Drought Response in South Carolina: Legal Issues

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Introduction to Water Law

In order to understand the legal basis for response to drought in South Carolina, it is first necessary to review the legal doctrines that are used to allocate water among users. There are two basic approaches used in the United States. In the arid and semiarid portions of our country the Appropriation Doctrine prevails, while east of the Mississippi, the Riparian Doctrine is applied.

The Riparian Doctrine was developed in England and was brought to the early colonial settlements in the United States. This law was adopted by the South Carolina Supreme Court in 1837.[1] The modern form of riparian law "gives each owner of land bordering on a stream, a right to make a reasonable use of the water and imposes a liability on the upper riparian owner who unreasonably interferes with that use."[2] This right exists whether or not the water is actually being used by the downstream riparian owner. Non-riparian landowners have essentially no rights at all to the use of surface water. Riparian rights are governed by the common law.

The Appropriation Doctrine, often called Prior Appropriation, was developed in the arid West of the United States. It arose from recognition that there was an obvious shortage of water and it protects those who first put the water to a beneficial use. It establishes a rule of priority that ensures that those who first obtain water rights are protected from those who come later. The appropriation doctrine is often condensed to the rubric, "First in time, first in right." Appropriative rights are statutory in nature. Certain steps must be followed to obtain a right to water, typically obtain a permit, but once this right is perfected, it is superior to those that follow. The place of use of the water is not restricted to riparian land or even to the watershed. The water right may be sold separately from the land. The water right may cease to exist if it is not used.[3]

There are obvious and significant differences between these two water use doctrines. Riparian law is based on the premise that the water right is a part of, attached to, the riparian land. In a strict interpretation, the use of water must be made on the riparian land only. Additionally, it must be reasonable and not interfere with the reasonable use of water by other riparian landowners. This interference can be in terms of diminution in quantity. In White v. Whitney Mfg. Co. the upper riparian landowner was restricting the flow of the creek for use at his cotton gin. The South Carolina Supreme Court stated that although each riparian owner had an equal right to the use of the water, he could not unreasonably diminish, detain, nor divert it from its original channel.[4]

Also, one cannot unreasonably degrade the quality of the water. In Lowe v. Ottaray Mills the South Carolina Supreme Court said that where pollution is discharged into the river in such a quantity that it creates a nuisance, is dangerous to the downstream riparian owner's health and is destructive to the value of his property, such a use must be unreasonable.[5]

Most significantly then, the riparian doctrine is one of sharing. The rights of one riparian owner are relative to and dependent upon the rights of the other riparian owners, both upstream and downstream. It is also significant that the right of a riparian owner does not increase nor diminish because of use for a particular length of time or lack of use.

Appropriation law, on the other hand, takes an entirely different approach. There is an up front acknowledgement that the demand for water exceeds the supply; and, that the purpose of this doctrine is to protect the investment of those who first put the water to a beneficial use. This doctrine recognizes, and in fact requires, the diversion of water from its natural channel when used for some beneficial purpose.

Again, the location of the ultimate use is irrelevant to the exercise of the water right; and also, it is immaterial whether the use is consumptive or non-consumptive. As an example, a farmer some distance from, and in another watershed from St. Varian's Creek in Colorado, constructed a dam and dug a ditch upstream of Mr. Coffin, a riparian landowner. This ditch and dam diverted the entire flow of St. Varian's out of the natural watershed and onto the farmer's

land. The Colorado Supreme Court stated that because the farmer was the first to use the water for a beneficial purpose, he was entitled to the water. The farmer's prior use gave him first priority to the water. The fact that a dry streambed was all that remained for Mr. Coffin was possibly lamentable, but was not something, which could be remedied by the court under the prior appropriation doctrine. [6]

Under the Appropriation Doctrine, a permit application sets a priority date for a particular water right, but no vested or perfected right to any water is obtained, until the water is actually diverted and applied to the beneficial use in accordance with the permit. Importantly there are some statutory hoops through which one must jump to obtain an appropriation water right, but when one does, the law protects that right in accordance with the priority of appropriation. One additional requirement exists when the water right is obtained; in order to maintain that right, one must continually divert and use the water.

