

**BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION
NASHVILLE, TENNESSEE**

IN RE:

**PETITION OF ISHA FOUNDATION, INC.
FOR DECLARATORY JUDGMENT**

DOCKET NO. 26-00034

REPLY TO CONSUMER ADVOCATE’S MOTION TO DISMISS AND BRIEF ON THE MERITS

The ISHA Foundation, Inc. (“ISHA”) submits the following reply to the Motion to Dismiss and the brief on the merits filed by the Consumer Advocate Division of the Office of the Attorney General (“Consumer Advocate” or “CAD”).¹ The Consumer Advocate’s Motion argues that ISHA’s Petition for a Declaratory Judgment should be dismissed because the judicial doctrine of *res judicata* prohibits ISHA from asking the Commission to correct an error of law made in Docket 25-00018 and similarly prohibits the Commission from fixing the mistake. The CAD also filed a brief on the merits repeating its *res judicata* argument and contending in addition that ISHA must

¹ While the Consumer Advocate has filed two briefs, one in support of its Motion to Dismiss and the other addressing other issues in this case, ISHA has filed one brief, a “Motion for Ruling on the Pleadings and Uncontested Facts.” ISHA’s brief asks the Administrative Judge to rule without further delay that, based on well-established case law, the Commission has no authority to require ISHA to obtain a certificate to operate within the exclusive service area of the Warren County Utility District (“WCUD”). ISHA’s brief was submitted to support the Petitioner’s request for a quick ruling, not to repeat arguments raised in the Petition about whether ISHA’s service to tenants living on the campus requires a certificate or to speculate about new facts that may arise when WCUD responds to ISHA’s subpoena. If this matter proceeds to a hearing, those other issues and new facts will certainly be discussed, and ISHA may ask to file a post-hearing brief.

obtain a certificate of convenience and necessity to provide water to tenants living on the ISHA campus. In this Reply, ISHA responds to both the Motion to Dismiss and the brief on the merits.

1. **The Commission “is and must be free to change its mind” as long as the agency adequately explains its reasons for doing so.**

As an administrative agency, the Commission is not bound by the juridical doctrine of *res judicata*. United Cities Gas v. Tennessee Public Service Commission, 789 S.W2d 256 (Tenn. 1990). Commissioners come and go over time and, as a result, legal opinions and agency policies change as well. As the Tennessee Supreme Court wrote in the United Cities decision, “The lower court took the approach that the Public Service Commission is free to reverse course if public policy demands it. Undoubtedly this is true....” Id., at 259 (emphasis added). The Commission, of course, may not act in an arbitrary and capricious manner nor make decisions that are not supported by material and substantial evidence, but the agency is not bound by its prior decisions. As the agency itself wrote, using words that the Supreme Court quoted with approval, “While an administrative agency is not legally bound by its prior decisions, the Commission should give substantial weight to a recent order which addresses in detail the same facts and legal arguments presented here.” Id., at 258 (emphasis added). Echoing what the Commission had written, the Court concluded its opinion in the United Cities case by explaining a well-understood principle of administrative law, a principle that remains in effect today. “The administrative body is and must be free to change its mind,” the Court said, “and, if there is substantial and material evidence to justify the change, the courts have no reason to overturn the new holding.” Id., at 259 (emphasis added).

The United Cities case illustrates the point that, even after the Commission has ruled against a party in one case and the same party later presents the same facts and arguments to the

agency a second time, the Commission is not prohibited from changing its mind as long as the agency explains the reason for the change. As explained in the United Cities opinion, the United Cities Gas Company argued to the Commission in 1985 that the company should be able to include in its rate base the full price it had paid to acquire the Franklin gas system, a price that was approximately twice the book value of the system. The Commission ruled against the utility, holding that United Cities could only include in rate base the book value of the Franklin system. Two years later, United Cities relitigated the same issue, hoping that the Commission would change its ruling. As the Commission explained, “No new evidence or arguments” were presented in the second case and “both sides relied on the record developed in the previous hearing.” *Id.*, at 257. The Commission again rejected the utility’s argument. In the second order, the Commission recognized that the agency could, if it chose, reverse its earlier decision on the value of the Franklin system. “[A]n administrative agency is not legally bound by its prior decisions,” the Commission wrote, adding that the agency “should give substantial weight to a recent order which addresses in detail the same facts and legal arguments presented here.” *Id.*, at 258. The agency heard the same facts and legal arguments twice and ruled both times against the utility’s position, not because of the doctrine of *res judicata* but because the agency believed it had made the right decision. Here, the Administrative Judge issued a ruling in Docket 25-00018 that ISHA is required to obtain a certificate. Now ISHA is asking the Administrative Judge to address the issue again. Like the Commission in the United Cities case, the Administrative Judge may make the same decision again, or she may change her mind because the agency “is not legally bound by its prior decisions.” Unlike the United Cities case, however, in which the Commission heard the same legal arguments in both 1985 and 1987, the Administrative Judge did not hear or address in Docket 25-00018 the legal argument that the Commission has no jurisdiction to award a certificate to another entity to

operate within WCUD's exclusive service area. That jurisdictional issue is now squarely before the agency in this docket and, as the Consumer Advocate acknowledges in its brief, that issue "must be addressed."² That is what ISHA is asking the Administrative Judge to do.

ISHA is asking the Commission to change its ruling on an issue of law. In Docket 25-00018, the Administrative Judge directed ISHA to obtain a certificate of convenience and necessity before proceeding with the "Yogi Golf" development, but the Administrative Judge overlooked what the Commission's own lawyers have described as "well settled" law that the agency "has no jurisdiction to issue a CCN to an entity to provide service ... within the confines of a utility district." ISHA's initial brief at 7. ISHA did not appeal the Judge's Initial Order which became a Final Order of the Commission by operation of law. Because of the Judge's mistake, ISHA is now stuck in a bureaucratic stalemate. It has been ordered to seek a certificate from the Commission, but the Commission has no authority to grant one.

What does the Consumer Advocate believe that ISHA should do? The CAD does not say. While implicitly acknowledging the Administrative Judge's error,³ the Consumer Advocate argues

² After citing several court opinions holding that utility districts have exclusive service areas, the Consumer Advocate writes, "These authorities establish that WCUD's exclusive service rights must be addressed in determining whether ISHA may lawfully operate a competing water system." CAD's brief on the merits, at 7 (emphasis added). The Consumer Advocate is correct. The case law is clear that the jurisdictional issue "must be addressed" before the Commission can order ISHA to obtain a certificate. That did not happen in Docket 25-00018. It needs to happen now.

