



Members Only

AN INFORMATIONAL BRIEF PREPARED FOR MEMBERS OF THE OHIO GENERAL ASSEMBLY BY THE LEGISLATIVE SERVICE COMMISSION STAFF

Volume 127 Issue 10
December 20, 2007

Ohio Law Governing Ground Water Ownership and Allocation

PREPARED BY: JILL ROWLAND, LSC STAFF ATTORNEY
ERIC VENDEL, LSC STAFF ATTORNEY
REVIEWED BY: MARCIA A. COOPER, DIVISION CHIEF

Introduction

Ohio's ground water is one of the state's most valuable natural resources and supports not only human life, but also the capacity for economic growth. Therefore, it is not surprising that conflicts among competing water users are common occurrences. Especially when such a conflict arises, it is useful to understand how Ohio law governs issues related to the use of ground water.

Reasonable use rule

Until 1984, the rule in Ohio was that one had no right to ground water; in other words, if a landowner's activities on adjacent land interfered with a neighbor's ability to withdraw ground water from beneath the neighbor's land, the neighbor had no legal redress against the interference.¹ In 1984, the Ohio Supreme Court abolished this rule and instead adopted the rule of reasonable use, specifically § 858 of the Restatement (Second) of Torts of the American Law Institute.² In 1990, the Ohio General Assembly enacted a bill that brought Ohio's statutory law into accord with the Restatement (Second) of Torts regarding the reasonableness of a use of water.³

The determination of the *reasonableness* of a use of water depends on a consideration of the interests of the person making the use, of any person harmed by the use, and of society as a whole.⁴ "Person" includes a political subdivision of the state such as a municipal corporation.⁵

The determination of the reasonableness of a use of water depends on a consideration of the interests of the person making the use, of any person harmed by the use, and of society as a whole.



Furthermore, in accordance with § 858 of the Restatement (Second) of Torts, all of the following factors must be considered, without limitation, in determining whether a particular use of water is reasonable: (1) the purpose of the use, (2) the suitability of the use to the watercourse, lake, or aquifer, (3) the economic value of the use, (4) the social value of the use, (5) the extent and amount of the harm it causes, (6) the practicality of avoiding the harm by adjusting the use or method of use of one person or the other, (7) the practicality of adjusting the quantity of water used by each person, (8) the protection of existing values of water uses, land, investments, and enterprises, and (9) the justice of requiring the user causing harm to bear the loss.⁶ Thus, courts must resolve ground water disputes by evaluating the facts of a particular case in accordance with the balancing factors enumerated above.

Under common law governing disputes involving competing water uses, a determination regarding whether a use of water is reasonable may be based in part on which use occurred first. The Revised Code recognizes this common law and specifies that, in certain cases, a determination regarding which water use occurred first is dependent on compliance with certain statutory registration requirements governing water use.⁷ In addition, it provides that any person who owns a facility that has the capacity to withdraw waters of the state in an amount

greater than 100,000 gallons per day from all sources and certain other facilities located in ground water stress areas must register with the Chief of the Division of Water in the Department of Natural Resources.⁸

In any determination of reasonable use of water under common law in which prior use is a factor, it is conclusive that one use is prior to another in the quantity claimed if the date of registration of one facility providing such use is prior to that of another facility. But, if an issue of prior use is a factor in a water dispute and the registration requirements do not apply, the determination of prior use must be based on historical information and documentation provided by any person.⁹

The application of the rule of reasonable use was affirmed in 2005 by the Supreme Court of Ohio. The Court agreed to answer the question of whether an Ohio homeowner has a property interest in so much of the ground water located beneath the land owner's property as is necessary to the use and enjoyment of the owner's home. The federal Sixth Circuit Court of Appeals asked the Supreme Court of Ohio to clarify that question of state law with regard to cases before the federal court. In the case deciding the question, the Court upheld the rule of reasonable use and stated that the rule protects property rights in ground water, rather than limiting them, because ground water rights are a separate right in property.¹⁰ Furthermore, the

Ohio land owners have a property interest in the ground water under their land; governmental interference with that right can constitute an unconstitutional taking.



