

**Water Law
Spring 2010
Professor Tony Arnold**

Syllabus

Overview: The Importance of Water Law and Water Policy

This course is a survey course in U.S. water law and policy, with a particular focus on how water law, policy, and institutions have evolved over time. The course will contain some examples from Texas, as well as some international examples, but the focus is on a survey of water law principles and issues throughout the U.S.

Water is one of our most important resources – for life, societal development, economic growth, and environmental quality. All life depends on water for survival, as does our economy. Water scarcity has always been a fact in the arid western United States, but increasingly water scarcity has become a major issue in the eastern United States. Degraded water quality and stresses to watersheds are problems everywhere. Public water supply distribution systems face aging infrastructure and growing pressures to privatize. Even global issues like international trade, management of waters shared with Mexico or Canada, and global warming have impacts on water in the U.S. Policies governing water allocation and conservation are some of the most critical in our society. How we use, manage, and protect water reflects our values and priorities. It also reflects the state of our legal and policy institutions.

Legal principles, institutions, and processes play an important role in the control, allocation, and conservation of water resources in the United States. Complex rules govern the distribution and management of surface waters, groundwater, and public water supplies. Many aspects of water law have old origins in historic social needs and conditions, yet many aspects of water law have undergone substantial change to adapt to new social conditions and needs.

Both the history and development of water law principles illustrate that non-legal forces, institutions, and processes also play central roles in the control, allocation, and conservation of water resources in the United States. These important institutions and forces include (in no particular order): 1) the physical, chemical, and biological structures of water systems in natural and human environments; 2) engineering and technology; 3) natural resources management systems and methods; 4) markets and economic forces; 5) politics, political forces, and public policy formulation and implementation processes; 6) culture and social forces; 7) organizational behavior and structures; 8) the psychology and geography of water in human and societal development; 9) land use planning and development practices; and 10) the functions of complex, adaptive systems generally. All of these forces, institutions, and processes shape water policy in the United States.

The course considers adaptation and change in water law institutions and systems. Over time, water law principles, policies, and institutions have evolved to meet changing social needs. Growing demand, declining supplies, and the resulting scarcity of water have become more pronounced in many areas of the nation. Economic changes have created changes in the relative

value of water for various uses, necessitating transfers of water resources from lower-value users to higher-value users. In addition, it has become apparent we need comprehensive solutions to protect the quality of natural water systems, efficiently provide clean public water supplies, and invest in water resource development. We are increasingly seeing linkages among water use, land use patterns and policies, and environmental protection, despite the historical separation of these three areas. Changing environmental and physical conditions, such as climate change, require that water law institutions adapt. Water law institutions contain both the capacity to change and barriers to change, in varying degrees and characteristics. In this course, we will explore how and why some changes occur, while others do not.

Objectives

- To master the basic legal concepts of the control and management of water resources, including riparianism, prior appropriation systems, permit systems, groundwater, environmental regulation of water, public rights in water and the public trust doctrine, federal water rights and power, interstate allocation and dispute resolution, water organizations, watershed management and planning, and takings.
- To understand the institutions, values, policies, and legal principles governing water resources in the United States, including the relationships between legal principles and public policy goals.
- To identify the most pressing issues facing water institutions in the United States and requiring adaptation in the governance and control of water.
- To explore the evolution of water law institutions to adapt to changing conditions and needs, including the capacity for – and barriers to – beneficial adaptation.
- To understand the nature of conflict over water resources, including competing human demands for various types of water uses.
- To understand the relationships between social systems and ecological systems with respect to water.
- To use insights from multiple disciplines to understand water law institutions, adaptive capacity, and the issues facing water governance and control systems.
- To engage in high-quality legal analysis of legal issues involved in resolving conflicts over competing water allocations and uses.

Required Texts

1. Sax, Thompson, Leshy, & Abrams, *Legal Control of Water Resources: Cases & Materials*, 4th ed. (Thomson/West 2006), ISBN 0-314-16314-X (“Casebook” in syllabus).

2. Supplemental material, provided electronically as much as possible, on our Blackboard Vista course webpage. When this material is available from the Social Science Research Network (SSRN) or other online material, links to those resources will be provided.

Course Meetings

The class will meet on Mondays and Wednesdays from 10:30 a.m. to 11:45 a.m.