³ The Consumer Advocate does not defend the Administrative Judge's decision and, by not defending it, implicitly admits that the decision was wrong. In twenty-seven pages of briefing, the CAD offers this one, ambiguous comment: "The Consumer Advocate does not contend that a CCN, standing alone, necessarily resolves WCUD's exclusive service rights. The Commission must consider the separate statutory restrictions governing utility district territory, including the limitations recognized in *W. Wilson Utility District*." Consumer Advocate's Brief on the merits at 17. In other words, the CAD acknowledges that the Commission has no authority to grant ISHA a certificate within WCUD's service area unless one of the "statutory restrictions" or the "restrictions" recognized in the *West Wilson* case applies. What are those exceptions to a utility district's exclusive service area? The CAD's brief on the merits (at 8) notes that a utility district may lose its exclusive service rights by giving "express permission, [making] contractual arrangements, waiver or laches." The CAD does not mention that a utility district may also lose its exclusive service rights if county officials find that the public requires "other or additional service." T.C.A. 7-82-301(a)(1). Those exceptions are also listed and discussed in detail in ISHA's initial brief at 7-9. As explained there, state statutes and court decisions hold that a utility district has the exclusive right to provide service within its service area unless (1) there is ruling by county officials that another provider is needed; (2) the utility district affirmatively agrees to allow another utility to provide service, as codified in T.C.A. 7-82-301(1)(a)(C); or (3), as occurred in one case, a court holds

nevertheless that the doctrine of *res judicata* prohibits ISHA from asking the Commission to fix the mistake made in Docket 25-00018 and similarly prohibits the Commission from granting relief. That is not the law. To repeat, the Commission “is and must be free to change its mind” as long as it adequately explains its reasons for the change. *Id.*, at 259. The explanation here is very simple: the earlier decision did not address the state statute and long line of cases holding that the Commission has no jurisdiction to authorize another utility to operate within a utility district’s service area. That explanation is reason enough for the agency to correct a clear and serious legal error. This is not a difficult issue.

2. The Commission’s has never required a landlord to obtain a CCN to provide utility service to tenants.

Even if WCUD agrees to give up a portion of its service area so that ISHA may be granted a CCN by the Commission, the Commission has a long-established policy of not regulating as a “public utility” a landlord who supplies utility service to tenants. As discussed in ISHA’s Petition, the Commission staff has conducted an extensive economic and legal analysis of the issues that would arise if the agency required a landlord to obtain a certificate in order to provide services to tenants in apartment buildings, condominiums, shopping centers and similar settings. The staff concluded that such service is not subject to regulation under Tennessee law.

[N]one of the submetering entities described in this report meet the definition of ‘public utility’ under this statute [T.C.A. 65-4-101] or relevant case law ... These submetering entities have been dedicated to a private, not public use. Nor are they operating under a privilege or franchise from a governmental entity. They do not have the power of eminent domain. Finally, submetering entities offer services to a limited, special class of people. This analysis can only conclude that

that the equitable doctrine of laches bars a utility district from claiming its exclusive service rights after the district failed for eight years to object to the provision of service by another utility. Does the Consumer Advocate believe that any of those exceptions applies to this case? They do not say, and their silence is eloquent.

currently the TRA is not authorized by law to regulate these submetering entities.

“Utility Submetering in Tennessee,” at 24-25 (emphasis added). A copy of the staff report is attached to the Petition.

This analysis is reflected in the Commission’s rules which define a “water utility” as an entity that distributes water “to or for the public for compensation.” Rule 1220-04-03-.03(2). A landlord is not offering service “to or for the public.” Similarly, as explained in the pre-filed testimony of ISHA’s witness, the water service proposed by ISHA is for private, not public use. It will only be offered to “members” of the ISHA community who live on the ISHA campus. ISHA’s witness will describe the physical and spiritual services that ISHA offers to its members and how those who wish to do so may lease lots and build houses on the ISHA campus. As the witness will also testify, ISHA will not charge these tenants for water service. The costs of providing that service will be recovered through revenue from lease payments and other revenue sources. In sum, ISHA’s proposed service will not be offered “to or for the public” nor will it be offered “for compensation.” Therefore, the treatment and distribution system providing water to Yogi Golf, will not be a “public utility” under the Commission’s rules. The service will be no different than water service provided by the owner of a multi-building apartment complex, shopping center or townhouse condominiums to tenants and owners who lease or own space on the owner’s property. None of those is classified and regulated as a public utility by the Commission.

The staff’s report and the definition of a “water utility” in the Commission’s rules are discussed in ISHA’s Petition at 3-4 but neither the staff report nor the agency’s definition of a water utility is mentioned in either of the CAD’s briefs. Instead, the Consumer Advocate argues

that ISHA has filed this Petition in the hope of taking advantage of a loophole in the law and escaping regulation as a public utility. See the CAD's brief on the merits at 9 and 16.⁴

That is incorrect. As the Petitioner has repeatedly explained, ISHA is stuck in a bureaucratic stalemate. Wishing only to build a development so its members can live on the campus and participate fully in ISHA's programs, ISHA has been ordered by the Commission not to proceed without a CCN, but ISHA is not able to obtain a certificate unless WCUD agrees to give up a portion of its legally protected service area. Therefore, ISHA has no choice but to ask the Commission for help. At the same time, ISHA is also asking WCUD to tell the Commission whether the utility district will agree to allow ISHA to obtain a certificate. If WCUD consents, ISHA believes that the Commission's long-standing practice of not regulating landlords should exempt ISHA from having to obtain a certificate. If the Commission rules otherwise, however, ISHA will obtain a certificate and proceed with its development. The important point is that ISHA will be able to go forward with the project one way or the other. ISHA is not looking for a regulatory loophole. It is looking to get unstuck.

CONCLUSION

For these reasons, the Administrative Judge should grant the Petition and correct the error of law made in Docket 25-00018. The facts are undisputed; the law is very clear. The Commission has no jurisdiction to order ISHA to obtain a certificate within WCUD's service area. There is no

⁴ Given the prohibitive cost of expanding WCUD's capacity, ISHA's only realistic option is to pump water from underground wells on the property, treat the water and provide it to the tenants. Such a system will be regulated by TDEC as a public water system, but ISHA does not require approval from WCUD. Under Tennessee law, a landowner has the right to use well water for any reasonable purpose on the owner's property. "Water Rights in Tennessee," 27 Tenn. L. Rev. 557 (1960). A copy of the article is attached. The Consumer Advocate describes this as a "regulatory gap" (CAD's brief on the merits, at 9) that the Commission should not permit. The CAD's concern is understandable, but their argument should be addressed to the General Assembly, not the Commission. There are hundreds if not thousands of situations in Tennessee where the cost of water service provided by a private owner to end users is not regulated by the government: commercial landlords, hotels, apartment buildings, public housing, trailer parks, campgrounds, marinas, homeowners' associations, condominiums, and other similar arrangements. ISHA's use of well water to provide service to tenants living on ISHA's property would be no different.

need for an evidentiary hearing. There is a need for ISHA to get relief.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Henry Walker", with a stylized, cursive script.

