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WATER LAW EXAM---574

May 5, 2003
9A.M.-12 Noon
Professor Em Hall

INSTRUCTIONS

This three hour exam consists of three equal parts totaling 14 pages. Part I includes ten equal multiple choice questions, presented on separate pages. Please select the best answer from among the listed alternatives, mark your choice on this exam sheet and explain your choice on the same sheet. Use the back side of the sheet if necessary. Be sure to put your exam number on each page. Correct answers and explanations garner six points; correct answers without explanations are worth five; correct answers with incorrect explanations are worth four; and so on. This is an open-book examination. You may bring course materials with you and outline materials you have prepared or prepared in a study group. No other materials are permitted. Be sure to turn in this examination with your answers and explanations.

Answer Parts II and III in standard Blue Books. Part II consists of a broadly framed general question about western water law about which you are asked to comment. Part III consists of a story whose water law implications you are asked to analyze.

Good luck.

PART I: MULTIPLE CHOICE

1. The fundamental law of prior appropriation protects both junior and senior water rights from impairment and detriment primarily because:

- A. senior water rights are entitled to a 100% supply before junior water rights receive any water;
- B. it is important to protect the investment made by senior water rights holders in the first application of water to beneficial use;
- C. maximizing beneficial use of all public water requires that senior water rights holders be protected in their first investments and that junior water rights holders be protected in their riskier second investments;
- D. water rights are water rights no matter what their priority; or
- E. None of the above.

2. Under the New Mexican version of the doctrine of prior appropriation incorporated municipalities:

- A. have a categorically superior right to municipal water;
- B. have a prior and paramount right to water originating under the law of New Mexico's antecedent sovereigns no matter when the municipality was established;
- C. are no different than any other public or private appropriator of water;
- D. have different water rights by virtue of the fact that due diligence is tied to increasing demand over time rather than the time necessary to build irrigation infrastructure;
- E. None of the above.

3. Federal reserved water rights for withdrawn federal public lands:

- A. have a priority as of the date of the withdrawal and a quantity of enough water to support all purposes of the withdrawal;
- B. have a priority as of the date of application of the water to beneficial use and an expanding quantity depending on the land's needs;
- C. have an immemorial priority and a potentially infinite quantity;
- D. have a priority as of the date of the withdrawal and a quantity of the minimum amount of water necessary to support the withdrawal's primary purpose, no more.
- E. None of the above.

4. In a declared ground water basin with water in storage and little or no recharge or discharge

- A. the State Engineer may set a life-time for the aquifer and allow withdrawals according to a schedule that will exhaust the resource in a reasonable amount of time;
- B. the State Engineer must protect each water right against any effect caused by a new well;
- C. the State Engineer has no jurisdiction to manage the resource;
- D. the State Engineer must conserve the ground water resource for future generations;
- E. none of the above.

5. Under the “Mechem Doctrine” of Pueblo Indian Water Rights in New Mexico, the Pueblos are entitled to a first priority for all of the acres that they irrigated in 1924 because

- A. that quantity was the amount guaranteed to them under Spanish and Mexican law;
- B. that quantity was the amount that they placed to beneficial use under state law;
- C. that quantity was the maximum amount that they had ever irrigated at any time in 1848;
- D. that quantity was the maximum amount that they had ever irrigated between 1848 and 1924, the time when Congress limited their otherwise expanding right by putting Indian and non-Indian rights on the same plane;
- E. None of the above.

6. At present, the State of New Mexico:

- A. does not recognize rights to minimum instream flows as a matter of state law;
- B. administratively recognizes rights to minimum instream flows under certain limited circumstances involving measurement and impairment;
- C. fully adopts minimum instream flows as a beneficial use of water under all circumstances;
- D. fully adopts minimum instream flows but only as an obligation imposed by superior federal law under the Endangered Species Act;
- E. None of the above.

7. In the Middle Rio Grande Underground Basin, involving an aquifer that is hydrologically connected to a surface water stream, a new appropriator of ground water now must:

- A. demonstrate that the new appropriation will not impair existing ground water rights;
- B. retire impacts of the proposed appropriation as they reach the River;
- C. demonstrate that the new appropriation will not impair existing groundwater rights and purchase and retire 100% of the impacts on the River at any time before any new pumping begins;
- D. show that there is sufficient ground water to support the proposed application;
- E. None of the above.

8. Under New Mexico law, the owner of a surface water right may supplement the surface water right with ground water only if:

- A. the ground water contributes somewhat to the surface water right;
- B. the ground water would contribute to the surface water point of diversion;
- C. the surface water owner can demonstrate that the supplemental ground water exclusively contributes to his surface water point of diversion;
- D. the ground water is somewhere in the watershed where the point of diversion is located;
- E. None of the above.