Contact Information and Office Hours

The instructor is Professor Tony Arnold. My office is 134, my cell phone is (502) 216-5534, and my email address is caarnol2@central.uh.edu or tony.arnold@louisville.edu.

My office hours will be late mornings and early afternoons on Tuesdays.

Attendance and Class Participation

You are expected to attend class regularly and participate in class discussions, including being prepared to respond to questions about the material. If you miss more than 20% of the class meetings, you will be dropped from the course. If you are unprepared or “pass” when called on more than twice during the semester, your grade will be lowered by one increment (e.g., B to B-).

Grade; Final Exam

The entire course grade will be based on an essay-based final exam, which is currently scheduled on May 5, 2010, from 9:00 a.m. to Noon. Students may type their exams using Electronic Bluebook or handwrite their exams in paper bluebooks.

Conduct Expectations

I view the course as a shared educational journey or venture in which we all share in the responsibility of learning and discussion, with me serving as the journey guide or venture leader. I hope that we will engage in many discussions both in class and outside of class during office conferences, over coffee or lunches, and around the halls and courtyards of the Law School. However, in order to facilitate a good learning environment for all and to promote the professional expectations that will await you as a lawyer, several basic minimums of conduct have been established. I have expressed them in a straight-forward manner here so that there are no misunderstandings as the course proceeds.

Students will be expected to abide by the applicable Law Center and University honor and conduct codes. Students giving or receiving unauthorized assistance in either class participation or the final exam will not receive a passing grade in the course.

Students are expected to be civil and professional. Class discussion should include diverse viewpoints, disagreement, and critique and may be informal at times, but should remain respectful, professional, and clear of personal attacks. In writing the final exam, students will be expected to maintain a professional tone consistent with lawyers’ writing such as client letters, memos, and court filings. Flippancy, unprofessional tone, and/or excessive informality will be grounds for a significantly low grade, as they do not meet minimum standards expected on the exam.

Students are expected not to distract their classmates (or me) in class. This applies to all forms of communication and Internet usage. Please consider this your prior warning now – if

you engage in distracting behavior in class, I will ask you to leave for the remainder of the class meeting that day.

Use of Blackboard Vista

We will use the University of Houston's Blackboard Vista course website for this class. You can link to it at <http://www.uh.edu/blackboard/>. It is your responsibility to check the course website regularly. If you are enrolled in the class, you will automatically be enrolled in the course web page, but you will need to log-in to get the materials, check announcements, obtain supplemental readings, etc. Below are instructions about how to log-in to UH's Blackboard Vista, which will not be available to you until the first day of classes:

USER NAME

- Your Blackboard Vista user name is your 7-digit **PeopleSoft ID**.
- Don't know your PeopleSoft ID?
 - **Students** should contact the Information Technology Support Center
 - [Online Support Form](#)
 - **By Phone:** - Call 713-743-1411, 24 hours a day, 7 days a week (except during University holidays)
 - **In Person at Main Campus** - 116-PGH Monday-Friday, 8 am to 8 pm (except during University holidays)
 - **By email** - support@uh.edu
 - **By live chat** - <http://www.uh.edu/infotech/livechat> - Monday-Friday, 8 am to 5 pm (except during University holidays)

PASSWORD

- **First time Blackboard Vista users**
 - **Initial password format** is your birthdate as **mmddyxx!** where x is the first initial of last name in your lower case, followed by an exclamation point.
 - On first log in, a Password Change screen will pop up. You will have to change your password and log in again with the new password.
- **Returning Blackboard Vista users**
 - Your password is whatever you last set it to.
 - If you don't remember your password and you are a current UH student, faculty, or staff, you can request a password reset from [Computer Account Management](#).
 - Allow 10-15 minutes for the password reset to take effect.
 - All passwords expire every 90 days.