Henry Walker (B.P.R. 000272)
Bradley Arant Boult Cummings LLP
1221 Broadway, Suite 2400
Nashville, Tennessee 37203
Tel: (615) 252-2363
hwalker@bradley.com

Counsel for ISHA Foundation Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via electronic mail, and upon request, a copy sent by U.S. Mail to:

Karen Stachowski
Deputy Attorney General
Office of the Tennessee Attorney General
Consumer Advocate Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
Email: karen.stachowski@ag.tn.gov

This 1st day of October 2026.



Henry Walker (B.P.R. 000272)

CITATIONS:**Bluebook 22nd ed.**

Mahlon L. Townsend, Water Rights in Tennessee, 27 TENN. L. REV. 557 (1960).

ALWD 7th ed.

Mahlon L. Townsend, Water Rights in Tennessee, 27 Tenn. L. Rev. 557 (1960).

APA 7th ed.

Townsend, M. L. (1960). Water rights in tennessee. Tennessee Law Review, 27(4), 557-568.

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Townsend, Mahlon L. "Water Rights in Tennessee." Tennessee Law Review 27, no. 4 (1960): 557-568. HeinOnline.

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Mahlon L. Townsend, 'Water Rights in Tennessee' (1960) 27(4) Tennessee Law Review 557

MLA 9th ed.

Townsend, Mahlon L. "Water Rights in Tennessee." Tennessee Law Review, vol. 27, no. 4, Summer 1960, pp. 557-568. HeinOnline.

OSCOLA 5th ed.

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COMMENTS

WATER RIGHTS IN TENNESSEE

Tennessee, along with other states in this country, is confronted with pressing problems in the supply, distribution, use, and control of water.¹ Positive action in the immediate future is imperative! Most of the existing law of water rights in Tennessee is common law. Thus many of the current legal principles emanate from cases decided in the distant past when none of the present-day problems were apparent.² The time has now arrived, however, for the legislature to re-evaluate our existing water laws in the light of an ever-increasing population and expanding

1. Marquis, Freeman and Heath, *The Movement For New Water Rights Laws in the Tennessee Valley States*, 23 TENN. L. REV. 797 (1955); PUBLIC ADMINISTRATION SERVICE, PUBLIC WATER POLICY IN TENNESSEE 139 (1955), a study prepared for the Water Policy Commission of Tennessee by the Public Administration Service, Chicago, Illinois. This very comprehensive report, covering all aspects of the problem, together with recommendations made, should prove invaluable to those interested in this subject.

That water problems are not confined to Tennessee, but are engaging the attention of people throughout the country is evidenced by the ever-increasing number of studies, investigations, and hearings that are being held, together with the numerous reports, articles and other types of material being published. Listed below are but a few of the significant publications in this area.

- WATER RESOURCES IN THE SOUTHEAST, by the Louisiana Legislative Council, Report Number 5 (1955); STUDY OF THE RIPARIAN AND PRIOR APPROPRIATION DOCTRINES OF WATER LAWS (With Particular Reference to the Situation in Georgia) (1955), prepared by the Institute of Law and Government of the School of Law of the University of Georgia; ILLINOIS WATER RIGHTS LAW AND WHAT SHOULD BE DONE ABOUT IT (1958) by the Water Resources Committee of Illinois State Chamber of Commerce; LAW OF WATER ALLOCATION IN THE EASTERN UNITED STATES (1958), a publication of the papers and proceedings of a symposium held in Washington, D.C., in 1956, sponsored by the Conservation Foundation, and published by The Ronald Press Co., New York; HUTCHINS, IDAHO LAW OF WATER RIGHTS (1956), published by the Idaho State Department of Reclamation; WATER LAW CONFERENCE PROCEEDINGS (1955), sponsored by the School of Law of the University of Texas; WATER RESOURCES AND THE LAW (1958), published by the University of Michigan Law School; WATER RESOURCES LAW, Vol. 3 (1950), a report of the President's Water Resources Policy Committee; Milliman, *Water Law and Private Decision-making: A Critique*, II J. OF LAW AND ECONOMICS, (1959); POLICY AND PROCEDURE FOR THE DEVELOPMENT OF WATER RESOURCES (1959), a report of the hearings before the Committee on Public Works of the House of Representatives, First Session of the Eighty-Sixth Congress. An interesting non-technical discussion of the water problem as it concerns Tennessee, entitled *It's Summer '75: Is There Water?* by Gene Graham appeared in the December 6, 1956 edition of the newspaper, *The Nashville Tennessean*.
2. The following selected statutes from Tenn. Code Ann. (1956) relate to water and riparian rights: §§ 39-2204 to 39-2206; 39-4503; 39-2906 to 39-2907; 51-511 to 51-512; 53-2012; 65-2709; 70-301 to 70-323 (pollution); 65-2701 to 65-2704 (acquisition of water rights); 43-2201 to 43-2226; 51-510; 65-2202 to 65-2204; 54-1201 to 54-1207; 54-1701 to 54-1805; 54-1101 to 54-1131 (dams and other improvements); 53-802 to 53-809 (impounding water); 39-2901; 65-2101 to 65-2106 (obstructing navigation); 70-501 to 70-506 (drains and ditches); 70-601 to 70-623 (levees); 70-101 to 70-120 (miscellaneous navigation statutes); 68-101 to 68-111 (floating timber); 70-701 to 70-751; 70-801 to 70-809 (drainage and levee districts); 70-1801 to 70-1849 (watershed district); 70-2001 to 70-2004 (Water Resources Board).

agricultural, commercial and industrial activity. So, for the benefit of the legislature, and the bench and bar, and others are concerned with the present and future laws on the subject, this study will outline the present status of the Tennessee law on water and riparian rights.

For the purpose of this study, waters will be classified as either surface or subterranean waters. Surface waters will be further classified into flowing streams and diffused surface waters, such as result from rains and melting snows. Subterranean waters will be classified as either flowing streams or percolating water.

Since the rights and duties of both individuals and the public in general depend in many instances on who owns the property over, or in which, the water flows or exists, it is necessary in each instance to first examine the ownership aspects.

