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Where Will You Go When the Well Runs Dry?  
Local Government Ownership and Water Allocation in North Carolina  

DANIEL F. MCLAWHORN*  

And it never failed that during the dry years the people forgot about the rich years, and during the wet years, they lost all memory of the dry years. It was always that way.¹  

INTRODUCTION  

It is no simple task to determine who owns—or rather who does not own—the water in North Carolina’s lakes, streams, and ponds. Those seeking to resolve conflicts involving water use invariably risk entanglement in a web of common law riparian rights and public trust assets loosely bound together by centuries-old court decisions and complex state and federal laws. The question of who owns water, particularly with regard to local governments, is clearly an area of increasing importance as North Carolina now sees an end to what once seemed its inexhaustible water bounty.²  

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² While North Carolina has had some relief since a major drought in 2007 and 2008, that drought was possibly the worst in the State’s history, and its effects will continue to be felt for years to come. See Press Release, U.S. Geological Survey & U.S. Dep’t of the Interior, Lowest Streamflows in More Than 110 Years for Some North Carolina Rivers as Drought Worsens (Aug. 31, 2007), available at http://www.ncdrought.org/press/usgs_20070831.pdf; see also An Act to Improve Drought Preparedness and Response in North Carolina as Recommended by the Environmental Review Commission, N.C. Sess. Laws 2008-143 (including provisions to improve water use...
North Carolina's law of water rights derives primarily from the common law, which provides local governments no ability based on riparian owner status, to provide citizens with drinking water. The North Carolina General Assembly has provided some relief from this common law restraint with regard to impounded waters, but the vast majority of the state's water resources are still governed by various judicial decisions interpreting eighteenth century English common law. That common law, however, may soon be a relic. Legislation introduced in 2009, if passed, would establish a comprehensive scheme for the allocation of water resources whereby essentially all large-scale water withdrawals would require a permit approved by the Environmental Management Commission.

If enacted, the new regulatory scheme would constitute a fundamental, but necessary change in North Carolina's common law pertaining to water ownership. The brewing battle over North Carolina's water underscores the prudence of moving into the modern era of eastern water law by substituting regulated riparianism and allocation for our current mix of murky court decisions and awkwardly tailored regulation. The alternative is to continue along an uncertain course—charted by courts—that is simply no longer adequate to sustain the type of investments and planning necessary to ensure adequate municipal drinking water supplies.

Much of this Article will focus on that inevitable change, but it is also the author's goal that it serve as a launching point for others who are called upon to consider the difficult questions that can arise in connection with water rights issues under the law as it now exists.

Part I of this article will examine the nature of water rights and ownership in North Carolina—particularly with regard to local governments—through an overview of the state's common law and various statutory declarations regarding flowing water, groundwater, and reservoirs. Part II explores whether a local government may protect certain in-stream uses, and if it can, how it might do so. Finally, Part III discusses the inevitable legislative wave that promises to wash away common law notions of water ownership and replace them with a com-

data, reduce drought vulnerability, and allow for quicker response to water shortage emergencies).


prehensive system of regulated riparianism, and why that might not be such a bad thing.

I. Ownership of Water

A. Common Law

The common law of North Carolina is the common law of England as it applied on July 4, 1776.\textsuperscript{5} The application of the common law predates the Revolutionary War because, by statute, that law was also applied during the colonial period.\textsuperscript{6} The North Carolina statute providing that common law authority remains in effect has not been amended since its adoption in 1715.\textsuperscript{7} Given the paucity of legislative changes to the law of water allocation and water priority, the foundation supplied by Eighteenth-Century English law is important to an understanding of the State's present day common law on the subject.

Much of our understanding of Eighteenth-Century common law is derived from Blackstone's *Commentaries.*\textsuperscript{8} While Blackstone is generally credited as a source of the "prior-appropriation" concept of water rights (the doctrine applied in the western United States), his most basic vision of property derived from a communal concept of ownership. Blackstone believed that property was generally first held by "all mankind, exclusive of other beings, from the immediate gift of the creator."\textsuperscript{9} Because all property belonged to all mankind, at its most basic level, man could own no personal property, but merely a "possessory-use right."\textsuperscript{10} The emergence of recognition for private-property interests, Blackstone argued, was the result of a need to limit disputes concerning scarce resources, an evolution of goods "into more permanent articles in constant use," and the "labour invested in moveables."\textsuperscript{11}

Blackstone further believed that ownership of natural elements remained untouched by concepts of individual ownership, and that

\begin{itemize}
  \item \textsuperscript{5} N.C. GEN. STAT. § 4-1 (2007) ("All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.").
  \item \textsuperscript{6} See Virmani v. Presbyterian Health Servs. Corp., 515 S.E.2d 675, 690-91 (N.C. 1999).
  \item \textsuperscript{7} See Gwathmey v. State ex rel. Dep't of Env't, Health, & Nat. Res., 464 S.E.2d 674, 679 (N.C. 1995).
  \item \textsuperscript{8} WILLIAM BLACKSTONE, COMMENTARIES (Edward Christian ed., A. Strahan 1800).
  \item \textsuperscript{9} JOSHUA GETZLER, A HISTORY OF WATER RIGHTS AT COMMON LAW 161 (2004).
  \item \textsuperscript{10} Id.
  \item \textsuperscript{11} Id.
\end{itemize}
persons could hold a mere "right-to-use" over natural elements.\textsuperscript{12} Essentially, the ephemeral nature of water (and certain other natural resources) was such that it remained a public good, and the inability to capture and permanently hold the resource rendered it a substance incapable of anything other than a usufructuary interest:

But, after all, there are some few things, which, notwithstanding the general introduction and continuance of property must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had: and there they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air and water; conveniences: such also are the generality of those animals which are said to be \textit{ferae naturae}, or of wild and untameable disposition: which any man may seise upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seise and enjoy them afterwards.\textsuperscript{13}

Because North Carolina has followed English common law since its colonization, the starting point to analyze an open question is the common law of 1776. Of course, the state has long recognized that the common law is not static and the North Carolina Supreme Court retains to power to "modify the common law of [the state] to ensure that it has not become obsolete or repugnant to the freedom and independence of this state and our form of government."\textsuperscript{14} Against the

\begin{itemize}
\item \textsuperscript{12} Id.
\item \textsuperscript{13} 2 \textsc{William Blackstone}, \textit{Commentaries} *14.
\item \textsuperscript{14} A contemporary account of the history of English common law water rights provides a succinct description of Blackstone's conception of water ownership:
\begin{itemize}
\item (1) Water is a type of corporal right, a transient element available to the public but subject to a qualified individual property or title during use; (2) the first appropriator of water wins title under a natural principle defending occupation; (3) title subsists only during time of use, as water can not be possessed or appropriated in the manner of land; (4) The prior appropriation theory is distinct from theories of acquisition of incorporeal rights by prescriptive long user; and (5) Actions for wrongs, such as nuisance and trespass, are used to defend such water rights; and this raises the issue of identifying actionable damage.
\end{itemize}
\end{itemize}

\textsuperscript{14} \textit{Getzler}, supra note 9, at 154.
backdrop of the common law of 1776, arguments can then be framed from more recent applications of the law of water rights in North Carolina and other common law jurisdictions to persuade courts that an answer different from that supplied in the past is appropriate.

B. Public Waters Legislation

Blackstone's communal conception of water is reflected in the common law notion that navigable waters—as well as the land underneath those waters—are held by the state in trust for the people. This trust serves to preserve the public's supply of water as well as certain uses. Initially, in North Carolina, these uses were limited to fishing, commerce, and navigation. The statutory definition of public trust uses was expanded to include the public interest in recreational activity—a use that had already been recognized in case law. In 1971, the public trust doctrine was made a part of the North Carolina Constitution in an amendment recognizing the state's policy of natural conservation:

'It shall be the policy of this State to conserve and protect its lands and waters for the benefit of its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water....'

"Waters" is statutorily defined as "any stream . . . reservoir, waterway or other body or accumulation of water, whether surface or underground, public or private, or natural or artificial." Those waters "belong to the people" and the state has "the ultimate responsibility for the preservation and development of these resources in the best interest of all its citizens." Additionally, in the statutes protecting wildlife as well as inland and coastal fishing, the scope of declared public own-

16. See id. at 577.
17. N.C. GEN. STAT. § 1-45.1 (2007) (recognizing public trust rights as "the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State"). Recreational activities were recognized as uses protected under the public trust as early as 1904. State v Twiford, 48 S.E. 586, 588 (N.C. 1904), overruled on other grounds by Gwathmey v. State ex rel. Dep't of Env't, Health, & Nat. Res., 464 S.E.2d 674, 683 (N.C. 1995).
18. N.C. CONST., art. XIV, § 5.
19. N.C. GEN. STAT. § 143-212(6).
20. See id. § 143-211(a).
ership expands to encompass "the entire ecology supporting such" marine and estuarine wildlife living in the public trust waters. 21

C. North Carolina Common Law and Flowing Water

This public trust exists in concert with the rights of riparian property owners, who by virtue of owning land abutting a water body, possess a bundle of rights typically articulated as: (1) the right to enjoy the advantage of adjacency to the water; (2) the right of access to the navigable parts of the waterbody; (3) the right to pier out; (4) the right to keep accretions or alluvium; and (5) the right to make reasonable use of the water as it flows past or leaves the shore. 22

These rights come with the caveat that riparian rights must be exercised so as not to unreasonably infringe upon the rights of other like riparian owners. 23 Riparian proprietors do not own the water in the channel or pond; rather they "own" the right to use the water for beneficial purposes, so long as that use does not unreasonably injure other riparian owners. 24 "The several proprietors along the course of a stream have no property in the flowing water itself but each proprietor has certain rights with respect to the water." 25 Reasonable uses normally include manufacturing purposes as well as domestic and agricultural uses connected to the riparian parcel. 26 That an individual does not own the water itself, but rather owns only certain rights that come with ownership of a parcel of land connected to a water body is a very basic, but very important concept to consider in relation to municipal supplies.

