

# Water Law

Senior College

Session 2

Classic and Modern Water Law Cases

# Today's session

- Classic and contemporary water cases
- Illustrate development of water law in US
- Historically significant decisions

# Tyler v. Wilkinson

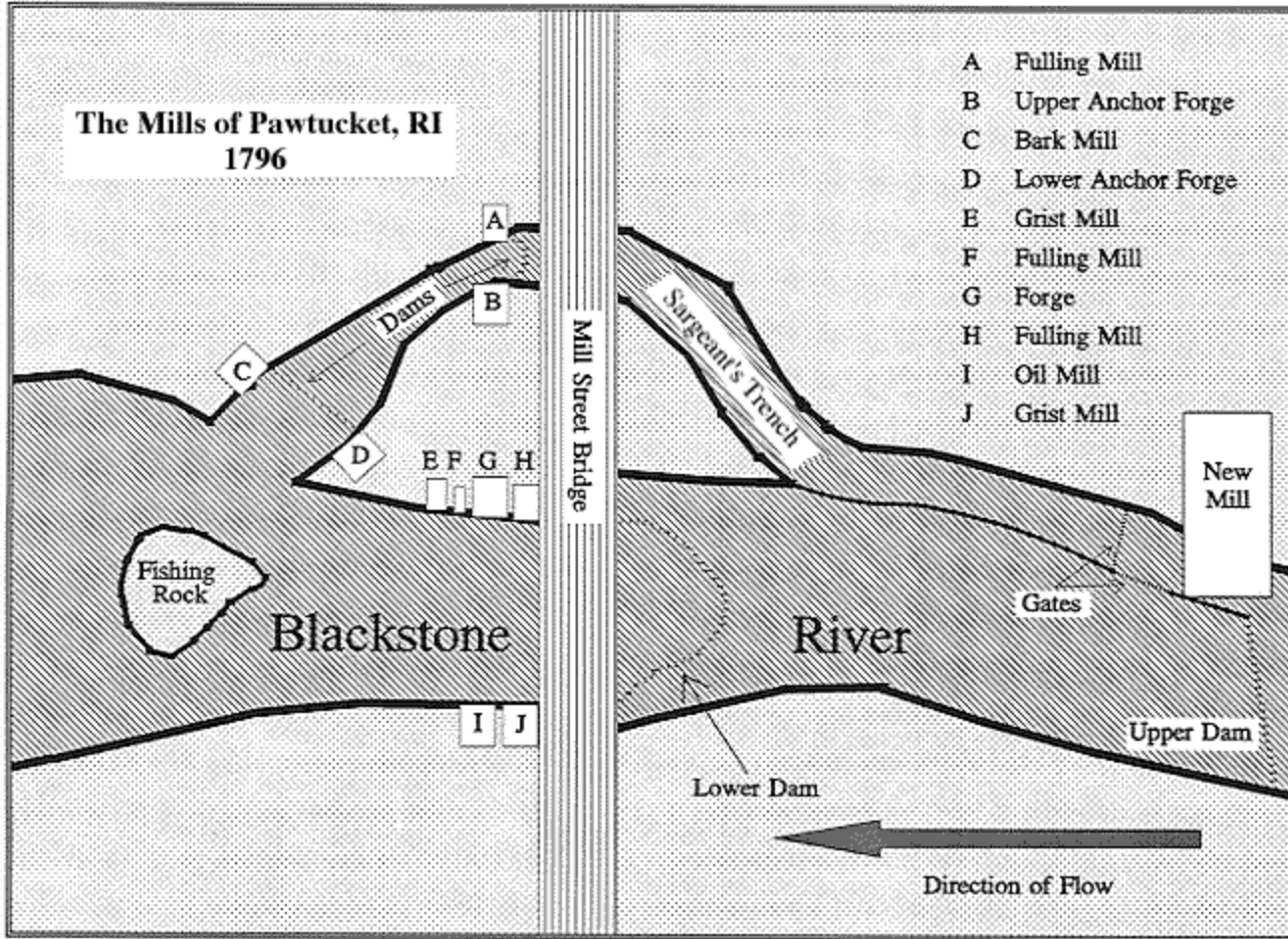


# Lower dam



# The Facts of *Tyler v. Wilkinson*

- Dispute between downstream mill owners and upstream diverters of river flow.
- How much water can the owners of Sergeant's Trench claim from the Pawtucket (Blackstone) River?