I. SURFACE WATERS

A. *Flowing Streams*. Ownership of land adjacent to or under the flowing stream is determined or limited by the navigable status of the stream.³ In this respect, Tennessee courts have made a distinction between those streams which are legally or technically navigable, and those which are navigable in fact.⁴ A stream is navigable in the legal or technical sense if it is suitable for the usual purposes of navigation⁵ as that term is employed in the ordinary sense.⁶ Tennessee expressly repudiates the common law test of navigability, *viz.*, that only those streams affected by the ebb and flow of the sea tides are navigable.⁷ Obviously, if this were the test, none of the streams in this state would be navigable. Instead of the common law test, the courts have adopted the civil law test: a stream is navigable if it is capable of being navigated in the ordinary sense of that term.⁸ Though the stream may not be navigable in the legal sense as determined by the civil law test, it still may be navigable in fact.⁹ Its navigability does not depend upon

3. *Elder v. Burrus*, 25 Tenn. 358 (1845); *State v. West Tenn. Land Co.*, 127 Tenn. 575, 158 S.W. 746 (1913); *Webster v. Harris*, 111 Tenn. 668, 69 S.W. 782 (1902); *Stuart v. Clark's Lessee*, 32 Tenn. 9 (1852); *Martin v. Nance*, 40 Tenn. 649 (1859).

4. *State v. West Tenn. Land Co.*, 127 Tenn. 575, 158 S.W. 746 (1913); *Webster v. Harris*, 111 Tenn. 668, 69 S.W. 782 (1902); *Miller v. State*, 124 Tenn. 293, 137 S.W. 760 (1911).

5. *Webster v. Harris*, 111 Tenn. 668, 69 S.W. 782 (1902).

6. *Miller v. State*, 124 Tenn. 293, 137 S.W. 760 (1911).

7. *Elder v. Burrus*, 25 Tenn. 358 (1845); *Sigler v. State*, 66 Tenn. 493 (1874); *Stuart v. Clark's Lessee*, 32 Tenn. 9 (1852); *State v. West Tenn. Land Co.*, 127 Tenn. 575, 158 S.W. 746 (1913).

8. *Sigler v. State*, 66 Tenn. 493 (1874); *Stuart v. Clark's Lessee*, 32 Tenn. 9 (1852).

9. *Webster v. Harris*, 111 Tenn. 668, 69 S.W. 782 (1902); *State v. West Tenn. Land Co.*, 127 Tenn. 575, 158 S.W. 746 (1913); *Stuart v. Clark's Lessee*, 32 Tenn. 9 (1852). But see *Irwin v. Brown*, 3 Tenn. Cas. 309 (Shannon 1889), wherein the court indicated that a stream not legally navigable, is not necessarily navigable in fact just because it had capacity for some type of transportation valuable to the public, such as floating logs.

any legislative act.¹⁰ Thus, a creek swollen by the rising waters of a large river may become navigable for a period of time¹¹ and so may a stream become deep enough during high water for large boats to navigate several miles inland.¹² However, the stream is not navigable if it is merely capable of floating logs downstream for short periods after heavy rains.¹³ A stream not in fact navigable cannot be declared navigable by the legislature if this will amount to a taking of the property of the riparian owners without compensation.¹⁴

If a stream is navigable in the legal or technical sense, ownership of the bed of the stream is in the public.¹⁵ Not only does the public possess all navigation rights but it may carry on other activities such as hunting and fishing which are incident to public ownership.¹⁶ The title of the riparian owners extends only to the ordinary low water mark.¹⁷ If the water later recedes or islands form in the bed of the stream the property remains that of the state.¹⁸

On the other hand, if the stream is only navigable in fact, the title to the land under the water is not in the public but in the riparian owners.¹⁹ However, their ownership is subject to a public easement for such navigation as the condition of the stream will permit.²⁰

A stream which is not considered navigable at all is subject to private ownership not encumbered with any rights in favor of the public.²¹ As will be pointed out later, even in this case the owner is subject to legal

10. *Southern Ry. Co. v. Ferguson*, 105 Tenn. 552, 59 S.W. 343 (1900).

11. *Sigler v. State*, 66 Tenn. 493 (1874).

12. See Note 10, *supra*.

13. *Allison v. Davidson*, 39 S.W. 905 (Tenn. Ch. App. 1896).

14. See Note 6, *supra*.

15. *State v. West Tenn. Land Co.*, 127 Tenn. 575, 158 S.W. 746 (1913); *Elder v. Burrus*, 25 Tenn. 358 (1845); *Goodwin v. Thompson*, 83 Tenn. 209 (1885); *Stuart v. Clark's Lessee*, 32 Tenn. 9 (1852); *Parmelee v. T. L. Herbert & Sons*, 13 Tenn. App. 101 (1930); *State v. Muncie Pulp Co.*, 119 Tenn. 47, 104 S.W. 437 (1907); *Webster v. Harris*, 111 Tenn. 668, 69 S.W. 782 (1902); *Cunningham v. Prevow*, 28 Tenn. App. 643, 192 S.W.2d 338 (1946).

16. *State v. West Tenn. Land Co.*, 127 Tenn. 575, 158 S.W. 746 (1913).

17. *Elder v. Burrus*, 25 Tenn. 358 (1845); *Goodwin v. Thompson*, 83 Tenn. 209 (1885); *Stuart v. Clark's Lessee*, 32 Tenn. 9 (1852); *Martin v. Nance*, 40 Tenn. 649 (1859); *Tallassee Power Co. v. Clark*, 77 F.2d 601 (6th Cir. 1935); *Nance v. Womack*, 2 Tenn. Cas. 202 (Shannon 1877); *Goodall v. T. L. Herbert & sons*, 8 Tenn. App. 265 (1928); *Holbert v. Edens*, 73 Tenn. 204 (1880).

18. *State v. Muncie Pulp Co.*, 119 Tenn. 47, 104 S.W. 437 (1907).

19. *Stuart v. Clark's Lessee*, 32 Tenn. 9 (1852); *Martin v. Nance*, 40 Tenn. 649 (1859); *Webster v. Harris*, 111 Tenn. 668, 69 S.W. 782 (1902); *State v. West Tenn. Land Co.*, 127 Tenn. 575, 158 S.W. 746 (1913); *Hurley v. American Enka Corp.*, 93 F. Supp. 98 (E. D. Tenn. 1950).

20. *Stuart v. Clark's Lessee*, 32 Tenn. 9 (1852); *Webster v. Harris*, 111 Tenn. 668, 69 S.W. 782 (1902).

21. *Miller v. State*, 124 Tenn. 293, 137 S.W. 760 (1911); *Webster v. Harris*, 111 Tenn. 668, 69 S.W. 782 (1902); *State v. West Tenn. Land Co.*, 127 Tenn. 575, 158 S.W. 746 (1913); *Allison v. Davidson*, 39 S.W. 905 (Tenn. Ch. App. 1896).

restrictions in regard to the manner in which he may use the water.