Court held that “. . . Ohio landowners have a property interest in the ground water underlying their land and that governmental interference with that right can constitute an unconstitutional taking.”¹¹

Water resources inventory

In addition to the above provisions concerning reasonable use, the Revised Code requires the creation of a water resources inventory that may be useful for planning purposes related to ground water supply. The Chief of the Division of Water must develop and maintain, in cooperation with local, state, federal, and private agencies and entities, the water resources inventory for the collection, interpretation, storage, retrieval, exchange, and dissemination of information concerning the water resources of Ohio, including, but not limited to, information on the location, type, quantity, and use of those resources and the location, type, and quantity of consumptive use and diversion of the water resources.¹² The water resources inventory also must include, without limitation, information to assist in determining the reasonableness of water use and sharing under common law, promoting reasonable use and development of water resources, and resolving water use conflicts. All agencies of the state must cooperate with the Chief in the development and maintenance of this inventory.

Registration and reporting requirements for certain water withdrawal facilities

Any person who owns a facility that has the capacity to withdraw waters of the state in an amount greater than 100,000 gallons per day from all sources must register the facility with the Chief within three months after the facility is completed.¹³ The Chief may establish a lower threshold withdrawal capacity at which registration is required regarding the withdrawal of water in a ground water stress area. The Chief may determine that an area is a ground water stress area in accordance with standards and criteria that he must establish by rule. A person who owns a registered facility must file a report annually with the Chief listing the amount of water withdrawn per day by the facility, the return flow per day, and any other information that the Chief may require by rule.

Permit requirements for certain diversions and withdrawals

Further, the Revised Code requires a permit to be obtained for certain diversions of water and requires a different permit to be obtained for certain withdrawals of water. No person may divert more than 100,000 gallons per day of any waters of the state out of the Lake Erie or the Ohio River drainage basin to another

Any person who owns a facility that has the capacity to withdraw more than 100,000 gallons per day of the waters of the state must register the facility with the Chief of the Division of Water within three months after the facility is completed.

Ohio law requires a permit to be obtained for certain diversions of water and requires a different permit to be obtained for certain withdrawals of water.



basin without having a permit to do so issued by the Director of Natural Resources.¹⁴

Additionally, state law prohibits, with certain exceptions, a person from allowing a facility that the person owns to withdraw waters of the state in an amount that would result in a new or increased consumptive use of more than an average of 2,000,000 gallons of water per day in any 30-day period without first obtaining a permit from the Director.¹⁵ “Consumptive use” means a use of water resources, other than a diversion, that results in a loss of that water to the basin from which it is withdrawn and includes, but is not limited to, evaporation, evapotranspiration, and incorporation of water into a product or agricultural crop.¹⁶

A person who wishes to obtain a consumptive use permit must submit an application containing specified information to the Director.¹⁷ The Director cannot approve an application for a consumptive use permit if the Director determines that any of the following criteria applies:

(1) Public water rights in navigable waters will be adversely affected.

(2) The facility’s current consumptive use, if any, does not incorporate maximum feasible conservation practices as determined by the Director, considering available technology and the nature

and economics of the various alternatives.

(3) The proposed plans for the withdrawal, transportation, development, and consumptive use of water resources do not incorporate maximum feasible conservation practices as determined by the Director, considering available technology and the nature and economics of the various alternatives.

(4) The proposed withdrawal and consumptive uses do not reasonably promote the protection of the public health, safety, and welfare.

(5) The proposed withdrawal will have a significant detrimental effect on the quantity or quality of water resources and related land resources in this state.

(6) The proposed withdrawal is inconsistent with regional or state water resources plans.