# Story begins

- Lip service to the traditional doctrine:
- A landowner on the bank of a river (a riparian owner) has a
  - “right to the use of the water flowing over it in its natural current, without diminution or obstruction”
- The right is “common to all” and “annexed . . . To the land itself”

# But quickly retreats

- “I do not mean . . . that there can be no diminution whatsoever . . .” for that “would be to deny any valuable use . . . .”
- “There may be . . . a reasonable use . . . whether it is to the injury of the other proprietors or not.”
- The law “acts with a reasonable reference to public convenience and general good . . .”



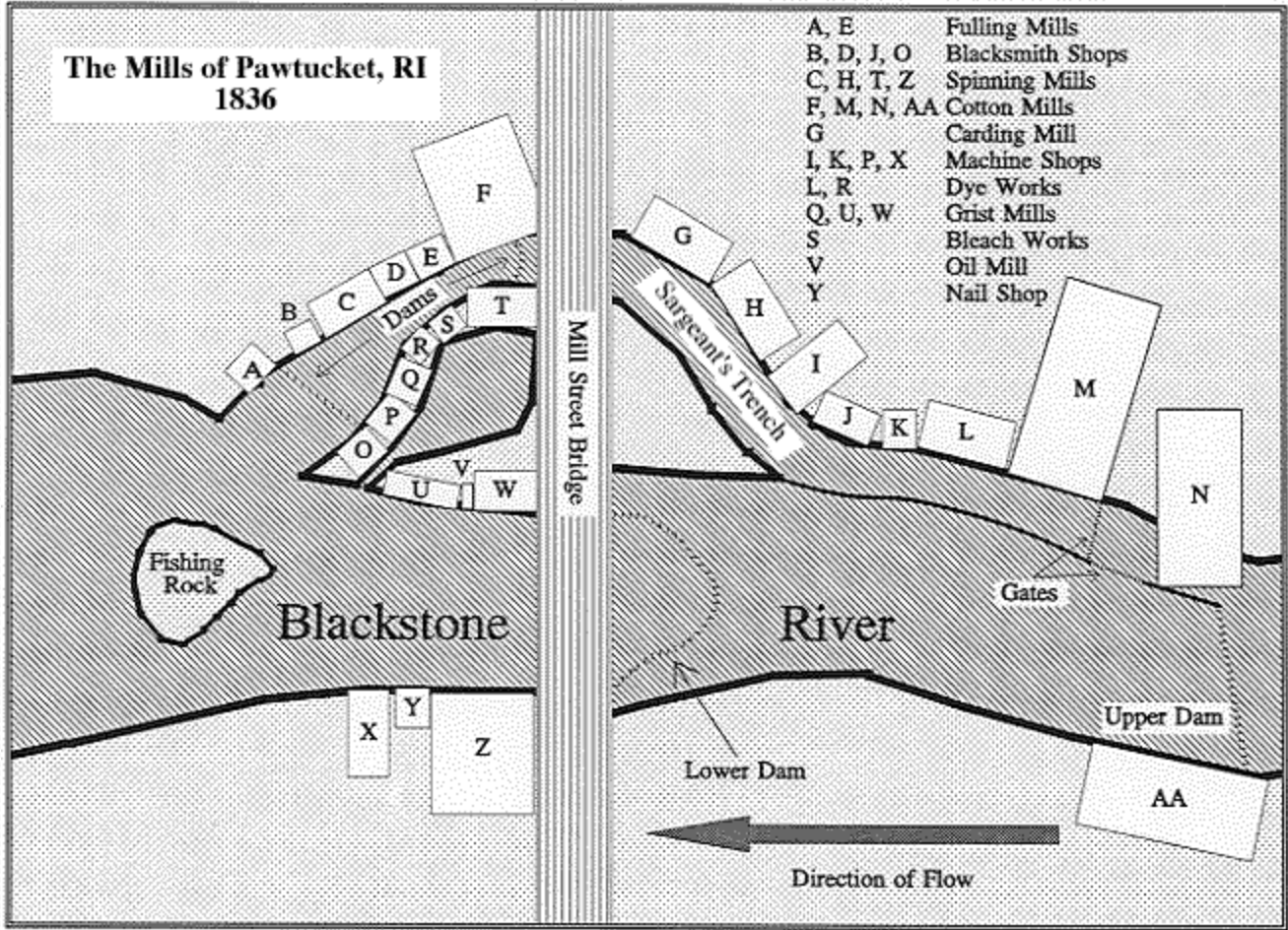
# Special rights in the Sergeant's Trench