1. *Effect of Accretion, Erosion, Reliction and Avulsion.*

Although at any given time the extent of riparian property may be established, such property may increase or decrease in amount as a result of the streams' actions. Deposits of alluvion known as accretion, resulting from the gradual action of the stream, become the property of the riparian owner²² because the action is so slow and gradual that it is impossible to determine the source of the deposit.²³ Likewise, a riparian owner is subject to a decrease in his holdings through the erosive action of the stream.²⁴ However, land lost by erosion may be regained by accretion,²⁵ or if lost by submergence, it may be regained by reliction, a gradual recession of the water, leaving the land uncovered by water.²⁶ But accretions which replace the land previously washed away by erosion belong to the owner under the law of accretions and not by virtue to any claim to title to the land lost by the erosion.²⁷ Such accretions are apportioned between adjacent riparian owners with reference to lateral lines running in the most direct course to the channel from the lateral boundaries of the individual tracts affected by the accretion.²⁸ Non-riparian land may become riparian by erosive action on the intervening property,²⁹ and such land does not lose its riparian status by accretion rebuilding the land lost by erosion.³⁰ A long lapse of time during which lost land is covered with water is no bar to the riparian owner asserting title to the same if it reappears by reliction or accretion.³¹

Unlike the gradual action of accretion, reliction and erosion, avulsion is a violent and sudden change in the course of a stream.³² Here, title to

22. *Cunningham v. Prevow*, 28 Tenn. App. 643, 192 S.W.2d 338 (1946); *Tenn. Power Co. v. Clark*, 77 F.2d 601 (6th Cir. 1935); *Posey v. James*, 75 Tenn. 98 (1881); *State v. Muncie Pulp Co.*, 119 Tenn. 47, 104 S.W. 437 (1907); *Tallassee Power Co. v. Clark*, 77 F.2d 601 (6th Cir. 1935); *Parmelee v. T. L. Herbert & Sons*, 13 Tenn. App. 101 (1930); *Arkansas v. Tennessee*, 246 U.S. 148 (1918), a leading case on accretions.

23. *Cunningham v. Prevow*, 28 Tenn. App. 643, 192 S.W.2d 338 (1946).

24. *Cunningham v. Prevow*, 28 Tenn. App. 643, 192 S.W.2d 338 (1946); *State v. Muncie Pulp Co.*, 119 Tenn. 47, 104 S.W. 437 (1907).

25. *State v. Muncie Pulp Co.*, 119 Tenn. 47, 104 S.W. 437 (1907); *Stockley v. Cissna*, 119 F. 812 (6th Cir. 1902).

26. *McClure v. Couch*, 182 Tenn. 536, 188 S.W.2d 550 (1945); *State v. Muncie Pulp Co.*, 119 Tenn. 47, 104 S.W. 437 (1907); *Stockley v. Cissna*, 119 F. 812 (6th Cir. 1902).

27. *Cunningham v. Prevow*, 28 Tenn. App. 643, 192 S.W.2d 338 (1946); See Note, *Riparian Rights—Rights to Follow Accretions Across Fixed Boundary Line*, 19 TENN. L. REV. 862 (1947).

28. *Stockley v. Cissna*, 119 F. 812 (6th Cir. 1902); *Cunningham v. Prevow*, 28 Tenn. App. 643, 192 S.W.2d 338 (1946).

29. *Cunningham v. Prevow*, 28 Tenn. App. 643, 192 S.W.2d 338 (1946).

30. *Ibid.*

31. *Keel v. Sutton*, 142 Tenn. 341, 219 S.W. 351 (1920).

32. *State v. Muncie Pulp Co.*, 119 Tenn. 47, 104 S.W. 437 (1907); *Stockley v. Cissna*, 119 Tenn. 135, 104 S.W. 792 (1907).

riparian land does not change. The owner against whose land new land is formed does not become the owner thereof, nor does the owner whose land is lost by such action lose it if it should reappear.³³

2. *Navigational Rights of the Public.* As stated previously, the public has a right to use streams navigable legally or in fact for commercial intercourse. And continued and uninterrupted navigation by the public of any stream for 20 or more years makes it a public thoroughfare not subject to unauthorized obstructions,³⁴ unless the public benefits resulting from the obstruction or impediment outweigh the navigational inconvenience.³⁵ However, mere collateral local benefits to a community resulting from an obstruction will not prevent it from being a public nuisance if the stream is legally navigable.³⁶ Even a temporary navigational obstruction, such as scaffolding used to erect a legally authorized bridge, may be so unlawful as to render the owners liable to injured parties,³⁷ unless the obstruction is so essential that the construction could not otherwise be accomplished and is no greater in extent or continued any longer than absolutely necessary.³⁸ Where a structure such as a railroad bridge is authorized by the state, a distinction has been made between actual interference with navigation and mere inconvenience, the later being sanctioned.³⁹ No prescriptive rights can be obtained to maintain an unauthorized obstruction in a navigable stream regardless of the length of time the obstruction has existed.⁴⁰

3. *Riparian Rights.* Riparian owners have the right of access to navigable streams and may build piers and wharves, either public or private.⁴¹ Although such rights are vested, they are subject to navigational improvements.⁴² The public navigation easement, however, is subject to riparian rights.⁴³

As to the right of a riparian owner to use the water from the stream, the Tennessee courts apparently do not distinguish between navigable and non-navigable streams, regardless of whether they flow across or border the user's land. Our courts apply the reasonable use rule which

33. *Stockley v. Cissna*, 119 Tenn. 135, 104 S.W. 792 (1907).

34. *Stump v. McNairy*, 24 Tenn. 363 (1844); *Southern R. Co. v. Ferguson*, 105 Tenn. 552, 59 S.W. 343 (1900).

35. *Pilcher v. Hart*, 20 Tenn. 524 (1840).

36. *Gold v. Carter*, 28 Tenn. 369 (1848).

37. *Memphis & O. R. Co. v. Hicks*, 37 Tenn. 427 (1858).

38. *Cantrell v. Knoxville, C. G. & L. R. Co.*, 90 Tenn. 638, 18 S.W. 271 (1891).

39. *Southern R. Co. v. Ferguson*, 105 Tenn. 552, 59 S.W. 343 (1900).

40. *Ibid.*

41. *Cunningham v. Prevow*, 28 Tenn. App. 643, 192 S.W.2d 338 (1946).

42. *Franklin v. U. S.*, 16 F. Supp. 253 (E.D. Tenn. 1936).

43. *Miller v. State*, 124 Tenn. 293, 137 S.W. 760 (1911).

is also followed by many states,⁴⁴ in contrast to the natural flow and prior appropriation doctrines prevailing in other states.⁴⁵ Thus, in *Cox v. Howell*, the Tennessee Supreme Court quoted with approval the following language:

The general proposition of law, that the owner of land across or over which a stream of water flows, has a right to have it flow over his land in its natural channel, undiminished in quantity and unimpaired in quality, except so far as is inseparable from a reasonable use of the water from the stream for the ordinary and useful purposes of life by those above him on the stream is well established by an almost unbroken current of authority He has, however, no property in the water itself, but simply the usufruct of it, as it passes over or across his land.⁴⁶

And in *American Association, Inc. v. Eastern Kentucky Land Co.*, the court lays down the rule that

. . . each riparian owner has an equal right to have the stream flow through his land in its natural channel, without material diminution in quantity or alteration in quality but with this limitation or qualification, however, that each proprietor is entitled to the reasonable use of the water for domestic, agricultural or manufacturing purposes.⁴⁷

Although there is an earlier case to the contrary,⁴⁸ it now seems to be the law in Tennessee that a municipality, as a riparian owner, does not have the right to divert water from a stream for municipal purposes to the injury of lower riparian owners;⁴⁹ this is in accord with the majority view.⁵⁰ To acquire such rights, the municipality, of course, could exercise its powers of eminent domain.

