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Water Rights, by J. H. Beuscher

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WATER RIGHTS, by J. H. Beuscher. Wisconsin: College Printing and Typing Co., 1967. Pp. 434.

PROFESSOR Beuscher was the leading eastern legal water resources scholar. His untimely death shortly after the publication of these materials deprived all those who teach and practice in this field of a valuable source of guidance and inspiration. For eighteen years prior to the publication of this casebook and during a period when most law schools in the East paid little attention to water resources problems, Professor Beuscher directed a program of water law research at the University of Wisconsin. The pages of the Wisconsin Law Review attest to the fruits of this research. These articles and student work from the core of scholarship on eastern water law and will serve as a valuable source of analysis and information for the solution of the region's increasingly complex water use problems. A scholar could ask for no better memorial than this.

The book comes at an appropriate time. There is increasing recognition of the need to preserve a balance between the natural environment and human activity. Years of relative insensitivity to this balance have created an environment which is increasingly discomfoting to live in and often threatens man's survival. Either man or his management of our natural resources must change. It is not yet clear which will occur. A perhaps apocalyptic vision of the future was contained in a recent news story about the Houston Astrodome.¹ The Astrodome was originally covered with transparent material but this caused player and spectator discomfort because of the sun's glare. This was eliminated by tinting the dome but this caused the grass to die. This was remedied by substituting artificial grass. Perhaps future generations will wonder why people in the second half of the twentieth century would want to clean up Lake Erie to make it fit for swimming. However, there are many indications that man is seriously attempting to preserve the natural ecology necessary to support human life and make it worth living. Professor Beuscher's materials are most welcome because they can be used to help train the kinds of future lawyers which will be needed to manage our nation's water resources.

1. The Wall Street Journal, Feb. 26, 1968, at 1, col. 4.

The book has a two-fold focus. As the author indicates in the preface the materials "focus on water problems more typical to the humid east rather than the arid west." The law of prior appropriation is covered but not systematically.² Materials on prior appropriation are included to provide a source of comparison with the law of riparian rights and to provide the necessary perspective for the student to understand and evaluate recent statutory modifications in the riparian system. The book's use will thus be limited to eastern law schools. The second focus reflects Professor Beuscher's concern for the criteria and methods which can be used to create and preserve a quality environment. Extensive coverage is given to public rights to use water courses and a strong sense of governmental responsibility for the maintenance of a quality environment emerges from the book. The monotony of the usual casebook is broken by a series of photographs which put the physical problems discussed in a visual context and serve to remind student and teacher that we are dealing with the human use of a scarce natural resource. Limited use is also made of maps to untangle the complex geographic descriptions of the cases.

The most disappointing feature of the book is its initial organizational pattern. The student is not given a sufficient value framework to evaluate the complex allocation conflicts which follow. At a minimum a working knowledge of hydrology and welfare economics will be essential for the modern water lawyer. The first chapter contains a brief introduction to hydrology and its relation to water law taken mainly from Piper and Thomas' classic *Hydrology and Water Law: What is Their Future and Common Ground*. The piece is a good scientific critique of the legal classifications of water, but my own preference would be to start with a more detailed and purely scientific explanation of the hydrologic cycle and to use it as a basis for evaluating the various classifications and their consequences in light of scientific knowledge rather than starting from the assumption that they are irrational. There are no introductory materials on welfare economics. The questions following the cases occasionally raise questions about the use of concepts such as the cost-benefit ratio to

2. Only 51 pages are devoted to the appropriation system. BEUSCHER, *WATER RIGHTS* ch. IV, §§ 6 and 7 (1967) (hereinafter cited as BEUSCHER).

solve the problem but nowhere is the student introduced to this concept or recent criticisms of it. In making this criticism, I am mindful of the fact that Professor Beuscher was well versed in the contributions of other disciplines to water law³ and I have no idea what he required as outside reading or what he used to supplement the casebook in class discussion. The criticism is made only to suggest that those who adopt the book may want to prepare their own introductory supplement.

The first topic considered is diffused surface water. The difference between the common enemy and reasonableness doctrines are developed and a short section on drainage district law is included. Few materials are included to put the problem in an urban context,⁴ where the cases most frequently arise, or to analyze public responsibility for flood protection.⁵ It is arguable that this topic is more appropriately covered in land use planning but most casebooks in this area merely raise the constitutional problems of flood plain zoning instead of going beyond this threshold question and examining the implementation of flood control programs.⁶ More and more the use of the multi-purpose dam as the ultimate answer to flood control is being questioned and more attention is being given to alternative methods of implementing a flood control program by flood plain zoning and related channel structures such as flood walls.⁷ In 1967 the Secretary of the Interior listed "Are we really at long last on the threshold of real flood plain management within this country?"⁸ as one of the major issues in river basin planning and this reviewer strongly believes that expanded coverage of this problem should be given in a water resources course.

3. See Dean Trelease's excellent essay: *Policies for Water Law: Property Rights, Economic Forces, and Public Regulation*, 5 NATURAL RESOURCES J. 1 (1965) which was prepared under Professor Beuscher's direction.

4. See BEUSCHER 22, comment 2, where the problem is briefly raised.

5. The Delaware Basin compact is excerpted, including Article VI which gives the authority the power to take various flood protection measures but its implementation is not discussed. BEUSCHER 399-408.