- Mere priority conveys no special rights,
- But appropriation of the water may be recognized due to
  - Grant from all other proprietors
  - Long exclusive enjoyment, without interruption (20 years)
    - Prescriptive rights, or “adverse possession”

# Result

- Who gets the flow of the river:
  - Sergeant's trench proprietors get the amount they have received for 20 years (since 1796)
  - If there is a shortage, any additional water must “be borne by all parties, as a common loss, wherever it may fall”
    - But only the riparian owners will be entitled to share of any surplus.

**The Mills of Pawtucket, RI  
1836**



# Kundel Farms

- Kundel raised level and reduced size of culverts
- Vir-Jo received less water
- HELD: Riparians have equal rights to reasonable use, BUT
  - Natural uses (stockwatering) preferred over
  - Artificial uses (creation of wetland for hunting)

# Herminghaus v. So. Cal. Edison

- Disputants:
  - A wealthy rancher (Amelia Herminghaus)
  - A politically-connected power company
- Irrigation by floodwaters
  - OR
- Hydropower for Los Angeles

25

LOCATION

DATE 4-29-24

NEGATIVE NO.



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Photographic Department

Scottsden California Edison

36  
LOCATION

DATE 5-9-24

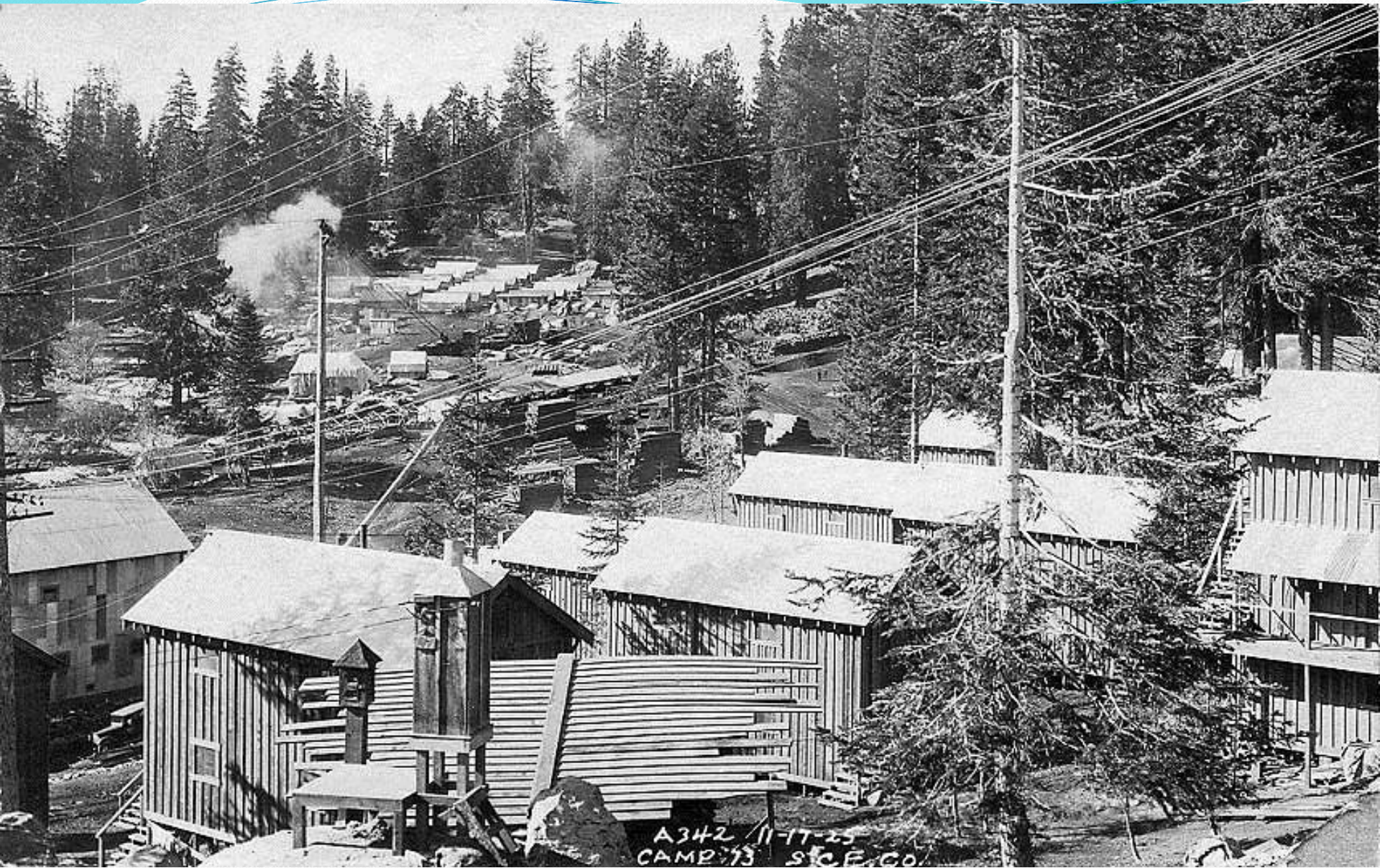
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Huntington Lake