In connection with his right to make a reasonable use of the water, a riparian owner has the right to divert it from the stream provided he returns it to its natural channel before it leaves his land,⁵¹ undiminished in flow and unimpaired in quality except to the extent that this has been justified by his reasonable use.⁵² What is a reasonable diversion or use of the stream with respect to the rights of the various property owners will depend on the size and character of the stream,

44. *American Association, Inc. v. Eastern Kentucky Land Co.*, 2 Tenn. Ch. App. 132 (1901); *Cox v. Howell*, 108 Tenn. 130, 65 S.W. 868 (1901); Marquis, Freeman and Heath, *The Movement for New Water Rights Laws in the Tennessee Valley States*, 23 TENN. L. REV., 797, at 808 (1955).

45. 4 RESTATEMENT, TORTS, § 847 *et seq.* (1939).

46. 108 Tenn. 130, at 133, 65 S.W. 868 (1901).

47. 2 Tenn. Ch. App. 132 (1901). Decision affirmed by the Tennessee Supreme Court.

48. *American Association, Inc. v. Eastern Kentucky Land Co.*, 2 Tenn. Ch. App. 132 (1901).

49. *Webster v. Harris*, 111 Tenn. 668, 69 S.W. 782 (1902).

50. 56 AM. JUR., *Waterworks*, § 43 (1947).

51. *Webster v. Fleming*, 21 Tenn. 518 (1841).

52. *Cox v. Howell*, 108 Tenn. 130, 65 S.W. 868 (1902).

the purpose of the use or diversion, and other circumstances of the case.⁵³

A riparian owner may not drain a stream or materially reduce the flow below its natural level against the objections of another riparian owner.⁵⁴ However, a riparian owner may construct a dam across a stream for proper purposes provided such dam is reasonable in size and its maintenance and operation do not adversely affect other owners.⁵⁵ Unless he has in some way acquired the right to do so, a riparian owner who, by constructing a dam or otherwise impounding or obstructing water below his own line, causes an overflow on the property of an upper riparian owner becomes liable to such owner.⁵⁶ Such interference may be found to be a nuisance,⁵⁷ and a judgment at law for damages against the offender in such cases is itself sufficient to establish the fact of a nuisance.⁵⁸ However, the right to overflow adjacent to upper riparian property may be acquired by consent, prescription (20 years adverse flowage), or by eminent domain proceedings in proper cases,⁵⁹ and possibly by acquiescence or estoppel.⁶⁰ Although any substantial interference with the flow is illegal, the court may apply the doctrine of "balancing the conveniences" and restrict the injured party to damages rather than injunctive relief.⁶¹

It is also unlawful to open flood gates in a dam or otherwise cast large, unusual amounts of water down upon the lands of a lower riparian

53. *Ibid.*

54. *Webster v. Harris*, 111 Tenn. 668, 69 S.W. 782 (1902).

55. *Miller v. State*, 124 Tenn. 293, 137 S.W. 760 (1911); *Cox v. Howell*, 108 Tenn. 130, 65 S.W. 868 (1901); *Tallassee Power Co. v. Clark*, 77 F. 2d 601 (6th Cir. 1942); *Hurley v. American Enka Corp.*, 93 F. Supp. 98 (E.D. Tenn. 1950); *Irwin v. Brown*, 3 Tenn. Cas. 309 (Shannon, 1889); *De Kalb County v. Tennessee Electric Power Co.*, 17 Tenn. App. 343, 67 S.W.2d 555 (1934); *Smelcer v. Rippetoe*, 24 Tenn. App. 516, 147 S.W.2d 109 (1941). In accordance with the announced policy of the state to encourage the building of dams to furnish water power for mills, Tennessee enacted a series of Milldam Acts in the early 1800's. See *Irwin v. Brown*, 3 Tenn. Cas. 309 (Shannon, 1889).

56. *Neal v. Henry*, 19 Tenn. 17 (1838); *Hurley v. American Enka Corp.*, 93 F. Supp. 98 (E.D. Tenn. 1950); *Heiskell v. Cobb*, 58 Tenn. 638 (1889); *Harmon v. Carter*, 59 S.W. 656 (Tenn. Ch. App. 1900); *Webster v. Fleming*, 21 Tenn. 518 (1872); *Chicago, M. & G. R. Co. v. Wheeler*, 1 Tenn. App. 100 (1925); *Spencer v. O'Brien*, 25 Tenn. App. 429, 158 S.W.2d 445 (1942); *Carriger v. East Tennessee, V. & G. R. Co.*, 75 Tenn. 388 (1881); *Coleman v. Bennett*, 111 Tenn. 705, 69 S.W. 734 (1902).

57. *Harmon v. Carter*, 59 S.W. 656 (Tenn. Ch. App. 1900); *Lassater v. Garrett*, 63 Tenn. 368 (1874); *Neal v. Henry*, 19 Tenn. 17 (1838); *Naff v. Martin*, 2 Tenn. Cas. 451 (Shannon 1877).

58. *Harmon v. Carter*, 59 S.W. 656 (Tenn. Ch. App. 1900).

59. *Harmon v. Carter*, 59 S.W. 656 (Tenn. Ch. App. 1900); *Louisville & N. R. Co. v. Mossman*, 90 Tenn. 157, 16 S.W. 64 (1891); *Smelcher v. Rippetoe*, 24 Tenn. App. 516, 147 S.W.2d 109 (1941); *Heiskell v. Cobb*, 58 Tenn. 638 (1872); *Cooper v. Great Falls Cotton Mills Co.*, 94 Tenn. 588, 30 S.W. 353 (1894); *Slatten v. Mitchell*, 22 Tenn. App. 547, 124 S.W.2d 310 (1939).

60. *Caldwell v. Knott*, 18 Tenn. 209 (1836); *Heiskell v. Cobb*, 58 Tenn. 638 (1872).

61. *Talley v. Baker*, 3 Tenn. App. 321 (1926); *Hurley v. American Enka Corp.*, 93 F. Supp. 98 (E.D. Tenn. 1950) (Balancing the Conveniences Rule).

owner,⁶² unless this right has been acquired in some legal manner.