(7) Insufficient water is available for the withdrawal and other existing legal uses of water resources are not adequately protected.¹⁸

The Director may hold public hearings regarding an application for a consumptive use permit and must approve or deny a permit within a time period established by rule.¹⁹ In addition, the Director must determine the period for which each approved permit will be valid, which period cannot extend beyond the life of the project as stated in the application.²⁰



Relevant authority of Chief of Division of Water

The Revised Code requires the Chief of the Division of Water to hold meetings or public hearings, whichever is considered appropriate by the Chief, to assist in the resolution of conflicts between ground water users. The meetings or hearings must be called upon written request from boards of health of city or general health districts or certain other authorities having the duties of a board of health, boards of county commissioners, boards of township trustees, legislative authorities of municipal corporations, or boards of directors of conservancy districts. In addition, a meeting or public hearing may be called by the Chief upon the request of any other person or at the Chief's discretion.²¹

At a meeting or hearing, the Chief must collect and present the available technical information relevant to the conflicts and to the ground water resource. The Chief must prepare a report and may make recommendations, based on the available technical data and the record of the meetings or hearings, about the use of the ground water resource. In making the report and any recommendations, the Chief may consider the factors established in the Revised Code for determining whether a particular use of water is reasonable

as discussed above. The technical information presented, the report prepared, and any recommendations made must be presumed to be prima-facie authentic and admissible as evidence in any court.²²

The Revised Code also authorizes the Chief to conduct basic inventories of the water and related natural resources in each drainage basin in the state and to develop a plan on a watershed basis that will recognize the variety of uses to which water may be put and the need for its management for those uses. This authority is in addition to the requirement that the Chief develop a water resources inventory as discussed above. Also under state law, the Chief must perform ground water gauging and may contract with the United States government or any other agency for the gauging of ground water within Ohio. Primarily with respect to ground water quantity, the Chief may collect, study, map, and interpret all available information, statistics, and data pertaining to the availability, supply, use, conservation, and replenishment of the ground waters in the state in coordination with other state agencies. Finally, primarily with regard to water quantity and availability, the Chief may cooperate with and negotiate for the state with any federal agency or any agency of this state or another state pertaining to the water resources of Ohio.²³

The Chief of the Division of Water must hold meetings or public hearings to assist in the resolution of conflicts between ground water users.





Endnotes

- ¹ *Frazier v. Brown*, 12 Ohio St. 294 (1861).
- ² *Cline v. American Aggregates Corporation*, 15 Ohio St.3d 384, 474 N.E. 2d 324 (1984).
- ³ Sub. H.B. 476 of the 118th General Assembly, which is codified as R.C. §§ 1521.16 and 1521.17.
- ⁴ R.C. § 1521.17.
- ⁵ R.C. § 1521.01.
- ⁶ R.C. § 1521.17.
- ⁷ *Id.*
- ⁸ R.C. § 1521.16.
- ⁹ R.C. § 1521.17.
- ¹⁰ *McNamara v. Rittman*, 107 Ohio St.3d 243, 246-247; 838 N.E. 2d 640, 646 (2005).
- ¹¹ *Id.* at p. 249.
- ¹² R.C. § 1521.15.
- ¹³ R.C. § 1521.16. “Waters of the state” includes all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and other bodies or accumulations of water, surface and underground, natural or artificial, regardless of the depth of strata in which underground water is located, that are situated wholly or partly within or border on this state or are within its jurisdiction. R.C. §§ 1501.30(A)(6) and 1521.01(A).
- ¹⁴ R.C. § 1501.32.
- ¹⁵ R.C. § 1501.33(A).
- ¹⁶ R.C. § 1501.30(A)(1).
- ¹⁷ R.C. § 1501.33(A).
- ¹⁸ R.C. § 1501.34(A).
- ¹⁹ R.C. § 1501.34(B) and (C).
- ²⁰ R.C. § 1501.34(B).
- ²¹ R.C. § 1521.03.
- ²² *Id.*
- ²³ *Id.*

**PUBLISHED BY THE OHIO
LEGISLATIVE SERVICE
COMMISSION STAFF**

9th Floor
Vern Riffe Center
Columbus, Ohio
614/466-3615

Interim Director
Mark C. Flanders

Contributing Authors
Jill Rowland,
LSC Staff Attorney

Eric Vendel,
LSC Staff Attorney

Reviewer
Marcia A. Cooper,
Division Chief

Layout & Design
Jeanette Cupp