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CAMP 73 ST. FRANCISCO



81 Winter at Big Creek

# California Law

- Hybrid system
  - Prior appropriation on public land
  - BUT adoption of common law and riparian rights for owners of land along rivers
- California's version of riparian rights:
  - “any diminution of the stream against the will of the riparian owner [is] an actionable injury”
  - No other proprietor has a right “*unreasonably* to divert” the water

# More doctrine

- A riparian “has the right to have the stream continue to flow through its lands in the accustomed manner . . . Undiminished by any additional or more injurious use or diversion of the water upon the stream above . . .”
- If the public demands appropriation of the water for power, let the public pay for it!

# Mrs. Herminghaus's use

- Use of the stream “in the usual and ordinary course of its flow” is “a reasonable use thereof”
- DISSENT: it is a wasteful use and should not be allowed

# So Cal Edison

- It is entitled to “reasonable use”
  - For such “customary and domestic uses as inhere in riparian owners along similar streams and for irrigation”
  - Can also “make appropriate use” for power and energy
- But they claim too much when they claim right to determine when and whether to release water

# Dissent

- The decision will “result in checking the progress of the state of California” in conserving water
- The common law “contains its own repealer,”
- Property rights are “subject to reasonable regulations under the policy power,” and subject to “proper limitations in the interest of the people of the state.”

# Dissent

- “No one may acquire a vested right to waste water in any form.”
- Plaintiffs use only a small amount of water; the rest “passes on to the sea and is utterly wasted.”
- “A more extravagant or wasteful use of water could not well be imagined.”



# A Constitutional Amendment

- “. . . the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, . . .
- The right to water or the use or flow of water in or from any natural stream or water course in the State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, . . .
- Such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable diversion of water.
- Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required . . . ; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator to water to which he is lawfully entitled."

# Irwin v. Phillips

- Canal owner diverted water from stream to serve mines away from stream
- Miners on stream claimed water
- Who gets it?

# Irwin v. Phillips II

- Public land
  - Claimants do not own land
  - No 'riparian' rights
- In resolving disputes, courts must “take notice of the political and social condition of the country which they judicially rule.”