Apart from statutes, it is unlawful for a riparian owner to pollute a stream permanently or temporarily,⁶³ regardless of how essential the activity causing the pollution is to the defendant.⁶⁴ In this respect, the Tennessee courts do not apply the "balancing of conveniences" rule recognized in several of our sister states. Although the right to pollute a stream may be acquired by prescription, it is doubtful if such prescriptive right would prevail against the state in exercising its police powers by legislative action to prohibit pollution in the interest of public health.⁶⁵

B. Diffused Surface Waters. These waters do not flow in a natural water course but flow in a diffused state over the land following precipitation such as rain or snow. Surface water may also rise to the surface in springs to spread over the surface.⁶⁶ If it reaches a natural watercourse it will then be treated as a flowing stream, as discussed previously.⁶⁷

It is generally held in this country that diffused surface waters belong to the owner of the land over which the waters flow and he may use part or all of such water if he so desires.⁶⁸

In Tennessee, the courts follow the civil law rule of surface waters to the effect that as regards adjacent land, the owner of the upper or dominant tract of land has an easement or servitude in the lower tract for the drainage of the surface waters.⁶⁹ In contrast to the Tennessee civil law rule, many states follow the common law rule which recognizes no such easement or servitude on the lower lands but permits each property owner to prevent the water from coming upon his land by obstruction or even diversion to the lands of another. In other words, the water is considered the common enemy of all, to be repelled at will.⁷⁰

62. *Tennessee Electric Power Co. v. Robinson*, 8 Tenn. App. 396 (1928); *Virginia-Carolina Chemical Corp. v. Industrial Products Corp.*, 195 F. 2d 552, (6th Cir. 1952).

63. *Love v. Nashville Agricultural & Normal Institute*, 6 Tenn. App. 104 (1927); *Summer v. O'Dell*, 12 Tenn. App. 496 (1930); *City of Nashville v. Wills*, 7 Tenn. Civ. App. 97 (Higgins, 1916); *H. B. Bowling Coal Co. v. Ruffner*, 117 Tenn. 180, 100 S.W. 116 (1907). See also the following: T.C.A. §§ 39-2204 to 39-2206; 39-4503; 39-2906 to 39-2907; 51-511 to 51-512; 53-2012; 65-2709; 70-301 to 70-323.

64. *H. B. Bowling Coal Co. v. Ruffner*, 117 Tenn. 180, 100 S.W. 116 (1907).

65. 56 AM. JUR., *Waterworks*, § 52 (1947).

66. 56 AM. JUR., *Waters*, § 65 (1947).

67. *Ibid.*

68. *Ibid.*

69. *Louisville & N. R. Co. v. Maxwell*, 126 Tenn. 323, 148 S.W. 692 (1912); *Davis v. Louisville & N. R. Co.*, 147 Tenn. 1, 244 S.W. 483 (1922); *Garland v. Aurin*, 103 Tenn. 555, 53 S.W. 940 (1899); *Louisville & N. R. Co. v. Mossman*, 90 Tenn. 157, 16 S.W. 64 (1891); *Louisville & N. R. Co. v. Hays*, 79 Tenn. 382 (1883); *Slatten v. Mitchell*, 22 Tenn. App. 547, 124 S.W.2d 310 (1939); See also Marquis, Freeman and Heath, *The Movement for New Water Rights Laws in the Tennessee Valley States*, 23 TENN. L. REV. 797 (1955).

70. 56 AM. JUR., *Waters*, § 69 (1947).

The Tennessee Supreme Court, in *Garland v. Aurin*, stated the Tennessee rule as follows:

... by the rule of the civil law, the proprietor of the lower land may not obstruct, by any means, the natural flow of surface water, and turn it back, to the injury of the higher lands of his neighbor, the latter owner having, by the law of nature, an easement or servitude of drainage over the lands of the former for the flow of surface waters. This rule . . . appears to prevail in . . . Tennessee.⁷¹ Furthermore, the court stated that the rule is applicable regardless of whether the land is in the country or in the city.⁷²

Under the Tennessee rule, the owner of the lower land becomes liable to the upper proprietor if he so dams up the water that it overflows the higher land.⁷³ Any such substantial interference with the flow is an actionable nuisance.⁷⁴ A dam on one's own property which will not cause backwaters under ordinary conditions may render its owner liable if unusual rainfall causes the water to rise over the other's property.⁷⁵ However, if the lower proprietor raises his land he no longer has the duty to receive the water but he cannot force the upper owner to provide other means for getting rid of it.⁷⁶

The owner of upper lands may not dam up or gather the surface waters by artificial means and discharge it in concentrated or unnatural quantities upon the lower lands,⁷⁷ nor may he materially increase the quantity of the flow.⁷⁸ Although he may alter the natural condition of his land to protect it from the injurious effects of the water, he nevertheless must observe the rights of the lower owner in discharging the water upon his land.⁷⁹

Railroad companies in particular have been affected by the Tennessee law of surface waters. In several cases they have been held liable to the owners or possessors of adjacent property because of accumulated waters on their roadbeds,⁸⁰ and the property owners have also been held liable for causing water to flow over the railroad property.⁸¹

Although the lower owner may not cast back the surface waters, it

71. 103 Tenn. 555, 53 S.W. 940 (1899).

72. *Ibid.*

73. *Louisville & N. R. Co. v. Hays*, 79 Tenn. 382 (1883); *Talley v. Baker*, 3 Tenn. App. 321 (1926).

74. *Talley v. Baker*, 3 Tenn. App. 321 (1926).

75. *Ibid.*

76. *Louisville & N. R. Co. v. Maxwell*, 126 Tenn. 323, 148 S.W. 692 (1912).

77. *Louisville & N. R. Co. v. Hays*, 79 Tenn. 382 (1883).

78. *Tyrus v. Kansas City, Ft. S. & M. R. Co.*, 114 Tenn. 579, 86 S.W. 1074 (1905).

79. *Slatten v. Mitchell*, 22 Tenn. App. 574, 124 S.W.2d 310 (1939).

80. *Carriger v. East Tenn. V. & G. R. Co.*, 75 Tenn. 388 (1881); *Davis v. Louisville & N. R. Co.*, 147 Tenn. 1, 244 S.W. 483 (1922); *Tennessee Central R. Co. v. Askew*, 11 Tenn. App. 406 (1930); *C. N. O. & T. P. R. Co. v. Moon*, 2 Tenn. App. 477 (1926).