6. See BEUSCHER, LAND USE CONTROLS 388-91 (3rd ed. 1964); HAAR, LAND USE PLANNING 359 (1959); and MANDELKER, MANAGING OUR URBAN ENVIRONMENT 505 (1965). An exception is LEFCOE, LAND DEVELOPMENT LAW 373-87 (1966).

7. See James, *A Time-Dependent Planning Process For Combining Structural Measures, Land Use, and Flood Proofing to Minimize the Economic Cost of Floods* (REPORT EEP-12, INSTITUTE OF ENGINEERING, ECONOMIC SYSTEMS, STANFORD UNIVERSITY (1964).

8. Speech Delivered at the National Conference of State and Federal Water Officials, Denver, Colorado, September 6, 1967 (U.S. Department of Interior news release).

A good starting point would be a recent California decision, *Albers v. County of Los Angeles*.⁹ Due to a hidden geologic condition, a county road project triggered a landslide. The court found that condition was not foreseeable and held that the county's activity was neither intentional, reckless, or ultrahazardous but imposed liability where a private party would not have been because the county was better able to distribute the loss. This is the first frank recognition that a public entity should be treated differently from a private individual for purposes of liability and has widespread applicability to the law of diffused surface waters.

Chapters III and IV are concerned with the acquisition and scope of private rights to water. Chapter III covers ground water. Recent legislation modifications of the common law are cited but not extensively developed, although a brief discussion of western statutory schemes is included. Chapter IV deals with the allocation of streams and lakes. The chapter contains a good selection of the important eastern cases and makes good use of secondary materials including some of the research Professor Beuscher directed. The best part of the chapter as far as this reviewer is concerned is the historical introduction to the anglo-American theories of riparian rights which includes Story's opinion in *Tyler v. Wilkinson* and selections from *Kent's Commentaries* and Weil's 1919 *Harvard Law Review* article, "Waters: American Law and French Authority."

The book recognizes the increasing demands for the reservation of large quantities of water for recreational use by allocating chapter V to "Limitations Imposed on Private Water Rights by Assertions of Public Interest" which deals principally with the public's right to use water for recreational activities and the government's responsibility to secure these rights. My only quarrel with this chapter is the failure to include the opinion of *Scenic Hudson Preservation Conference v. FPC*.¹⁰ The second circuit set aside a license for a

9. 62 Cal. 2d 250, 398 P.2d 129 (1965). See Comment, 17 STAN. L. REV. 763 (1965).

10. 354 F.2d 608 (2d. Cir. 1965), cert. denied, 384 U.S. 941 (1966). In *Udall v. FPC*, 387 U.S. 428 (1967), the Supreme Court has apparently adopted the approach taken in *Scenic Hudson*, although *Scenic Hudson* is not mentioned. The Supreme Court reversed an FPC license because the Commission had not allowed the Secretary a sufficient opportunity to introduce evidence as to the superiority of federal as opposed to private power development. Mr.

pump-storage plant on the Hudson River because the FPC failed to consider sufficiently alternative sources of power which would minimize the disruption of the area's ecology. Although *Scenic Hudson* is referred to in a footnote, the book includes instead the earlier seventh circuit opinion in *Namekagon Hydro Co. v. FPC*¹¹ which upheld the Commission's authority to deny a license on the grounds that preservation of a free-flowing stream could be considered its highest and best use. *Scenic Hudson* has more far reaching implications for protection of the public's interest in preservation of scenic beauty and the enhancement of recreational opportunities for it develops a theory that the Commission has an affirmative duty in its licensing proceedings to protect the public interest in wildlife, scenic beauty, and recreation.¹²

The final two Chapters cover pollution and interstate allocation of water. The pollution chapter covers recent state administrative systems as well as the Federal Water Pollution Control Acts of 1965 and 1966. No more can be expected at this time for it is impossible to determine how the federal law will be implemented. At the date of this writing, February 22, 1968, Secretary of the Interior Udall had only approved the seventeenth state's water quality standards and thus it will be several years until a federal water pollution control law emerges and the nature of future legal conflicts are more clearly defined. The final chapter contains a well chosen selection of cases, statutes, and treaties. However, this reviewer believes the problem of inter-state allocation can best be studied by a detailed examination of several river basins. For example, the opinion in *Arizona v. California* must be studied as merely one stage of a long and continuing struggle over the Colorado River.¹³ The problems of pollution and municipal water supply might be brought out by a detailed study of the Delaware River basin. Focus on the selected basins, with reference to relevant cases

Justice Douglas then got in his licks with 17 pages of dictum which questioned the need for the project in light of its probable adverse impact on non-power interests such as anadromous fish and scenic beauty and the availability of alternative sources of power.

11. 216 F.2d 509 (7th Cir. 1954). See Tarlock, *Preservation of Scenic Rivers*, 55 Ky. L.J. 745, 769-83 (1967).
12. See Note, *Of Birds, Bees, and the FPC*, 77 YALE L.J. 1227 (1966).
13. See Meyers, *The Colorado River*, 19 STAN. L. REV. 1 (1966) and Meyers & Noble, *The Colorado River: The Treaty With Mexico*, 19 STAN. L. REV. 367 (1967).

from other basins, should allow the student to develop a method of solving basin-wide problems—large or small, and the student's interest should be more stimulated by having to evolve concrete solutions to the problems of a specific area.

This casebook is the first to deal principally with eastern water problems and thus should be welcomed by those in eastern schools who teach in this area. It will also be a useful source of reference for western scholars and for the practicing attorney and administrator.

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