IL Agriculture & Water Law

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Three general ag issues …

1. Getting rid of excess water (drainage law)
2. Landowners’ rights to dig wells and pump ground water for agricultural uses
3. Riparian landowners’ rights to withdraw water from a stream

So … lets look at each of these in turn and then do some reflecting
**IL Drainage Law Overview**

- *Local* Ordinances are important, e.g., Storm-water Detention/Management Ordinances
- *State* laws are important, especially Court Decisions the Illinois Drainage Code
- *Federal* laws are important, *e.g.*
  - Wetlands provisions of ‘85 Farm Bill: Tie wetlands protection to Ag Program Benefits
  - Clean Water Act: Drainage improvements may require a Section 404 Permit from Army Corps of Engineers
State Drainage Law

Civil Law Rule (Landowners entitled to natural drainage) *plus* “Good Husbandry” Rule

- Higher landowner entitled to natural drainage and can improve drainage in the interests of good husbandry
  - e.g. drain or fill ponds
  - e.g. accelerate flow by tiling or ditching in course of natural drainage
- See *Peck v. Herrington* (IL Sup Ct, 1884)
- But there are limitations . . .
Limitations on Ag Drainage Improvements

- Can *not* bring water in from another watershed
- *Must* discharge at point where water naturally enters lower land

Possibility of Other Limitations:
- Local Ordinances, e.g., storm-water detention
- Federal Laws, e.g., wetlands protection
Non-Ag Development

- No water from another watershed (same)
- No discharge unless at natural drainage point (same)
- No unreasonable increase in flows (New twist)
  - *Templeton v. Huss* (IL Sup Ct, 1974)
- But also remember . . .
  - Federal Wetlands Protections may apply, e.g., a permit from the Corps may be required
  - Local Ordinances may apply, e.g., storm-water detention requirements
2009 IL Supreme Court Case
Halpin v. Schultz (IL Sup Ct, 2009)

- **Key facts:**
  - Grundy County dispute involving repairs to drainage tile
  - Upper landowner needed to enter lower owner’s land to make repairs to drainage tile running from higher land across lower land

- **IL Supreme Court confirmed the following principles:**
  - Upper landowner can enter lower land to repair tile
  - Lower landowner entitled to
    - Damages caused by negligence, if this is a “mutual drain”
    - All damages, if this is an “extension” of upper landowner’s drain
Drainage Law Summary

- Local, State and Federal laws are important
- Basic State Law of Drainage: Civil Law Rule
  - Additional rights to improve natural drainage
  - Limitations on drainage improvements
- Statutory Enlargements:
  - Extending Covered Drain; Mutual Drains
    - 2009 IL Supreme Court Case: Halpin v. Schultz
- Drainage Districts can be created (Drainage Code)
- Federal Environmental Considerations
  - Swampbuster provisions of the Food Security Act
  - Section 404 of the Clean Water Act
IL Water Use Law (Groundwater)

- **Doctrine of Reasonable Use**
  - IL Water Use Act of 1983
  - Landowners (e.g., farmers) can withdraw … a fair share for artificial needs (e.g., irrigating crops, watering commercial livestock)
  - If planning a new well pumping > 100,000 Gal/Day, must notify SWCD
    - SWCD shares info but has no real power
- **IL Courts** resolve “fair share” disputes
- **Water Authority**
  - Has more regulatory power, but …
  - Little of IL within boundaries of Water Auth.
IL Water Use Law (Streams)

- **Riparian Doctrine – Reasonable Use Rule**
  - Fashioned by courts over centuries
  - Riparian owners (e.g., farmers next to stream) can make … reasonable use of stream for artificial uses
    - Irrigating crops
    - Watering commercial livestock
- **Courts resolve “what is reasonable use” disputes**
Implications for Agriculture

- Accessing water for irrigation, commercial livestock
  - Few legal hurdles before farmer can access water
  - But the same is true for any landowner
- Future planning by farmers, other water users
  - Planning for and investing in operations requiring large volumes of water is problematic
  - Hard to know what your “fair share” is, up front
  - As others also tap into your water source, your “fair share”, whatever it was initially, is likely to decline
  - Since nobody is managing the whole water resource, your source of water may become depleted
Ag Implications (Cont’d)

- IL has historically been a water surplus state
  - Generally, enough water to go around, for ag and others
  - Disputes over water use have been relatively rare
- But the future may be more problematic
  - Need for water continues to increase
    - Growing population
    - New uses, e.g., ethanol plants, recreation
    - Recognition of ecological value of minimum stream flows
  - Uncertainty re effects of climate change on rainfall
The Big Question

Should IL Water Law further evolve, e.g., by

- Recognizing the connectedness between diffused surface water, stream water, and groundwater;
- Providing greater guidance regarding the rights of competing water users and uses; and
- Creating other tools to manage this increasingly scarce resource in ways that are sustainable?
Thank you!

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