North Carolina local governments seeking to provide citizens with potable water cannot accomplish this goal through the common law. In Pernell v. Henderson, the North Carolina Supreme Court quashed the contention that a city, by its riparian rights, could divert water in order to sell it as drinking water to its citizenry. 27 In Pernell, the City

21. Id. § 113-129(11) (defining "wildlife resources" as "[a]ll . . . fish found in inland fishing waters . . . and the entire ecology supporting such . . . fish, plant and animal life, and creatures"). It is worth noting that "private ponds" are excluded from the definition of public fishing waters. See id. § 113-129(13).
24. See Harris v. Norfolk & Western Ry. Co., 69 S.E. 623, 624 (N.C. 1910) ("A riparian owner may use water for any purpose to which it can be beneficially applied, provided he does not inflict substantial injury upon those below him.").
26. Dunlap, 195 S.E.2d at 47.
of Henderson withdrew substantial amounts of water from a stream for that purpose. After a downstream grist mill owner brought suit claiming damage from this use, the city demurred on the grounds that its withdrawal of water for domestic purposes by its citizens was a reasonable exercise of its riparian rights and therefore not actionable—even if the city took the entire flow. The city also claimed that its use of the water for drinking purposes was preferable over the mill owner’s use of the water for manufacturing.

The supreme court’s decision for the mill owner was grounded in the idea that while a local government’s citizens might purchase water supplied by that government for domestic uses, the individual citizens could not organize themselves into a larger body that held riparian land; nor could they establish by riparian right the authority to divert waters to supply non-riparian individuals to the detriment of all other users. The court stated:

Conceding that those who own the banks of a stream may, for their own convenience, contrive and use facilities and devices for distribution of water amongst themselves for such purposes, withdrawing from the flow needful quantities, that situation is not presented by the typical construction and use of a water supply system by a municipality as in the case at bar, which impounds the water in suitable reservoirs, pipes it in large quantities into the city, and distributes and sells it to consumers for any purpose whatever for which it may be used. It could hardly be contended that these users are riparian owners, or that they could invest the city, as representative, or in the role of parens patriae, with rights in that respect which they themselves did not have.

Reiterating its point, the court also cited a leading treatise of the time for the rule that “a municipal corporation can not, as riparian owner, claim the right to supply the needs of its inhabitants from the stream.” The court also rejected the idea of a hierarchy of reasonable uses by striking down the city’s argument that diverting water to supply its populace takes preference over another riparian owner desiring to use the water for manufacturing purposes.

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28. Id.
29. Id.
30. Id.
31. Id.
32. Id. at 451.
33. Id. (citing 1 HENRY PHILIP FARNHAM, THE LAW OF WATERS AND WATER RIGHTS 611 (1904)).
34. Id.
The Pernell decision remains the controlling law on the ability of a local government to supply citizens with drinking water based on traditional common law riparian rights. Therefore, given the conclusive and clear-cut nature of the Pernell decision (and the soundness of its rationale), it appears that a North Carolina local government seeking to supply its citizens with drinking water cannot rely on common law principles.

D. Groundwater

North Carolina subscribes to the "American" rule that allows groundwater pumping for reasonable uses. 35 No duty to share with others exists so long as the use is reasonable.36 The water must be used on the land overlying the water source; in other words, the groundwater may not be extracted and then transported elsewhere for use if doing so harms a neighbor or other user.37 Use on overlying land is thus considered reasonable, but use of groundwater on non-overlying ground is per se unreasonable.38

The underlying limitation is similar to that described above for the exercise of riparian rights. The unrestricted draw down of groundwater by a local government for the purpose of supplying its citizens with water is not a "reasonable use."39 As stated by the North Carolina Supreme Court:

This rule does not prevent the private use by any landowner of percolating waters subjacent to his soil in manufacturing, agriculture, irrigation, or otherwise; nor does it prevent any reasonable development of his land by mining, or the like, although by such use the underground percolating waters of his neighbor may be thus interfered with or diverted; but it does prevent the withdrawal of underground waters for distribution or sale, [or] for uses not connected with any beneficial ownership or enjoyment of the land from which they are taken...40

This rule effectively forecloses a city's ability to supply citizens from groundwater under common law. Presumably, that city would endeavor to supply its citizens off the parcel associated with the sup-

36. Id.
38. Id.
40. Id.
ply, and if that withdrawal injured another user, the city’s off-site use would be considered *per se* unreasonable.\(^4\)

**E. Common Law and Impounded Water**

North Carolina’s judicial decisions involving reservoirs are sparse with regard to what special right to water, if any, belongs to those that slow and impound flowing water for later use. From *Pernell*, an implication can be drawn that a municipality impounding water behind a dam for drinking water purposes would not have an exclusive right to that water, or be free from damages caused by the impoundment, under a reasonable use riparian theory. Presumably the impoundment would be maintained for the non-riparian citizens, and therefore withdrawal for their benefit would not enjoy protection as a reasonable use.\(^2\)

