inadequate collection of studies and court decisions scattered throughout Illinois law. (Governor's Land and Water Task Force - 1993)
- State Water Plan - instream flow, groundwater districts and emergency powers legislative needs (1984)
- ILL. Economic & Fiscal Commission draft law (1974)
- strongly recommended ... in-depth study of Illinois Water Law (1967 State Water Plan)
- As a basis for a sound water code, ILL. should immediately begin a comprehensive study of all aspects of the water problems in the State. W.A. Act clarified, strengthened to prevent arbitrary use and insure constitutionality (State Chamber - Cribbet, U. of I. Law School - 1958)
- Groundwater difficulty in many localities ... is rapidly becoming a reality ... warrants discussion of state control and administration (ILL. Leg. Council - 1948)

Conservation 2000 Water Law Study

- **Task A - Review laws of other states**
 - Study completed September, 1995 by Paul Foran, et el.
- **Task B - Assessment of Illinois Water Laws**
 - Study completed July, 1996 by Planning and Management Consultants, Ltd., Carbondale Illinois
 - Focus was on water quantity law (not quality, flooding or drainage)
 - **Study process**
 - Identify major issues and conflicts
 - Determine inadequacies in current law
 - Develop optional legal responses
 - Based on a three part assessment
 - **Legal analysis, literature analysis, and focus groups**

Management Issues - Illinois Water Law



Report

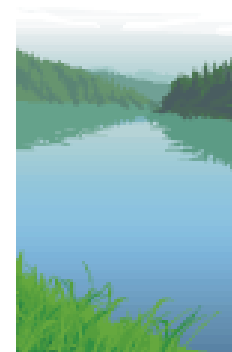
to the

INTERAGENCY COORDINATING
COMMITTEE ON GROUNDWATER

from the

SUBCOMMITTEE ON INTEGRATED
WATER PLANNING AND MANAGEMENT

*With Recommendations Pursuant to
Executive Order Number 5, 2002*



December 20, 2002

Later in 2002, in response to
Governor's EO 2002-05,
came the
ICCG Subcommittee Report

Guidelines and Principles for the Use and Management of Water in Illinois under the “Rule of Reasonable Use”

- “Absolute Ownership Doctrine” is dead!
- Groundwater rights of landowners are “usufructuary.”
- Seniority in use does not increase right.
- Wasteful or malicious uses are unreasonable.
- The lowering of the water table or artesian pressure which reduces or eliminates the use of a neighbors well is not necessarily unreasonable.
- Priority in times of shortage are natural wants (i.e. domestic use). Any remaining water may be used for artificial wants according to their “just proportion.”
- The right to transport water for use off of overlying land does not exist without statutory authority. You cannot sell water to your neighbor!

ISSUES and CONFLICTS - DROUGHT DRIVEN

- Expanding irrigation - both surface and G.W.
- Impacted rural and small community domestic wells
- Impacted flowing artesian wells
- Interstate management conflicts
- Expanding public water supplies
 - other communities wells
 - low stream flow impacts
 - surface water quality & habitat degradation
- Areas of “protectionism”
- Violations to well permitting and Water Use Act

REAL ISSUES - GROUNDWATER

1. How much groundwater do we have?
2. What are the real groundwater resource development conflicts?
3. What should be the responsible level of government for groundwater management?
4. What is the proper role of State government to oversee the stewardship of Illinois' groundwater resources?
5. Who is going to fix my well?
6. The **right / responsibility** to say **no** must be balanced with the **right / responsibility** to say **yes!**

REAL ISSUES - SURFACE WATER

▼ INSTREAM FLOW PROTECTION

- forcing allocation issues
- forcing storage issues
- forcing supplemental supply issues
- forcing drought and emergency management issues
- forcing fisheries and recreation issues

▼ EMERGENCY MANAGEMENT POWERS

- system interconnections
- water sales
- low flow releases
- water conservation and restricted use

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Thank You - Questions

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Report

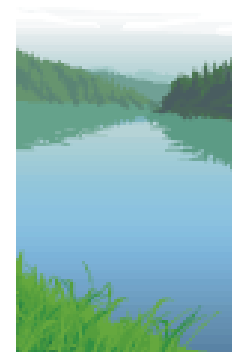
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12 Consensus Principles of the Governor's Water Resources Advisory Committee, 2001

1. **Better science and more funding for science is needed.**
2. **A system for identifying water resource problem areas is needed.**
3. **Water resource problem areas should not be too large; could be based on ground or surface water sources or both; should be based on supply and demand; a drop below sustainable yield should be a criteria; pollution could be a criteria.**
4. **Need to see details of how such areas will be identified both short-term, based on existing information, and long-term, as better data become available.**
5. **Emphasize regional water management authorities—boundary should have some relationship to scale of the water resource (watershed and/or aquifer boundary).**
6. **State's role: for later resolution; should support, provide science, establish or appoint regional authorities.**

12 Consensus Principles of the Governor's Water Resources Advisory Committee, 2001

7. Is there a role for water authorities established under the Water Authorities Act?
8. Phased approach to implementation would be received better by a broader group of interests.
9. Immediately begin pilot programs in "willing" areas; pilots programs should be site-based and located in problem areas.
10. Sunsets should be established for #8 and #9.
11. There should be an ongoing role for the Water Resources Advisory Committee in developing the details associated with establishing regional water management authorities.
12. Both groundwater and surface water should be considered.