

# **The Evolution of Laws Governing Water in Maryland and Elsewhere**

By Jesse J. Richardson, Jr.

Associate Professor

Urban Affairs and Planning

Virginia Tech

Blacksburg, Virginia 24061-0113

Research and Policy Advisor

Water Systems Council

## **WATER SUMMIT**

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# Water

- Water, whether moving or motionless in the earth, is not, in the eye of the law, distinct from the earth. The laws of its existence and progress, while there, are not uniform, and can not be known and regulated. It rises to great heights, and moves collaterally, by influences beyond our apprehension. The influences are so secret, changeable and uncontrollable, we can not subject them to the regulations of law, or build upon them a system of rules, as has been done with streams upon the surface. Priority of enjoyment does not, in like case, abridge the natural rights of adjoining proprietors.
- *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352 (1850), cited in *Miller v. Black Rock Spring Company*, 99 Va. 747, 40 S.E. 27, 86 Am. St. Rep. 924 (1901).

Recent drought conditions and water shortages have placed water supply planning and water rights at the forefront of the debate. This presentation briefly addresses:

- Common law water rights
- Statutory changes to common law
- Evolution of water rights in the east
- Maryland Developments
- Implications for Carroll County



# 4 Legal Regimes for Water Rights:

- streams, lakes and related waters;
- diffuse surface waters;
- percolating groundwater;
- atmospheric water.



# Real Property as a bundle of sticks

- In the East, one stick in the bundle- right to use water adjacent to or beneath the property



# Common Law Rules for Percolating Groundwater

- the absolute dominion rule;
- the reasonable use rule;
- the prior appropriation doctrine;
- the correlative rights rule; and,
- Restatement of Torts



# Absolute Dominion (English Rule)

- Owner of land overlying aquifer may use all the groundwater he wishes (law of the biggest pump)
- No liability unless withdrawals are malicious
- Ten States



# Prior Appropriation

- First in time, first in right
- Thirteen western states



# Correlative Rights

- Rights allocated based on proportion of land overlying aquifer- similar to gas and oil
- California, Hawaii, Iowa, Vermont\*



# Restatement of Torts

- a reasonable use rule which is basically an adoption of the riparian rights reasonable use rule
- Limits: (a) the withdrawal of groundwater unreasonably causes harm to the proprietors of neighboring land through lowering of the water table or reducing artesian pressure, (b) the withdrawal of groundwater exceeds the proprietor's reasonable share of the annual supply or total store of groundwater, or (c) the withdrawal of groundwater has a direct and substantial effect upon a water course or lake and unreasonably causes harm to a person entitled to the use of the water." *Restatement Second of Torts*, Section 858
- 2 states-
- Ohio, Wisconsin

# Reasonable use (American Rule)

- Landowner allowed reasonable use of groundwater in view of the similar rights of others
- Lift prohibited
- Twenty states have adopted the reasonable use rule, including Maryland



# Maryland Groundwater Rights

- Reasonable Use Rule
- *Finley v. Teeter Stone, Inc.*, 248 A.2d 106 (Md. 1968)- Carroll County!
- Owners of farm brought action against quarrying company for damage to farm as result of the pumping of percolating water from quarry by quarrying company
- Caused sinkholes on the farm
- The Court of Appeals held that there was no negligence by quarry company in its excavation of its quarry or any waste, malice, or sale of percolating waters, or other unreasonable use, so quarrying company was not liable to owners of farm

# Statutory Modifications to Common Law

- The recent trend is for state legislatures to modify common law rules
- Permitting systems and other statutes may modify common law, but only to an extent; if they go too far, the water rights owner must be compensated
- How far is too far?
- Established water rights are clearly protected, beyond this????



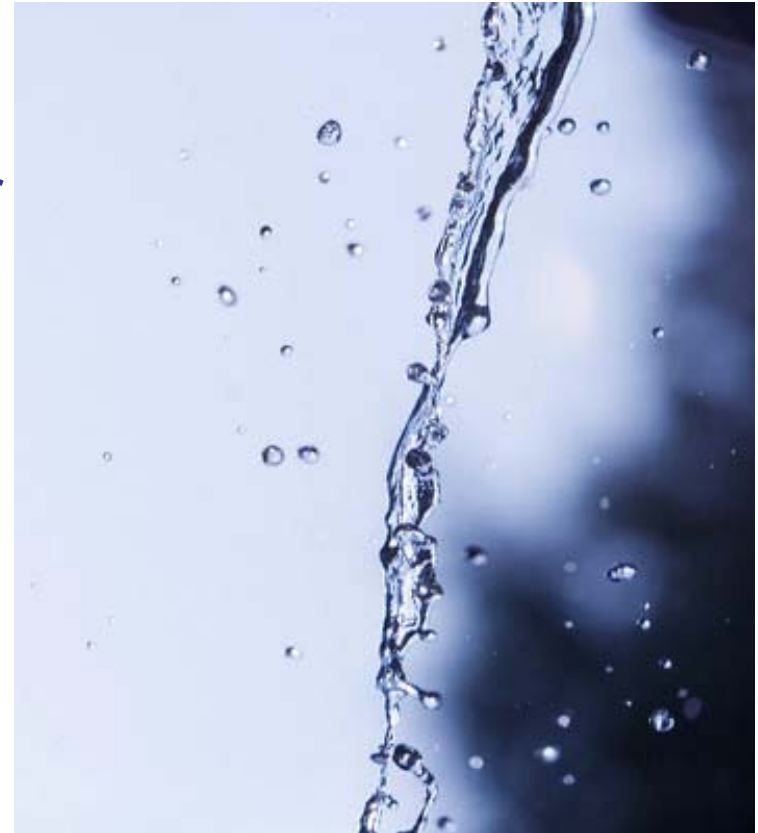
# Maryland Statute

- Withdrawals of more than 10,000 gallons per day require a permit
- Some exemptions and a grandfather clause for agriculture
- Allocation: If a “water supply emergency” exists then priority is:
  - (1) Domestic and municipal uses for sanitation, drinking water, and public health and safety;
  - (2) Agricultural uses, including the processing of agricultural products; and
  - (3) All other uses



# Maryland's "Recharge Rule"

- Unwritten, administrative policy
- Calculates recharge very conservatively
- Water appropriators must "own or have control over" sufficient land area to capture recharge equal to or greater than withdrawals
- Example: If I wish to withdraw 3,000 gallons of groundwater per day and we assume a recharge calculation of 300 gallons/day/acre, I must own or have control over 10 acres of land
- Very problematic for public water suppliers and commercial users



# What is the recharge rule?

- Odd, and improper, marriage of the reasonable use rule and Restatement of Torts rule?
- Administrative overstepping?
- MDE improperly interpreting and enforcing common law?
- ??????

# Recharge Rule and Smart Growth

- For localities depending on groundwater for water supply (like Carroll County and the towns within the county), localities must own or have control over huge amounts of land to provide public water
- As a practical matter, development in towns is discouraged or impossible
- The water policy encourages sprawl, since the rule can only be complied with through the use of large lot development
- The impacts on farmland and open space could be dramatic
- Smart growth encourages dense development in towns-  
There's a disconnect

# Alternatives

- Conservation
- Gray water
- Special measures during drought



# Conclusions

- State administrative policy conflicts with common law groundwater rights
- The recharge policy's unintended consequences also run counter to the state's smart growth policies
- Commercial and public water supplier concerns need to be considered in state policy