That the “reasonable use” theory of riparian rights would apply to an impoundment appears to be supported by the 1938 case of *Dunlap v. Carolina Light and Power Co.*\(^4\) In *Dunlap*, the North Carolina Supreme Court held that an upper riparian owner could erect a dam and alter the natural flow to generate power; however, the riparian right of use did not allow for diversion of the water for use off the riparian parcel:

The mere erection of a dam and the use of the water in driving wheels or providing power must necessarily derange its steady, constant, and natural flow and substitute a different manner as to the time and mode of holding it up and letting it down, but the water can be retained for the purpose of the upper mill if it is not diverted from the stream and the storing of water in a pond or reservoir for power purposes is not actionable if it is retained no longer than is reasonably necessary. The upper proprietor may hold back the water a reasonable time to raise a pond or reservoir, although the effect is to deprive the lower owner of the use of the water to a certain extent. *He may hold the water back and let it down in such manner as is necessary for the use of his manufacturing enterprises if the enterprise is adapted to the character of the stream and the use is reasonable* and the lower proprietor will not

\(^{41}\) The impact of this holding was softened somewhat by the judge’s determination that by paying damages to the injured property owner, the city acquired a right to withdraw to the detriment of that landowner. *Id.*

\(^{42}\) See *Pernell v. Henderson*, 16 S.E.2d. 449, 450-51 (N.C. 1941); see also *Geer v. Durham Water Co.*, 37 S.E. 474, 475-76 (N.C. 1900) (distinguishing claim of unreasonable use from one of unlawful diversion).

\(^{43}\) 195 S.E. 43, 47 (N.C. 1938).
be heard to complain on account of the incidental irregularity in the flow of the water.\(^4\)

There is, however, some authority supporting the notion that ownership of impounded water hinges on ownership of the land beneath the water and not common law riparian proprietorship. In a 1986 decision concerning a conflict about pilings attached to the bed of Lake Wylie, the North Carolina Court of Appeals recognized that the owners of the bed of an impounded waterbody "like the owner of dry land, owns also to the sky and to the depths: \textit{cujus est solum, ejus est usque ad coelum et ad inferos}."\(^5\) However, it appears that no decision directly addresses ownership of the bed as a means by which a right to withdraw water from an impoundment or an outright ownership interest in the overlying water might arise.

\section*{F. Water Is a Locavore Commodity}

North Carolina municipalities might not be able to serve the public's thirst through means employed in the past. In 2007, the North Carolina General Assembly made important changes to the statutes regulating interbasin transfer (IBT) permits.\(^6\) An interbasin water transfer occurs when water withdrawn from one river basin is provided as potable water to citizens, collected and treated as wastewater, then discharged into a different basin than the one from which the water was withdrawn. IBT permits have long been a source of contention, and invariably invoke protests from residents of the withdrawal basin, environmental activists, and even from neighboring states.\(^7\)

In the past, IBTs provided a means to address water shortages. However, the combined effect of the 2007 amendments likely renders future IBT approvals unfeasible. For example, the IBT statute now includes a statement of policy—a philosophical position that can

\begin{footnotesize}
\begin{enumerate}
\item[44.] Id. (emphasis added).
\item[45.] Steel Creek Development Corp. v. James, 294 S.E.2d 23, 27 (N.C. Ct. App. 1982). In his opinion, Judge (later Justice) Whichard, through a satirical anecdote, noted the lack of public knowledge of the \textit{ad inferos} concept:
\begin{quote}
An Irish lawyer named Sullivan once argued an air rights case before the highest court of Great Britain. A member of the court asked during oral argument: "Mr. Sullivan, have your clients not heard of the maxim, \textit{cujus est solum, ejus est usque ad coelum et ad inferos}?'" Sullivan responded: "My lords, the peasants of Northern Ireland speak of little else."
\end{quote}
Id. at 27 n.2.
\end{enumerate}
\end{footnotesize}
thwart an otherwise qualifying IBT petition if applied broadly by the courts:

It is the public policy of the State to maintain, protect, and enhance water quality within North Carolina. It is the public policy of this State that the reasonably foreseeable future water needs of a public water system with its service area located primarily in the receiving river basin are subordinate to the reasonably foreseeable future water needs of a public water system with its service area located primarily in the source river basin. Further, it is the public policy of the State that the cumulative impact of transfers from a source river basin shall not result in a violation of the anti-degradation policy set out in 40 Code of Federal Regulations § 131.12 (1 July 2006 Edition) and the statewide anti-degradation policy adopted pursuant thereto.48

The regulatory conditions imposed on IBT permit applicants prior to approval leave little doubt that the state regards IBTs as a measure of last resort. If the transfer is between two of thirty-eight statutorily defined basins or sub-basins, the process imposes numerous opportunities for public comment as well as the preparation and approval of an Environmental Impact Statement (EIS).49 Those steps must be taken before the applicant may even petition the Environmental Management Commission for final approval of an action that the state explicitly discourages.50 It is therefore no wonder that the Division of Water Resources, in its IBT guidance document, suggests that the process can take between three and five years (and one can assume, many thousands if not millions of dollars).51 It stands to reason that local governments cannot reasonably rely on IBTs to provide for future water needs, and indeed should only be considered once all other options have been exhausted.52

G. **Statutory Right of Withdrawal**

As discussed supra, local governments likely cannot rely on common law riparian rights to maintain a supply of potable water from flowing or impounded waters. However, the General Assembly has

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49. Id. § 143-215.22G.
50. Id.
52. The IBT permitting process generally requires applicants to demonstrate that there is no reasonable alternative to an IBT. See N.C. GEN. STAT. 143-215.22L(k)(5).
determined that local governments can gain the exclusive right to withdraw water held in certain reservoirs.