# Irwin v. Phillips III

- Should honor rules developed by
  - “voluntary action and assent of the population”
  - Based upon “a universal sense of necessity and propriety”
  - Must be viewed “as having the force and effect of *res judicata*.”

# Irwin v. Phillips IV

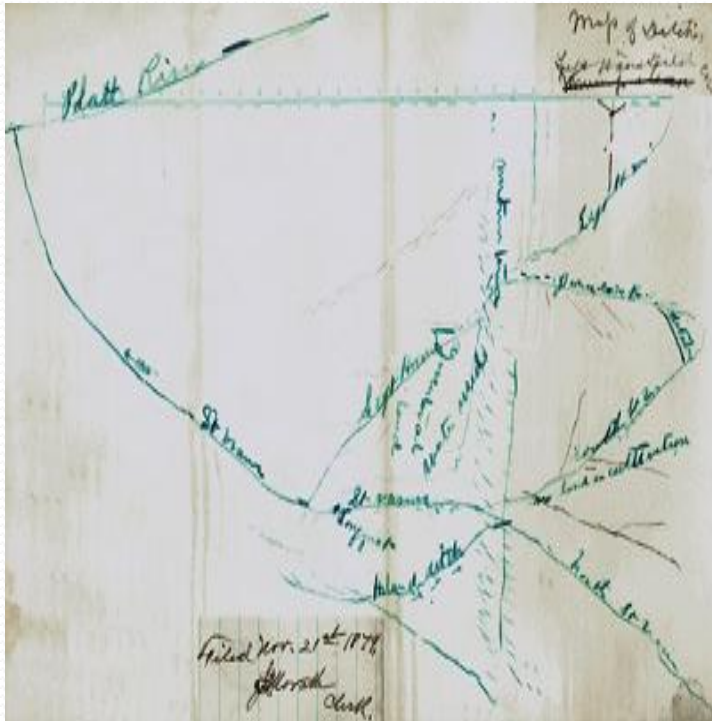
- Courts should protect
  - “the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines . . .”
  - Without their actions “the most important interests of the mineral region would remain without development.”

# The rule?

- When rights conflict
  - The fact of priority
  - Upon the maxim of equity: first in time, first in right.

# Coffin v. Left Hand Ditch

- Dispute over the waters of the St. Vrain creek
- Coffin and others tore out the dam of the Left Hand Ditch Co.
- Suit for damages and injunctive relief





# Coffin v. Left Hand Ditch II

- A questionable ruling rejecting riparian rights
  - Colorado statutes seemed to endorse riparianism (prior to 1876), but the Court found a way around it
- Our situation is different than in moister climates
- Water is much more important, and diversion is essential

# Coffin v. Left Hand Ditch III

- On the basis of appropriation of water:
  - “Houses have been built”
  - “Permanent improvements made”
  - “The soil cultivated”
  - 1000s of acres “rendered immensely valuable”
- Deny priority of right, and “a great part of the value of all this property is at once destroyed.”

# Coffin v. Left Hand Ditch IV

- The rule:
  - Riparian rights doctrine “is inapplicable to Colorado.”
  - “Imperative necessity . . . Compels the recognition of another doctrine . . .”
- Absent contrary statutes:
  - **“the first appropriator of water from a natural stream for a beneficial purpose has . . . A prior right thereto, to the extent of such appropriation.”**

# Arizona v. California

- Rights to water in the Colorado River System
  - 6 states
  - Drains 1/12 the area of continental US
  - Critical to development in the “Great American Desert.”



# Arizona v. California

- Hoover Dam
- Lake Mead
- Boulder Canyon Project Act



# Arizona v. California II

- Two issues (in this excerpt)
  - Dividing up the water among the three lower basin states
  - US claims to water for Indian Reservations, National Recreation Areas, and National Forests

# Arizona v. California III

- Boulder Project Act – a national solution to a national problem
  - “with the health and growth of the Lower Basin at stake”
  - “Congress responded to the pleas of the States” and
  - “transform[ed] dry and barren deserts into lands that are livable and productive”

