

Notre Dame Law School  
Fall 2023  
Classroom: 1315 Biolchini  
Weds/Thurs 2:00-3:15pm

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## WATER LAW

*"Whiskey is for drinkin'. Water is for fightin' over."*

- Unknown; commonly but erroneously attributed to Mark Twain.

This course provides an overview of American water law and policy. Water is an essential resource, yet the law that deals with its protection and allocation is neither straightforward nor consistent across the fifty states. Just as population growth and industrial expansion have strained the nation's limited freshwater supplies, so also have they tested the laws established to manage these supplies. Today water law is called upon not only to resolve disputes among competing users, but also to help maintain adequate supplies of clean water in the face of widespread and chronic pollution, disappearing aquifers, and growing demand. In this course, we will examine these issues by studying, among other things, the classic water allocation doctrines of riparianism and prior appropriation (as well as variations that apply to groundwater), interstate controversies over shared water resources, public rights and interests in the provision and protection of water resources, and the law governing the major institutions and organizations involved in water allocation and management.

### **Course materials:**

- The required casebook is Adler, Craig & Hall, MODERN WATER LAW: PRIVATE PROPERTY, PUBLIC RIGHTS, AND ENVIRONMENTAL PROTECTIONS (Foundation, 2<sup>nd</sup> ed., 2018). All page numbers on the reading schedule below refer to this casebook.
- From time to time, I may distribute other materials via email, so please check your account often.
- I will also maintain a bare-bones course website at [sites.nd.edu/bruce-huber](https://sites.nd.edu/bruce-huber). The current course syllabus, slides, supplemental readings, etc., will be posted there.

### **Course requirements:**

- 40% (yes, 40%!) of your grade will be based on your class participation, in two respects:
  - Weekly question/comment. Beginning August 30, once per week you must submit by email some comments or questions about the assigned reading. You may raise questions about the reading assignment, or you may write a few sentences about what you found most interesting, confusing, counter-intuitive, etc. It only needs to be a paragraph long, but it should reflect thoughtful engagement with the entire reading assignment. It must arrive in my inbox no later than 8:00am on the day of the relevant class.
  - Class discussion. This is not primarily a lecture course. Our class meetings presuppose that you are thoroughly prepared for a productive discussion. This includes careful reading, attentive comments/questions, and a willingness to speak to the class about what you learn from your independent research. In grading your participation, I will also take into account your punctuality and attendance.

- 60% of your grade will be based on a paper. You must identify your topic, prepare a one-page outline and a one-page annotated bibliography, and get my approval on these materials by September 28. Please allow at least 48 hours for me to review these items. The requirements for the paper depend on whether you are enrolled for two or three credits.
  - Two credits. You must write a polished research paper of at least 6,000 words in length on a significant legal question in water law.
  - Three credits. You must write a substantial research paper, at least 10,000 words in length, that conforms to the Upper Level Writing Requirement as set forth in Section 4.3.3 of the Hoynes Code. The paper must address a significant legal question in water law.
  - Further instructions and sample topics will be provided in class.
  - Please note that I will not be able to read and provide feedback on entire drafts during the semester. If you'd like comments on your writing, please send no more than one page of text at a time and allow a full 7-10 days for a reply.

### **TENTATIVE SCHEDULE OF TOPICS AND READING ASSIGNMENTS**

Aug 23-24. No class.

Aug 30. **An Overview of Water Law in 75 Minutes**. No reading assignment.

Aug 31. **An International Point of View**. Guest lecture with Prof. Dr. Josephine van Zeben.

Sept 6 & 7. **Riparianism**. Read pp. 37-55, 64-73, 77-100.

Sept 13 & 14. **Prior Appropriation**. Read pp. 111-123, 128-170, 192-202.

Sept 20. **Groundwater**. Read pp. 215-265.

Sept 21. **Permit systems**. Read pp. 281-332.

Sept 27 & 28. **Federal and Tribal Water Rights**. Read pp. 463-503.

\*\*\* October—no class—write your paper! \*\*\*

Nov 1 & 2. **Interstate Disputes**. Read pp. 533-606 (you may skim pp. 566-578).

Nov 8 & 9. **Dams, Hydropower, and Reclamation**. Reading assignment will be sent via email.

Nov. 15. **Navigable Waters**. Read pp. 343-399 (you may skim pp. 350-379).

Nov 16. **The Public Trust Doctrine**. Read 401-434. Skim pp. 434-462. Read *Gunderson v. Indiana*, 90 N.E. 3d 1171 (Ind. 2018).

Nov 29 & 30. **Regulating Water Quality**. Read pp. 677-718 and *Sackett v. EPA* (U.S. 2023).

Dec. 4 & 5 (Mon-Tues). **Takings**. Read pp. 865-911.

Dec. 15 by 11:59pm. **Deadline for paper submission**.