The previous discussion addressed surface water only. Groundwater is also treated by various doctrines. If it is a discernable underground stream, it is treated by the same doctrine as a surface water. By and large though, groundwaters are diffuse, and these waters have historically been treated differently than surface waters. The first rules of ownership were absolute; that is, a person was permitted to take whatever quantity he could pump without regards to whether that water came from directly below his land or whether it had migrated, due to his pumpage, from under his neighbor's. A few states retain this absolute ownership doctrine, but most have progressed to some form of reasonable use doctrine; that is, one can take water from his own land for beneficial use, and additionally, can use water from under the land of others if it doesn't harm them. Some states also apply the prior appropriation doctrine to ground water. For these appropriation states, and also in some reasonable use states, a permit is required in order to withdraw and use the groundwater.[7]

Water Use and Drought under Riparian Law

Most of the time, we are quite content with the sufficiency of our water supply source. But there have been some uncomfortable summers of late, when we, at least momentarily, began to have some doubts.

"Water problems arise out of too little or too much water. Too little water results from drought, rapid or over development, lack of storage or replenishment, and impairment in water quality by sediment, industrial and human waste, and by salt encroachment."[8] This timely quote was made in 1952. These words are becoming more meaningful each day, but a solution has been wanting for some forty years.

"In Eastern states conflicts are now beginning to appear between water users ...and in both fields - ground water and surface water."[9] Again, a disturbingly timely quote which was made in 1952. Two years later an attempt was made to overhaul our common law, riparian, water law system. "A New Water Policy for South Carolina" was proposed to the South Carolina General Assembly. It proposed a modified prior appropriation system which would be administered by way of permits to replace the riparian system.[10] Its time was not ripe however, and it was rejected by the Legislature. Is it time to do something now, or do we really have a problem that needs to be addressed?

Under current South Carolina law, any user of water has a very tenuous hold upon its water supply source. If that user is riparian and the water source is surface water, it is subject to the rights of all other riparian users on the river. In times of drought, this means that all users must share the lessened flow and reduce their usage proportionately. This is theoretically an acceptable and fair way to bear the burden imposed by a drought. Practically though, it's very likely that the upstream riparian users will not feel obligated to reduce their usage and thus a downstream user may be harmed. The downstream user of course, has a common law right to either damages for the harm caused, or equitable relief in the form of an injunction to force the upstream users to bear their reasonable allocation of the burden.

There are several obvious problems with such a system, though. First, obtaining a remedy in a court is a very expensive and time-consuming proposition, with uncertain results. Additionally, the solution the court may formulate will be developed for only the parties involved in the lawsuit. This solution could possibly ignore the needs of other downstream riparian users. A piecemeal approach, fraught with inconsistencies and inequities would likely result; but, most significantly, it would take an inordinate amount of time for a courts to make the required decisions.

South Carolina Drought Response Act of 1985

In 1982 the Governor's State Water Law Review Committee stated that, “Existing law and state government structures are not adequate to minimize economic and social disruptions during a period of drought.” The Committee recommended that a detailed drought response plan be developed.[11] The Legislature responded in 1985 by enacting the South Carolina Drought Response Act. [12]

Under the South Carolina Drought Response Act (the "Act"), the Governor can declare a state of emergency if drought conditions have progressed to the extent that the safety, security, health, or welfare of the citizens are threatened. He can then exercise his emergency powers, with advice from the drought response committee, to curtail the withdrawal of water or to allocate water usage on an equitable basis.

The Act defines the words, “drought, drought indices, incipient drought, moderate drought, severe drought, and extreme drought” consistent with nationally recognized, technical definitions and provides actions that may be taken by the State when conditions meet these definitions. The Act is applicable to all water resources in streams, lakes and potable drinking water supplies and water levels in surface waters and in groundwater, but does not authorize any restriction in the use of water stored on private property that is fed only by diffused surface water as long as minimum or 7Q10 stream flow, whichever is less, is maintained. The Act establishes a Drought Response Committee composed of state personnel and a local committee for each drought management area composed of state and local representatives.

The regulation promulgated under the Act[13] established four drought management areas within the state, defined specific responsibilities of the Drought Response Committee, defined in detail the four drought alert phases of incipient, moderate, severe and extreme, the notification system for dissemination of public information, provides for reduction and curtailment of nonessential water use in affected areas, provides for an appeal mechanism for persons affected by mandatory curtailment, provides for a voluntary mediation of water disputes by the Department of Natural Resources, and requires municipalities or other public entity that supplies water for any purpose to develop and implement local drought response ordinances or plans.

South Carolina is the only state that has a full-time Drought Program Coordinator dedicated to dealing with drought issues even when droughts are not occurring.