81. *Louisville & N. R. Co. v. Binkley*, 1 Tenn. Ch. App. 531 (1901).

seems that he may erect embankments or conduits to protect himself where the flow has been greatly increased into ditches along the streets and the water would otherwise pass over his land in the absence of barriers along the boundaries of his property.⁸²

An owner of a building is liable to the owner of an adjoining building if he allows water to wrongfully drain from the first building onto the second building, but only for damages arising after the defendant is given notice of the fact.⁸³

It has been held that each wrongful overflow caused by the obstruction of the defendant is a separate and distinct cause of action, the statute of limitations beginning to run from each act.⁸⁴ Injunctive relief is an available remedy in proper cases involving surface waters.⁸⁵

Surface water rights may be acquired or lost by prescription,⁸⁶ and also may be transferred by conveyance, as well as arising in the form of implied easements or rights appurtenant to other property conveyed.⁸⁷

II. SUBTERRANEAN WATERS

A. Flowing Streams. An underground stream flowing in a defined and distinct channel is subject to the law applicable to flowing surface streams. The owners of such streams have the same legal rights and liabilities, previously discussed, as riparian owners.⁸⁸ The major problem in this area concerns proof of the stream's characteristics. Unless a permanent channel can be clearly established, all underground waters are presumed to be percolating.⁸⁹ The law of surface riparian rights also applies to the large bodies of subterranean water located in well-defined strata.⁹⁰

B. Percolating Waters. These are underground waters that do not flow

82. *City of Sweetwater v. Pate*, 59 S.W. 480 (Tenn. Ch. App. 1900).

83. *Schlessinger v. Rosenheim*, 2 Tenn. App. (1926).

84. *Cincinnati, N. O. & T. P. R. Co. v. Roddy*, 132 Tenn. 568, 179 S.W. 143 (1915).

85. *Collier v. City of Memphis*, 4 Tenn. App. 322 (1927); *Dixon v. City of Nashville*, 29 Tenn. App. 282, 203 S.W.2d 178 (1946), *cert. den.* by Tennessee Supreme Court in 1947.

86. *Cooper v. Great Falls Cotton Co.*, 94 Tenn. 588, 30 S.W. 353 (1895); *Louisville & N. R. Co. v. Mossman*, 90 Tenn. 157, 16 S.W. 64 (1891); *Davis v. Louisville & N. R. Co.*, 147 Tenn. 1, 244 S.W. 483 (1922); *Finch v. Smith*, 7 Tenn. App. 65 (1928); *Louisville & N. R. Co. v. Hays*, 79 Tenn. 382 (1883).

87. *Horton v. Shacklett*, 20 Tenn. App. 72, 95 S.W.2d 936 (1936); *Louisville & N. R. Co. v. Binkley*, 1 Tenn. Ch. App. 531 (1901); *Cox v. Howell*, 108 Tenn. 130, 65 S.W. 868 (1901); *Wall & Co. v. Cloud*, 22 Tenn. 181 (1842); *Whittle Springs Co. v. Johnson*, 2 Tenn. Civ. App. 324 (Higgins, 1912); *Hodges v. Town of Bluff City, Tenn.*, 32 F. 2d 779 (6th cir. 1929).

88. *Tennessee Electric Power Co. v. Van Dodson*, 14 Tenn. App. 54 (1931); *Nashville, C. & St. L. Ry. v. Rickert*, 19 Tenn. App. 446, 89 S.W.2d 889 (1935); *Marquis, Freeman and Heath, The Movement For New Water Rights Laws in the Tennessee Valley States*, 23 TENN. L. REV. 797 (1955).

89. *Tennessee Electric Power Company v. Van Dodson*, 14 Tenn. App. 54 (1931).

90. *Ibid.*

in well-defined channels, but ooze, seep or percolate through the ground.⁹¹ Although springs and wells are usually distinguished from percolating waters, they are so closely related that they are herein so classified.

Tennessee follows the reasonable use, or correlative rights doctrine, sometimes referred to as the American rule, in regard to percolating waters,⁹² in contrast to the English rule of absolute ownership.⁹³ Under the American rule, the landowner is entitled only to make a reasonable use of the water which percolates through his own and his neighbor's lands, such water being a common source of supply to the owners.⁹⁴ Thus, in *Nashville, C. & St. L. Ry. v. Rickert*, the Court of Appeals observed:

According to the English or common-law rule, a landowner had the right to dig a well on his land and collect therein subterranean percolations which he might use as he pleased, even if he thereby destroyed the source of supply of wells or springs on the lands of others. This rule was followed in some early decisions in American states other than Tennessee, but the modern and "the better rule is that the rights of each owner being similar, and their enjoyment dependent on the action of the other landowners, their right must be correlative and subject to the maxim that one must so use his own as not to injure another, so that each landowner is restricted to a reasonable exercise of his own rights and a reasonable use of his own property, in view of the similar rights of others."⁹⁵

Although the law has been so stated, Tennessee courts have as yet had little occasion to define reasonable use in this area. In view of the constantly increasing drain on underground water tables, it is quite likely that the respective rights to such water will be clarified in the future.

It is also well established that an owner of a spring or well is entitled to damages caused by pollution, whether from a surface,⁹⁶ or a subterranean source.⁹⁷

CONCLUSION

It is apparent from this study that most of the decisions in Tennessee have involved surface streams, possibly because of early conflicts between riparian owners and navigational interests when water navigation was

91. 56 AM. JUR., *Waters*, § 111 (1947).

92. *Nashville, C. & St. L. Ry. v. Rickert*, 19 Tenn. App. 446, 89 S.W.2d 889 (1935); *Tennessee Electric Power Co. v. Van Dodson*, 14 Tenn. App. 54 (1931); See Marquis, Freeman and Heath, *The Movement For New Water Rights Laws in the Tennessee Valley States*, 23 TENN. L. REV. 797 (1955).

93. 56 AM. JUR., *Waters*, § 113 (1947).

94. *Ibid.*

95. 19 Tenn. App. 446, 89 S.W.2d 889 (1935), *cert. den.* by Tennessee Supreme Court.

96. *Neal v. Henry*, 19 Tenn. 17 (1878); *Allen v. McCorkle*, 40 Tenn. 181 (1859).

97. *Sinclair Refining Co. v. Bennett*, 123 F. 2d 884 (6th cir. 1942); *Love v. Nashville Agricultural & Normal Institute*, 146 Tenn. 550, 243 S.W. 304 (1922).

relatively more important than it is today. With the growing concern over our future water supply, it is likely that cases involving all classes of water rights will multiply, especially when legislation is enacted in this area. It is well established in Tennessee that water rights are vested rights,⁹⁸ and the big problem is the balancing of these rights of the individual owner with the domestic, agricultural and industrial water needs of a mushrooming population.

MAHLON L. TOWNSEND

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98. *Miller v. State*, 124 Tenn. 293, 137 S.W. 760 (1911); *Allison v. Davidson*, 39 S.W. 905 (Tenn. Ch. App 1896). See also, Marquis, Freeman and Heath, *The Movement For New Water Rights Laws in the Tennessee Valley States*, 23 TENN. L. REV. 797 at 828 (1955).