The construction of numerous multi-purpose reservoirs in the 1950s led North Carolina's lawmakers to consider whether legislation was necessary to protect state and local government investments in the water resources their money helped create. The result was a series of statutes that not only authorized local investment in water reservoirs, but that also created perhaps the only means by which a local government might obtain ownership of a water supply. First, the 1959 Corps of Engineers Local Participation Act authorized local government bonds for investment in reservoirs built by the U.S. Army Corps of Engineers. Next, in 1967, the General Assembly granted the Environmental Management Commission authority to transfer the state's interests in reservoirs to local governments, provided the local entity assumed or repaid the state's obligations. The final step was passage of the Stored Water Act of 1971, which provided that where a community invests in the construction of dam, that government then has the exclusive right to withdraw any water in a reservoir created above the dam, or in the stream below it. The resulting statutory scheme addresses the limitations raised in Pernell by providing that "[a] person operating a municipal, county, community or other local water distribution or supply system and having a right of withdrawal may assert that right when its withdrawal is for use in any such water system as well as in other circumstances."

This legislation is particularly important given that the common law provides no means by which a local government can obtain exclusive withdrawal rights for the purpose of providing drinking water. However, almost as critical to local government owners as the creation of an exclusive right to withdraw impounded water are the provisions

55. Act of Mar. 24, 1971, ch. 111, 1971 N.C. Sess. Laws 81 (codified at N.C. GEN. STAT. §§ 143-215.44 to 215.50 (2007)). Section 143-215.44(c) defines excess volume as "the volume which may be withdrawn . . . without foreseeably reducing the rate of flow of a watercourse below that which would obtain in that watercourse if the impoundment did not exist." Section 143-215.48(a) defines excess above the watercourse's natural flow as anything greater than "the minimum average flow for a period of seven consecutive days that have an average recurrence of once in ten years." This is known as the "7Q10" level.
56. N.C. GEN. STAT. § 143-215.49. The right of withdrawal is available not only to local governments, but to any person or entity that assists in financing the project. Id. § 143-215.44(a).
57. See supra text accompanying notes 28-35.
that provide a means for protection of water subject to ownership under the statute. "A 'right of withdrawal,' within the meaning of this Part, is an interest which establishes a right to withdraw an excess volume of water superior to other interests in the water." § 143-215.44(b). Also, "[a] person may exercise his right of withdrawal by withdrawing directly from the impoundment, from a watercourse below the impoundment, or from both . . . ." § 143-215.46. These provisions give the local government that invested in the creation of the source the ability to protect its right of withdrawal—regardless of whether someone places a straw directly into the impoundment or into a stream channel below used to move the water.

The statute is equitable and accords with the riparian doctrine's concept of "reasonable use." When a local government spends money to create a new and stable supply of potable water, the statute recognizes that the local government has the right to the excess resource that it created. To illustrate the point, imagine a riparian landowner downstream of a location where a city has participated in the financing of a U.S. Army Corps of Engineers constructed dam that briefly detained some water, but soon resulted in the creation of a large reservoir. The city withdraws drinking water directly from the reservoir and the Corps releases a flow in excess of the stream's previous average flow. If the city decided to later appropriate the excess flow that it created through its expenditure, the statute protects the city's right to that flow, and the downstream owner would be unable to claim that the city's appropriation deprived him of his riparian rights.

Through these statutes, the General Assembly made clear that private ownership of impounded waters is authorized, and that local governments may use that water for the operation of local water distribution or supply systems. This strengthens the position of a local government against withdrawals of water downstream of the impoundment, and protects against objections to the withdrawal. Essentially, where the local government holds rights in impounded water under these statutes, it is entitled to assert rights of withdrawal as if its citizens were actual riparian owners with land bordering the excess water.

58. N.C. GEN. STAT. 143-215.44(b).
59. Id. § 143-215.46.
61. See generally id.
H. Allocation of the Public Trust

These statutory rights could mean that there is a conflict between the broad legislative declarations of public rights in North Carolina's water,62 and those impounded waters where the rights of withdrawal and protection of "owned" waters have been legislatively conferred. However, the North Carolina Supreme Court has examined when and under what circumstances public trust rights can be allocated.