The South Carolina Water Plan was published in 1998 to comply with the requirements of Act and the Water Resources Planning and Coordination Act.[14] The Water Plan restates the drought definitions from the drought regulation and provides guidelines for reduction in water use during periods of shortage for various categories, e.g., domestic, power production, commercial and industrial, agricultural; however, the guidelines do not offer meaningful guidance. For example, for “Livestock Use,” the Water Plan states that, “Livestock water use should be voluntarily reduced.”

Implementation and Implications of the Act

Unfortunately, the past four years provided an abundant opportunity to witness the initial implementation of the Act. The drought began in the summer of 1998 and did not end until the fall of 2002. The Drought Response Committee issued monthly status reports for the four drought management areas of the state and declared all levels of drought. An incipient drought was declared for the entire state beginning in July 1998. We were at the precipice when extreme drought conditions were declared for the entire state on August 26, 2002. Several small upstate drinking water suppliers were down to several days of water remaining. Voluntary and mandatory water use restrictions were imposed by several upstate water utilities. Thankfully it began raining the last week of August and it has been raining regularly ever since. No State action was taken to curtail water use, but we were close. No voluntary mediations were requested, but water use conflicts were on the horizon.

The Act provides a timely mechanism for addressing water quantity issues during times of drought and gives the governor power to transfer the right of one entity to use water to another, e.g., from an industry to a municipality. What is not clear, however, is whether that municipality, or possibly the State, would be required to pay just compensation for the condemnation of a private right. The amount of compensation would most likely be determined at some later date, after the emergency had passed. With hindsight, the fair market value of the condemned water right could become quite large. If the municipality is a non-riparian landowner, it is in a very tenuous position with regards to use of a surface water source.

The Act does not mention riparian water rights; it does not address rights of riparian versus other riparian water users nor does it address rights of riparian versus non-riparian users. The Act does not address consumptive versus non-consumptive use other than as one of the listed criteria to be used by the Drought Response Committee in determining reducing or curtailing non-essential water use. And so, it is unclear how this law coordinates with, possibly overrides or stands separately from common law riparian water rights. We were about to find out the hard way, but thankfully it began raining again and we received a reprieve until the next prolonged period of drought.

Other Factors Affecting Drought

In 1982 the Governor's Commission stated that, "Under present law, diversions are accomplished with little or no State review and are limited only by the economic considerations of the diverter and the application of uncertain common law doctrines of riparian rights."[15] In 1985 the SC legislature authorized Interbasin Transfer of Water.[16] It is not clear whether some lesser deviation from traditional riparian law, e.g., use of water on non-riparian land within the same watershed, is also authorized. Under the traditional riparian law, a non-riparian landowner has no right to use of surface water. Thus any riparian landowner could bring suit to enjoin that use.

No court challenge to this has occurred to date, but the next drought could provide the impetus to a riparian landowner to bring such a suit. A court would be hard pressed under current law to rule against the riparian owner. It's possible that the court would "legislate" a new rule to accommodate the non-riparian user, but such an action is by no means certain.

Even without a drought or other extreme weather generated condition, one's rights are tenuous. One must remember that riparian rights, though unasserted, are viable indefinitely. As more people and industry move into South Carolina the potential for conflict increases. As an example, a 1000-acre riparian farm with minimal water usage could be sold and the use of the land changed to a paper mill. Overnight, the reasonable use of the riparian land could increase 1000 fold or more. Correspondingly, the other riparian users might have to adjust downward their reasonable use. In addition, the General Assembly may see fit to legislate that paper mill a specific right, as was done in 1955 for the International Paper Company in Georgetown." Although such an unequal treatment has typically been held unconstitutional, unless challenged it is an effective right.' [8]

The legislature made this grant of right to the paper company less singular by adding §49-190 to the Code, which said that anyone else desirous of 100 cfs (65 million gallons of water per day) could have it too. Specifically this section reads, "Any person, firm, company, municipality or county which may acquire rights of ways for canals, pipelines or ditches, shall have to the same extent the came rights of diversion granted in §49-1-RO to International Paper Company, to be exercised in the same manner. "[Emphasis added] Literally this says that anyone **shall** have the right to divert 100 cu. ft. per second per day, but not more than eight percent of the flow of the stream at the point of diversion; and, presumably the legislature would be obligated to place this requested diversion right in the statute because § 49-1-80 states that any person **shall** have the same right as International Paper.

