



## **Basic Water Law**

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Because of the many resources available on the topic of water rights in North Carolina, including its coverage as a subject at the most recent Real Property Section Meeting, this article will cover some of the basic theory of water law instead of focusing solely on North Carolina water law. As more and more people move into our state from other areas of the country, having a basic understanding of the theory of water rights will allow us to better explain our system of water rights by contrasting them to what others may be accustomed.

Water rights are known as usufructuary (e soo fruck choo ary) rights which are rights to enjoy something owned by another and to draw from it all the profit, utility and advantage that it may produce without altering its substance. It is a right entitled to legal protection, even though it is a right of use and not ownership unless the water is reduced to possession, in which case it becomes personal property.

Water rights vary from region to region and from state to state. In the eastern part of the country, including North Carolina, we refer to water rights as riparian rights, which means that the water right is acquired as the result of ownership of an adjoining tract of land. In many western states, especially interior states, water rights are referred to as prior appropriation rights and not riparian rights. There are also states that have hybrid systems of riparian rights and prior appropriation rights. Prior appropriation rights are not associated with the ownership of land adjoining the body of water, but rather with a land owner's use of water. To acquire a prior appropriation right, a land owner must properly appropriate water for use on the land. Whether an appropriation is proper is dependent on various factors including the availability of other water, withdrawal or diversion of the water and that its use is for a beneficial purpose. Prior appropriation rights must be continuously exercised or they will be lost. Any system of water rights, however, boils down to an equitable manner of allocating the use of water.

There is a distinction between the allocation of consumptive rights and the allocation of non-consumptive rights in the use of water. Non-consumptive rights concern the use of water that is neither consumed nor removed such as recreational use or transportation. This right is dependent on whether the water is navigable. Consumptive rights vary depending on the category of water.

There are four categories of water: 1. confined surface water, 2. diffused surface water, 3. water in distinct underground streams and 4. percolating groundwater. Confined surface water is anything confined by banks, beds or shores. Diffused surface water is unconfined water such as rain runoff, melting snow and ice; diffused surface water becomes either confined surface water or percolating groundwater depending upon drainage. Percolating groundwater is the water that seeps and flows through the soil but without defined channels. Wherever water is found, it is physically related to all other water. The law, however, has traditionally categorized water and each category carries its own rules and rights.

Rights to confined surface water in a riparian right jurisdiction allows all adjoining property owners to a body of water to make reasonable consumptive use of the water. All adjoining owners have equal rights to remove or use the water. This right, however, does not allow the owner to divert the water from its natural stream or to use so much water that downstream owners are materially impacted. In a prior appropriation jurisdiction, water is considered a more scarce resource. A prior appropriation right is acquired by diverting water from its

source on the lands of another. The amount of water a land owner has a right to use is limited by various factors, and rights to water wasted is forfeited. Competing land owners have different priorities to water diverted from the source so that if there isn't enough water to satisfy all land owners, the first owner to acquire a water right has superior rights to those owners that appropriated water later.

Rights to distinct underground streams are generally governed by the same rules that govern confined surface streams. Percolating ground water has become the predominate source of water for consumptive use. There are several systems that govern the use of percolating ground water. The most prominent system and the one in affect in North Carolina is the American Rule (or the Reasonable Use Rule) which recognizes that the water beneath the ground belongs to the landowner but restricts the use of the water for the benefit of the land from which it is drawn. This rule evolved from the Absolute Ownership Rule derived from English Common Law, which is still in effect in a few states. The evolution to the American Rule in most states resulted from the recognition that percolating ground water knows no boundaries. Several states follow the Correlative Rights rule which allows the land owners over a common pool to share the ground water proportionately. Other systems include the Restatement of Tort Rule and Statutory rules.

Diffused surface water is typically not useful and serves no consumptive purpose. The English Common Law applied the Common Enemy Rule to diffused surface water which assumed that this category of water was a common enemy of all landowners allowing each owner to do whatever they desired to protect their property without liability to any other landowner. Many states apply the Civil Law Rule to diffused surface water which recognizes that water will flow wherever it wants to go, and a landowner could not change the natural drainage of water. A landowner that owned lower land would have to accept the runoff from other landowners. Also, an upper landowner could not increase the drainage flow to lower land owners. North Carolina followed a modified version of this rule until the 1977 case of Pendergrast v. Aiken, 293 NC 201 (1977). After the Pendergrast case, North Carolina followed a version of The Reasonable Use Rule, which is the third way to treat diffused surface water. The Reasonable Use Rule is based more in tort law than real property law. Under this rule, a landowner is entitled to the reasonable use of their land and can therefore change the flow of drainage that could reasonably impact other landowners. If other landowners are damaged, they have the option to bring a suit alleging that the damage is substantial and unreasonable.

The legal categorization of waters based on its location has resulted in an evolution of rules that have varied by state. While there is no real need to know the laws of other states, it is helpful to have a general idea when explaining our system of water laws to buyers from other areas of the country.