Following statehood, North Carolina's citizens became the owner of lands beneath navigable waters, but the General Assembly retained the power to dispose of such lands provided it does so expressly by special grant.63 The state's ability to part with title to lands submerged by navigable waters is qualified by a presumption that legislative enactments do not indicate a legislative intent to authorize the conveyance of submerged lands.64 The special circumstances which control the state's ability to convey public trust assets were further solidified by the supreme court's 1995 decision, Gwathmey v. State ex rel. Department of Environment, Health, & Natural Resources:

[T]he General Assembly is not prohibited by our laws or Constitution from conveying in fee simple lands underlying waters that are navigable in law without reserving public trust rights. The General Assembly has the power to convey such lands, but under the public trust doctrine it will be presumed not to have done so. That presumption is rebutted by a special grant of the General Assembly conveying the lands in question free of all public trust rights, but only if the special grant does so in the clearest and most express terms.65

While there is no case law directly on point, it appears the decision whether the impounded waters are subject to public trust rights, such as the rights of navigation and fishing, as well as the statutory "right of withdrawal" discussed above, will be a case-by-case determination premised on the navigability of the waters prior to impoundment.66 Where these rights conflict, a court would likely hold in favor

62. See discussion supra Part I.B.
63. See, e.g., Shepard's Point Land Co. v. Atlantic Hotel, 44 S.E. 39, 41 (N.C. 1903).
64. Atlantic & N.C. R.R. Co. v. Way, 90 S.E. 937, 938-40 (N.C. 1916); see also N.C. Gen. Stat. § 1-45.1 (2007) (providing that public trust lands and rights cannot be acquired by adverse possession or prescriptions); State ex rel. Rohrer v. Credle, 369 S.E.2d 825, 832 (N.C. 1988) (holding that under the public trust doctrine, fisherman could not have acquired by prescription the exclusive right to harvest oysters in navigable waters).
66. See Bauman v. Woodlake Partners, 681 S.E.2d 819, 825, 826-27 (2009). However, it is worth noting that impoundments created by the U.S. Army Corps of Engi-
of preserving the public trust rights due to the law’s preference for public trust rights over privately held riparian interests.  

II. LOCAL GOVERNMENT RIPARIAN RIGHTS

What is the scope, if any, of the riparian rights that a local government can assert against an upstream water user or diverter? Particularly with regard to greenways and other public demands, many local governments own waterfront parks where access is provided to its citizens for boating, fishing, or other recreational uses. As a riparian owner, the local government possesses the right to access the river from its property, to wharf out to deep water, to enjoy the natural advantage the water brings, and to make reasonable use of the water as it flows past and leaves the shore.

To illustrate this concept, imagine a municipally owned riparian park with a commercial entity upstream of that park desiring to withdraw a large quantity of water for manufacturing. A central question in the continued examination of this issue will be: can a local government, as a riparian owner, protect navigation and fishing by its park users? To answer this question, it is essential to determine whether the local government has standing to challenge the use.

An initial standing hurdle will be whether the riparian right at issue is within the state’s exclusive authority of regulation in public trust waters. The issue of standing to protect public trust waters was well illustrated in the relatively recent case of *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.* In that case, a group of plaintiffs comprised of non-profit conservation organizations, employees of those nonprofits hired to monitor rivers ("riverkeepers"), riparian land owners, and commercial and non-commercial users of the river brought suit against several large hog farming corporations for pollution.

neers are often created for recreational purposes and thereby have public trust rights by congressional authorization.

67. For example, in *Weeks v. N.C. Department of Natural Resources & Community Development*, a littoral owner appealed the decision of the North Carolina Coastal Resources Commission to deny his request for a permit to build a 900-foot pier into Bogue Sound. 388 S.E.2d 228, 230 (N.C. Ct. App. 1990). In upholding the State’s decision to deny the permit, the court noted that the plaintiff’s rights in the submerged land were subordinate to public trust protections. *Id.* at 234.

68. Parks and recreational programs are an authorized activity for local governments that have a public purpose. N.C. GEN. STAT. § 160A-353(1); see also *Hickman by Womble v. Fuqua*, 422 S.E.2d 449, 452 (N.C. Ct. App. 1992).


70. *McLawhorn: Where Will You Go When the Well Runs Dry? Local Government Owners* Published by Scholarly Repository @ Campbell University School of Law, 2009
caused to the Neuse, Cape Fear, and New Rivers.\footnote{Id. at 50.} In holding that no group of plaintiffs had standing, the court stated, \footnote{Id. at 54-55 (quoting Jones v. Turlington, 92 S.E.2d 75, 77 (N.C. 1956)).} 

[t]he state's exclusive authority to regulate its public trust waters . . . limits the private rights of riparian landowners bordering such waters, subjecting them "to such general rules and regulations as the Legislature, in the exercise of its powers, may prescribe for the protection of the public rights in rivers and navigable waters."\footnote{Id. at 53 (citing Hampton v. Pulp Co., 27 S.E.2d 538, 544-46 (N.C. 1943)).} 