9. A perfected water right may be abandoned if:

- A. the owner fails to use it for four consecutive years prior to June, 1965;
- B. the owner intends to cease applying the water to beneficial use;
- C. the State Engineer determines that the use to which the owner is putting the water is no longer beneficial;
- D. none of the above.

10. Ground water rights that are perfected prior to the State Engineer's declaration of a ground water basin

A. belong to the well owner by virtue of his ownership of the surface estate that overlies the groundwater;

B. are created by and limited to the application of water to beneficial use but are never subject to the jurisdiction of the State Engineer;

C. are created by and limited to the application of water to beneficial use but are subject to the jurisdiction of the State Engineer if adjudicated or if subsequently included within a ground water basin and the pre-basin right is changed or transferred.

D. none of the above.

PART II: GENERAL ESSAY

ESSAY: Critics of the doctrine of prior appropriation claim that the doctrine is devoted to an instrumental view of nature that wreaks havoc in the natural world. They also claim that the doctrine is incapable of the kind of flexibility it takes to incorporate new and more modern ideas, including the economy of nature. Using the materials from this course, discuss these assertions. Be sure to identify those aspects of the prior appropriation system that seem the most inflexible and to analyze where there is sufficient play in the system to incorporate new values and different uses.

PART III: FACT ANALYSIS

They call Jose Marujo "JM" for short. JM owns two tracts of land on the Rio del Castor. The Rio del Castor heads high in the watershed, near the basin divide and flows down to the confluence of the Rio Grande. Small tributaries enter the Castor at various points in the River, some above JM's first tract of land and some in between the two tracts. The stream gains as it flows downstream, partially the result of base in-inflow and partially the result of tributary flood flow. The Castor has never been adjudicated.

JM's upstream tract lies high on the stream system, above all other private diversions on the stream. It is surrounded, above and below and on both sides, by Forest Service land. By 1904 Executive Order, the President withdrew and reserved the land for Forest purposes.

On his upstream tract of land, JM diverts the water from the stream to a six acre tract on which he usually grows garlic. The garlic patch was put in by JM's great grandfather in 1876. It's been irrigated ever since until 1994 when JM got sick and couldn't plant. Since then, he hasn't planted but he intends to start up again as soon as he feels better.

JM owns another tract of land six miles downstream from his garlic patch and below the last piece of Forest Service land. This tract has never been irrigated but Joe has been told that it's soils would be excellent for growing high value crops like strawberries if he could get water to it. When he went to the State Engineer's office about it, the engineers laughed. "You can't get a new appropriation of surface water there," they tell him, "that stream's been fully appropriated for 100 years."

Now Joe wonders what his alternatives might be. He has heard that he could transfer his water rights from the garlic patch to the proposed strawberry patch if no one protested. The problem is a very small and very cantankerous Pueblo located between his upper and lower patch and a very cantankerous neighbor with an alfalfa field between the garlic field and the proposed strawberry patch, and the upstream Forest Service.

The Pueblo shares a common history with the other New Mexico Pueblos. They have always irrigated a very small 20 acre parcel near the River even though there's a lot more flat land around the Pueblo. Hearing of JM's proposed transfer, the Pueblo announces that it will protest any effort that JM makes to move the right downstream.

In addition, the cantankerous alfalfa farmer between JM's two tracts also says that he will protest JM's proposal. JM has investigated the history of this neighbor's irrigation and has discovered that it didn't begin on this tract until 1880. "I'm older than he is," JM thinks, "so he's no problem." "No way," his irritable neighbor responds. "You can't jump the creek in between the two tracts and take my water." JM tries to negotiate with his neighbor, but you know how these things go in this part of the world; there's no hope.

Finally, there's the Forest Service and its fish. JM has heard that the Forest Service is trying to maintain the flows in the creek for the benefit of a native cut-throat trout. The rangers say they don't like the idea of a new irrigated tract downstream from the reach of the Castor where the cut-throats thrive. "Why ever not?" JM wants to know. It's talk like that, say the rangers, that will make the forest service protest JM's transfer. And if that doesn't work, they say, they will go to their Fish and Wildlife Service (FWS) compatriots and have the cutthroat listed as endangered.

Beleaguered on all sides, JM finally considers abandoning the idea of transferring his surface water rights from the tract above to the tract below and simply digging a well and irrigating his proposed strawberry patch from that source. When he investigates, he discovers that the tract is within a ground water basin declared by the State Engineer. He also learns that the OSE manages the groundwater in the basin conjunctively with the surface water rights because they are so inter-connected. In fact, JM learns that in the area of his would-be strawberry patch pumping ground water has an immediate and complete effect on the Castor.

At this point, JM throws up his hands and says, "I rue the day, but I need a water lawyer." He comes to your office to ask about his options and your assessment of them. Please give him your best advice. Make sure to tell him how his neighbor, the Pueblo and the Forest Service and the State Engineer might be able to thwart his plans and what you think the chances of their success might be.