Course Reading and Discussion Assignments

Class	Date	Topic	Reading Assignment
1	1/20	Introduction to Water Resources Issues	Casebook pp. 1-26
2	1/25	Riparianism I: Flow & Use	Casebook pp. 27-40, 47-52
3	1/27	Riparianism II: Harm & Drainage	Casebook pp. 57-60, 118-123
4	2/1	Riparianism III (& some Prior Appropriation too): Interbasin Transfers	Casebook pp. 87-101, 234-243
5	2/3	Riparianism IV: Regulated Riparianism	Casebook pp. 101-118, 70-79
6	2/8	The Evolution of Western Water Law	Casebook, pp. 325-365 (read this like a history)
7	2/10	Prior Appropriation I: Acquisition	Casebook pp. 124-152
8	2/15	Prior Appropriation II: Beneficial Use & Waste	Casebook pp. 152-165, 173-182, 190-197,
9	2/17	Prior Appropriation III: Unused & Returned Waters	Casebook pp. 182-187, 197-209, 247-249, 256-257
10	2/22	Prior Appropriation IV: Western Permit Systems	Casebook pp. 215-216 & 227-234; Supp. (In re Adjudication of the Brazos River Basin, 746 S.W.2d 207 (Tex. 1988))
11	2/24	Groundwater I	Casebook pp. 393-417, 429-433; 454-455
12	3/1	Groundwater II	Casebook pp. 433-439, 443-450, 467-468, & 478-490
13	3/3	Groundwater III: Texas Groundwater Law	Casebook pp. 417-423; Supp. (Sipriano v. Great Spring Waters of America, Inc., 1 S.W.3d 75 (Tex. 1999) & Texas legislation on groundwater management districts)
14	3/8	Federal Control of Water: The Edwards Aquifer & the Endangered Species Act	Casebook pp. 651-653, 661-668; Supp. 672, & 1009-1023
15	3/10	Federal Control of Water: The Clean Water Act; Reserved Water Rights	Casebook pp. 1009-1012, 1032-1041, 1056-1062, 903-909, 958-970
16	3/22	Public Rights I: State Ownership & Federal Navigation Servitude	Casebook pp. 521-546
17	3/24	Public Rights II: Recreational Access & Use	Casebook pp. 546-564 & 576-584
18	3/29	Public Rights III: Public Trust Doctrine	Casebook pp. 590-597 & 621-628

19	3/31	Public Rights IV: Public Trust Doctrine & the Mono Lake case	1) Casebook pp. 608-621; & 2) Arnold, Craig Anthony (Tony), Working Out an Environmental Ethic: Anniversary Lessons from Mono Lake. Wyoming Law Review, Vol. 4, No. 1, p. 1, 2004. Available at SSRN: http://ssrn.com/abstract=1025857
20	4/5	Interjurisdictional Water Management I: Interstate Allocation	Casebook pp. 835-862, 868-873
21	4/7	Interjurisdictional Water Management II: Interstate Water Conflict; International Allocation	Casebook pp. 878-902
22	4/12	Water Organizations	Casebook pp. 746-752, 681-688, 704-719
23	4/14	Water and Land: Wet Growth; Watershed Planning & Management	1) Arnold, Craig Anthony (Tony), Is Wet Growth Smarter than Smart Growth?: The Fragmentation and Integration of Land Use and Water. Environmental Law Reporter, Vol. 35, No. 3, p. 10152, 2005. Available at SSRN: http://ssrn.com/abstract=1040821 ; 2) Kara Gillon, Watershed Down: The Ups and Downs of Watershed Management in the Southwest, 5 U. Denv. Water L. Rev. 395 (2002) (supp.); 3) Sabine River Basin Highlights 2004, http://www.sra.dst.tx.us/srwmp/tcrp/state_of_the_basin/basin_highlights/2004/Sabine2004-BasinHighlights-Web-LoRes.pdf ; 4) Texas State Soil & Water Conservation Board's Watershed Protection Plan Program webpage, http://www.tsswcb.state.tx.us/wpp .
24	4/19	Water Markets	Casebook pp. 264-300
25	4/21	Takings and Water I	pp. 365-374, 379-384, 450-454
26	4/26	Takings and Water II	1) Casebook pp. 384-392; and 2) <i>Stop the Beach Renourishment</i> case, http://www.fsbpa.com/documents/Supreme%20Court%20Decision%209-29-08.pdf [note: this may be replaced by the US Supreme Court opinion in this case if it comes out in time]
27	4/28	Takings and Water III	Casebook pp. 653-661, 788-796; and article: Zellmer, Sandra B. and Harder, Jessica, Unbundling Property in Water. Alabama Law Review, 2007. Available at SSRN: http://ssrn.com/abstract=1010617
28	5/3	Review	No reading; there may be a review problem to prepare & discuss