The holding in \textit{Neuse River Foundation} makes clear that the nature of the harm claimed will be determinative of standing.\footnote{Id. at 53.} The non-profit was barred for lack of standing to protect the fish and the quality of the water, because "only the State can bring action for injury to public trust waters."\footnote{Id. at 52.} Persons owning land along the rivers relied on their status as riparian owners, but failed to allege "the existence of a special damage" separate from the damages of the general public.\footnote{Id.} The court of appeals recognized and applied the standard that a private party may bring an action for damages resulting from a public nuisance caused by water pollution.\footnote{Id. at 53 (citing Hampton v. Pulp Co., 27 S.E.2d 538, 544-46 (N.C. 1943)).} However, the court rejected the complaint by the riparian plaintiffs because "none of these plaintiffs seeks individual compensation for the 'invasion of a more particular and more personal right' that cannot be considered 'merged in the general public right.'"\footnote{Id.} If a local government could allege special damages unique to its riparian property, it would likely have standing to assert riparian rights. This follows from the North Carolina Supreme Court's statement, in a case concerned with a water utility, that "[m]unicipal corporations have the same rights as individuals and private corporations to battle for justice and equality of opportunity . . . ."\footnote{Elizabeth City Water & Power Co. v. Elizabeth City, 124 S.E. 611, 620 (N.C. 1924).} 

III. Pending Legislation

The blame for a lack of cohesion in North Carolina's water law is likely attributable to the state's historically ample supply of water. Where there is enough of a resource to go around, it stands to reason that disputes, and therefore rules to govern those disputes, are rare.

\footnotesize{71. Id. at 50.}  
\footnotesize{72. Id. at 54-55 (quoting Jones v. Turlington, 92 S.E.2d 75, 77 (N.C. 1956)).}  
\footnotesize{73. Id.}  
\footnotesize{74. Id.}  
\footnotesize{75. Id. at 52.}  
\footnotesize{76. Id. at 53 (citing Hampton v. Pulp Co., 27 S.E.2d 538, 544-46 (N.C. 1943)).}  
\footnotesize{77. Id.}  
\footnotesize{78. Elizabeth City Water & Power Co. v. Elizabeth City, 124 S.E. 611, 620 (N.C. 1924).}
However, as demand for water has increased, the tenets of the common
law riparian doctrine have come to share space with a number of regu-
latory programs promulgated by separate divisions within the North
Carolina Department of Environment and Natural Resources (DENR)
and various legislative determinations. The field is further crowded
by federal agencies such as the Environmental Protection Agency, the
Federal Energy Regulatory Commission, the Tennessee Valley Author-
ity, and the U.S. Army Corps of Engineers—each with its own set of
rules and guiding principles. Essentially, water allocation in North
Carolina is highly regulated, but not in a comprehensive or integrated
manner.

The increasing complexity of the area, as well as the vital part that
water allocation will play in sustaining North Carolina's rapid growth,
led the 2007 General Assembly to order an Environmental Review
Commission (ERC) study of the issue. Specifically, the ERC was
directed to study and make recommendations concerning “the alloca-
tion of surface water resources and their availability and maintenance
in the State, including issues related to the transfer of water from one
river basin to another, [and] the withdrawal of water for consumptive
use . . .”. The Commission was also told, among other things, to

study and recommend measures to provide for a comprehensive system
for regulating surface water withdrawals for consumptive and noncon-
sumptive uses; provide for the establishment of a statewide plan for
water resources development projects; provide for adequate resources
for the Department so that it may develop and implement a compre-
hensive approach to water resources management; ensure that all State
laws regulating water resources are consistent with and fully integrated
into the comprehensive system for regulating surface water with-
drawals and the statewide plan for water resources development projects;
and ensure that potential interstate conflicts related to water resources
are avoided or minimized.

The ERC's Water Allocation Study Team's report, released in
2008, recommended that the General Assembly take nine measures to
ensure the State's future water supply:

79. For example, by statute, North Carolina requires registration of all expected
withdrawals and transfers of 100,000 gallons per day or more. N.C. GEN. STAT. § 143-
215.22H(a) (2007). Agriculture has a special exception: a threshold of 1,000,000 per
day. Id. § 143-215.22H(b1). The penalty for failure to comply with the registration
program is capped at $500. See id. §§ 143-215.22H, -355.6. This registration require-
ment creates no right of withdrawal, but appears intended merely to allow for adequate
allocation planning.


81. Id.
1. Clearly state policy goals to guide administrative and judicial decisions.
2. Establish a permit for large water withdrawals.
3. Conform existing laws to each other and to policy goals.
4. Establish proactive, adaptive, river basin water supply planning.
5. Simplify and integrate water and water-funding information.
6. Address critical research and study needs.
7. Ensure that water infrastructure is maintained.
8. Reward and spread best practices and leadership efforts in water efficiency.
9. Create more storage.\textsuperscript{82}

The legislative byproduct of the ERC's report was Senate Bill 907, which was intended to enact the Water Resource Policy Act of 2009.\textsuperscript{83}

A. Senate Bill 907

The bill's policy declaration makes clear that this legislation, if passed, will fundamentally alter North Carolina's water law:

(1) Water is a public trust resource. The waters of the State are a natural resource owned by the State in trust for the public and subject to the sovereign power of the State to plan, regulate, and control the withdrawal and use of those waters, under law, in order to protect the public health, safety, and welfare by promoting economic growth, mitigating the harmful effects of drought, resolving conflicts among competing water users, achieving balance between consumptive and non-consumptive uses of water encouraging conservation, protecting ecological integrity, and enhancing the productivity of water-related activities.