# Arizona v. California IV

- Congress's authority rests upon its power
  - To control navigation
  - To promote the general welfare
- This gives it “right to regulate and develop the river”
- Where the government has “undertaken a comprehensive project for the improvement of a great river,” there is “**no room for inconsistent state laws.**”



# Arizona v. California V

- The suggestion in the Boulder Project Act becomes a rule
  - “Congress intended an apportionment among the States”
  - Congress created “machinery plainly adequate to accomplish this purpose” (i.e. by giving the Interior Secretary power to make water contracts)
- **The Secretary has the power “to allocate and distribute the waters of the mainstream of the Colorado River.”**

# Arizona v. California VI

- Federal claims
  - Creation of Indian Reservations includes “not only land but also the use of enough water from the Colorado to irrigate the irrigable portions of the reserved lands”
- Constitutional basis:
  - Commerce Clause
  - Land Clause
- Water is essential to life of Indians on lands and intent to reserve it is clear.

# Arizona v. California VII

- Principle of ‘reserved water rights’ also applies to other federal reservations
  - When US sets aside land for federal purposes
  - It intends to reserve water sufficient for future requirements of those areas.



# Higday v. Nickolaus

- Groundwater conflict –
  - Farmers
    - V
  - Columbia, Missouri
- Columbia plans to drill wells in McBain Bottom and ship water 12 miles away to city municipal system
- Plan will reduce water table

# Higday v. Nickolaus II

- Some groundwater rules:
  - Rule of capture / absolute ownership
  - Correlative rights/reasonable use/American rule
    - Owner may withdraw groundwater
    - But uses are restricted to uses “incident to the beneficial enjoyment of the land”
    - Unlimited use in connection with land
- NOTE: reasonable use/correlative rights not so restricted in other jurisdictions

# Higday III

- What rule in Missouri?
  - Not absolute ownership!
  - *Springfield* is out of date
    - Water scarcity is an issue
    - Groundwater hydrology is developing science
- Court adopts reasonable use “for purposes incident to beneficial enjoyment of land”

# Higday IV

- Consequences for City?
  - If its uses hurt plaintiffs, it has no right
  - If withdrawals do not interfere with plaintiffs, then they have no complaint
  - City's withdrawals must be limited, or it faces liability.



# Wayman v. Murray City Corp

- Disputants:
  - City
    - Versus
  - City residents with wells
- Doctrine?
  - Utah: prior appropriation
- Withdrawals from a new, deeper well, have diminished flow in plaintiff's wells

# Wayman II

- There is plenty of water
- City has prior rights
- Problem is that city's new method of diversion has caused plaintiff's wells to become ineffective

# Wayman III

- Solution?
  - Analyze “the total situation”
  - balance “individual rights in relationship to each other in a reasonable way”
  - And serve the overall objective” of “seeing that all available water is put to use” while preserving individual rights to particular waters

# Wayman IV

- No one, not even first appropriator, has a right to maintenance of water level or water pressure
- Whether any particular move is reasonable – we depend on the “expertise of the State Engineer and his staff who are professionally qualified to make such determinations”

# Michigan Citizens v. Nestle



# Michigan Citizens II

- Review of groundwater law
  - Absolute ownership
  - American “reasonable use” (any use, to any extent, upon the land, regardless of impact)
  - Reasonable use//correlative rights
- Which doctrines are most beneficial to Nestle? To Michigan Citizens?

# Michigan Citizens III

- Michigan's law? An evolving doctrine
  - American reasonable use – maybe?
  - Tolerates uses 'off the land'
  - Seeks to protect broad access for beneficial uses, while protecting traditional uses

# Michigan Citizens IV

- Is Nestle's use beneficial?
  - Employs 140 people – this is a benefit
  - Provides water to people – this is a benefit
- Harm to other users?
  - Recreational and aesthetic use of Dead Stream, which is a traditional use
- Other considerations
  - Both uses are “artificial” rather than natural
  - Sanctuary springs not well suited for high-volume extractions



# Michigan Citizens V

- Withdrawals will impair recreational uses and affect quality of fishing
- But extractions have significant commercial benefits
- Overall: harm and benefits balance
- But Nestle's pumping rate is too high