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Water Resources Research Project

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INTRODUCTION

In July, 1967, the School of Law of the University of South Carolina began a research project into South Carolina water law[1] supported by funds provided by the United States Department of the Interior, Office of Water Resources Research, as authorized under the Water Resources Research Act of 1964, and also supported by the Clemson University Water Resources Research Institute. This project enabled the School of Law to add to its curriculum a seminar on water law. The papers which follow are among those submitted in that seminar.[2]

Within the past decade, the General Assembly and the successive governors of the State have been highly sensitive to the important role of water resources in the municipal, agricultural, and industrial development of the State, and the ancillary need to preserve, and in many instances improve, the quality of the environment, to provide a healthy habitat for fish and wildlife, and to expand recreational resources. Important Federal[3] and State[4] legislative enactments have begun the task of establishing a legal framework to solve these problems. These statutes allocate responsibilities to government at all levels, Federal, State and local. Legal doctrines, whether of constitutional limitations or of common law, can assist or can inhibit government in discharging its assigned duties under the statutory scheme. Some of the papers that follow discuss problems of the first magnitude in defining

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1. The initial research project was entitled "Legal Aspects of Water Use and Control in South Carolina," and terminates December 31, 1970; a continuing project, "Administrative Law, Problems and Potentials, in Water Resources Planning for South Carolina," is now under way.

2. A previously published paper, written for the seminar, is that of Joseph F. Singleton, *Pollution of the Marine Environment From Outer Continental Shelf Oil Operations*, 22 S.C.L. REV. 228 (1970).

3. Federal Water Pollution Control Act, 33 U.S.C. § 466 *et seq.;* Clean Air Act, 42 U.S.C. § 1857 *et seq.;* National Environmental Policy Act of 1969, Pub. L. No. 91-190 (Jan. 1, 1970), are among many statutory enactments and executive orders.

and executing governmental water policy. Others involve problems of more interest to the private citizen and his lawyer.

Mr. Wald's paper[5] discusses the South Carolina decisions on navigable waters. Caution is required in reading decisions dealing with "navigable waters", since there are different meanings given to these words in different contexts. The State of South Carolina has taken the position that the tidelands of the State, below the usual high water mark, are owned by the State, unless a claimant can produce an unbroken chain of title back to an original grant from the Crown, the Lords Proprietors, or the State itself. This argument rests on the decisions of the State Supreme Court adopting the English common law rule of "navigable waters," that the State owns the bed and banks of all streams where the tide ebbs and flows, and all lands lying below the mean high water mark. In *Lane v. McEachern*,[6] decided after Mr. Wald's article was completed, the Supreme Court of South Carolina rejected an opportunity to re-examine the decisions and establish a clear rule that title was presumed in the State, rebuttable by an unbroken chain of title from the sovereign. The Court held that, under the stipulated facts, the grant from King George II before the Court in that case conveyed title to the disputed tidelands to the claimant. The State is continuing to seek both judicial and legislative[7] clarification of the question. The importance of the tidelands question, involving approximately 450,000 acres in this State,[8] is emphasized by increasing attention to the control of tidelands in judicial decisions from other states.[9]

Mr. Hill's article[10] and that of Mrs. Toal[11] relate to two facets of the same problem. The Constitution of South Carolina provides:

> Private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor.[12]

4. South Carolina Water Resources Planning and Coordination Act, S.C. CODE ANN. § 70-21 *et seq.* (Supp. 1969); Groundwater Use Act of 1969, S. C. CODE ANN. § 70-31 *et seq.* (Supp. 1969); South Carolina Pollution Control Act, S. C. CODE ANN. § 70-101 *et seq.* (Supp. 1969).
5. *See* p. 28 *infra.*
6. 251 S.C. 272, 162 S.E.2d 174 (1968).
7. Proposed legislation is outlined in SOUTH CAROLINA WATER RESOURCES COMMISSION, SOUTH CAROLINA TIDELANDS REPORT at 5-6 (1970).
8. *Id.* at 5.
9. Maine v. Johnson, 265 A.2d 711 (Me. 1970); Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970); *see also* Porro, *Invisible Boundary—Private and Sovereign Marshland Interests,* 3 NAT. RES. L. 512 (1970).
10. *See* p. 43 *infra.*
12. *See* p. 63 *infra.*
12. S.C. CONST. art. I, § 17 (1895).

Where, in the judgment of government, water is maldistributed, in the sense that the need for it is greater outside of the watershed where it is found, the question has arisen whether the riparian doctrine of rights in water inhibits the removal of the water to another watershed. Where the proposed use is for a municipal or other governmental purpose, the eminent domain power can be used, provided that the governing statutes authorize its use. Where, however, the proposed use is for a non-governmental purpose, as for industry, a serious question arises under the "private property taken for private use" provision. Mr. Hill explores the implications of the riparian doctrine, and the experience of other States in dealing with the problem, while Mrs. Toal discusses the important decision of the Supreme Court of South Carolina in *Edens v. City of Columbia*,[13] indicating the reach of the constitutional provision. This decision is not only of importance in considering any statutory solution of the maldistribution problem, such as that proposed for South Carolina in 1954;[14] it also has implications for the statutory efforts to deal with other water allocation problems, such as that in the law governing underground waters.[15]

The articles of Mr. Harman[16] and Mr. Toal,[17] while they do not deal as intimately with high governmental policy making in water resources and environmental control law, discuss problems that are of great concern to the general public. Mr. Harman studies, with particular reference to Lake Murray, the problem of drawing the line between the rights of members of the public enjoying boating and fishing privileges on navigable lakes and the rights of riparian owners thereon to control waters below the high water mark. Mr. Toal deals with the water law area that has been historically the most active breeder of litigation, the extent of the privilege of a landowner to rid himself of unwanted surface water.

13. 228 S.C. 563, 91 S.E.2d 280 (1956).
14. REPORT OF THE WATER POLICY COMMITTEE TO THE GENERAL ASSEMBLY, A NEW WATER POLICY FOR SOUTH CAROLINA (1954). The report recommended shifting from the riparian system to a modified appropriation system, under which a State Board of Water Commissioners would grant permits for water use.
15. *See* p. 63 *infra*.
16. *See* p. 71 *infra*.
17. *See* p. 82 *infra*.