Likewise for a groundwater source, a new activity could begin on adjacent property. It could withdraw what would be reasonable for the new use, but devastating to the well field of, say, a municipality. In a court, the municipality could show harm and seek an appropriate remedy, but the court will balance the two activities, their usefulness and needs in the process. No matter what result, this is a very indefinite, subjective process that translates into an uncertain right to groundwater.

In the coastal areas, and in particular in the capacity use areas19 one's right to groundwater usage should become more certain. Since large withdrawals, greater than 100,000 gpd, must be permitted, a closer look at the relative needs of nearby users will be evaluated before a physical problem develops.[20] But still one has no guarantee of a certain right since these permits are not permanent and grant no right, and thus could be altered by the South Carolina Department of Health and Environmental Control (DHEC) at a later date.

Interbasin transfers are possible with the approval of DHEC. 21 Although such a transfer is not to be approved unless the "losing river basin" is protected, individual rights may be harmed though the basin is protected as a whole. In any case, though it causes a close look to be taken before such a proposed transfer is approved, it does not guarantee anyone a particular inviolable water right.

Wastewater Discharges

A wastewater discharge permit is like a riparian water right in many respects. Its effluent limitation values depend on other dischargers' pollutant loadings into the same watercourse.22 The Water Classifications and Standards define the level of water quality, which must be attained to protect the designated uses of the receiving water body.23 Effluent limitations will proceed to tighten for current users, as development continues. Additionally, tighter limitations have been recently imposed by the amendments to the Water Standards that will reduce the waste load allocations of current users so that the assimilative capacity of the receiving waters is not exceeded.

DHEC began issuing wastewater discharge permits by watershed in 1995. All permits within a watershed are to be renewed during the same year so that a more comprehensive look at the receiving water bodies and their assimilative capacities will be performed. Nothing, however, specifically prevents a current discharger from increasing its discharge or

a new discharger coming into the watershed, which would possibly require the reduction of the waste load allocation for other current users.

Conclusions and Recommendations

The problem of our indefinite water rights was recognized in the 1950's. Proposals were made by the Governor's State Water Law Review Committee and the Governor's Council on Natural Resources and the Environment24 that would have developed more certain water rights. The Interbasin Transfer statute, the Drought Response Act and the Groundwater Use Act were steps in the right direction in making water rights more certain, but we are far from a coordinated or comprehensive system.

Water users should assess their water supply sources in terms of current and future yield during drought conditions and possible reductions in yield based on projected industrial, commercial, agricultural and residential development. Likewise, they should evaluate their wastewater receiving waters and their wastewater loadings. They should examine their current and future needs and evaluate methods to reduce pollutant discharges if their waste load allocations are reduced.

The State should continue to refine the current statutes to address and coordinate common law riparian water rights.

Footnotes

[1] Omelvany v. Jaggers, 2 Hill 634, 9 S.C. 294 (1837)

[2] Trelease, Water Law 3rd Ed. (1979)

[3] Id.

[4] 60 S.C. 254, 38 S.E. 456 (1901)

[5] 93 S.C. 420, 77 S.E. 135 (1913)

[6] 6 Colo. 443 (1882)

[7] Id. at note 2 above

[8] Busby, American water Rights Law, 5 S.C.L.Q. 106 (1952)

[9] S. Prince, Moderator's Remarks at the Symposium on Southeastern Water Law, 5 S.C.L.Q. 103 (1952)

[10] A New Water Policy for South Carolina, Report of the Water Policy Committee, Submitted to the General Assembly of South Carolina 30 (1954)

[11] Governor's State Water Law Review Committee: Report and Recommendations (1982)

[12] South Carolina Drought Response Act, S.C. Code Ann. § 49-23-10 et seq.

[13] S.C. Code of Regulations 121-11.2 et seq.

[14] Water Resources Planning and Coordination Act, S.C. Code Ann. § 49-3-10 et seq.

[15] Id. at note 11 above

[16] Interbasin Transfer of Water, S.C. Code Ann. § 49-21-10 et seq.

[17] S.C. Code Ann. § 49-1-80

[18] For example, Harkins v. Town of Shaw, Mississippi (5th Cir. 1971)

[19] Groundwater Use Act, S.C. Code Ann. § 49-5-10 et seq.

[20] S.C. Code Ann. § 49-5-50

[21] Id. at note 16 above

[22] Clean Water Act, § 402, 33 U.S.C. § 1342

[23] S.C. Code of Regulations 61-68

[24] Report of the Governor's Council on Natural Resources and the Environment (1984)