(2) Water should be used efficiently and productively. Pursuant to this Article, the State undertakes, by permits and other steps authorized by law, to allocate the waters of the State among users in a manner that fosters efficient and productive use of the water supply of the State in a sustainable manner in the satisfaction of economic, environment-


WATER ALLOCATION IN NORTH CAROLINA

Under the common law, the riparian doctrine does not provide a local government the right to withdraw water for its citizens, and the only time a use of water by any riparian owner might be legally halted is where the use is “unreasonable.” It is therefore no exaggeration to say that, if passed, Senate Bill 907’s scheme of allocating water based on “efficient and productive use” and “environmental and social goals” effectively abandons North Carolina’s common law of water in favor of a system designed around modern demands.

Senate Bill 907 would create a new comprehensive requirement that a permit must be obtained for each water withdrawal in excess of 100,000 gallons per day. The withdrawal of water from streams, lakes, and reservoirs, pursuant to the permits, would be controlled where an approved hydrologic model of the river basin was previously adopted by the Environmental Management Commission, or without an approved hydrologic model if the basin is designated as “overallocated.” Unless an approved hydrologic model is in place, the bill’s interim allocation provisions will serve as the system for a river designated as “overallocated.” The time and money required to create hydrologic models for each river basin make it likely that in the first decade of any such regulatory system, the system that would be applied would be the interim allocation scheme.

87. Id. A river basin is overallocated if both
[a]n approved hydrologic model demonstrates or projects that the river basin or portion of the river basin does not or will not have sufficient available daily yield to meet the needs of water withdrawers and instream water uses in accordance with [certain statutory policies] at any time within the next 40 years[,] . . . [and] [m]ore than one interim allocation or permitted withdrawal is projected to have insufficient water to meet its present and future demands for more than seven consecutive days in two or more years and the projected shortfalls cannot be demonstrated to be due to the failure of the approved hydrologic model to consider alternative sources of water that are allocated or permitted and legally available to the system with a projected shortfall.

Id.
89. Building a hydrologic model is no small task. A computer model that presents an accurate depiction of natural conditions requires the collection and input of vast...
would require that the system be self-funded through local government contributions and permit fees.\(^90\)

The proposed interim allocation scheme has two primary components. First, it would control existing users and continued withdrawals under the permits.\(^91\) Second, it would establish a separate scheme for new or expanded withdrawals.\(^92\) Two important general conditions apply to each interim allocation: (1) expiration on the earlier of when the hydrologic model is approved or at the end of five years, and (2) modification or termination when the new allocation scheme requires an overall reduction in water withdrawals.\(^93\)

An existing user could continue a historical withdrawal if that withdrawal was properly registered with DENR and a timely application was made to continue the withdrawal.\(^94\) For at least riparian owners, this provision departs from the common law by (1) requiring a permit to withdraw water in amounts over 100,000 gallons per day, and (2) limiting the withdrawal from the reasonable use at the riparian amounts data from historic sources and field observations prior to the model’s calibration and validation. See Modeling & TMDL Unit, N.C. Div. of Water Quality, Presentation, Watershed (Water Quality) Modeling-An Overview (May, 21 2009), ftp://ftp.tjcog.org/pub/fallslake/pres2_20090521.pdf. Oftentimes, hydrologic models that serve as the basis for decisions must comply with certain minimum statutory requirements. See N.C. GEN. STAT. § 143-215.1(c5) (2007) (requiring that nutrient mass load limits set by the EMC must be based on a calibrated nutrient response model that is maintained with current data and capable of predicting the impact of nutrient pollution in receiving surface waters). Senate Bill 907 requires the creation and implementation of hydrologic models for each of the state’s seventeen major river basins, each of which must, at minimum, contain known surface and groundwater resources, transfers of water in and out of the basin, permitted withdrawals, withdrawals exempt from permitting, ecological flow and other instream flow requirements, projected future withdrawals, and estimates of return flows. S.B. 907, sec. 2.2, 2009 Gen. Assem., Reg. Sess. (N.C. 2009). Those models must be designed to predict the flows and available daily yield of each surface water resource within the basin, be based on the best science and modeling methodology practically available as well as data and algorithms that are public records and open to public review and comment. Id. Given these rigorous requirements, it is conceivable that basin models created in the past—and others currently in development—might not be adequate for decision making under the suggested allocation regime. See, e.g., MODELING & TMDL UNIT, N.C. DIV. OF WATER QUALITY, FALLS LAKE NUTRIENT RESPONSE MODEL PROVISIONAL DRAFT REPORT (2009), available at http://h2o.enr.state.nc.us/tmdl/documents/FallsLakeDraftReport8_full.pdf.


\(^{91}\) See id. at sec. 3.2.

\(^{92}\) See id. at sec. 3.3.

\(^{93}\) See id. at sec. 3.4.

\(^{94}\) See id. at secs. 3.1, 3.2.
property to the historical use. For local governments that own impoundments and have statutorily conferred rights of withdrawal, the proposed interim allocation system would impinge on those rights to the extent they have not been exercised. The proposed interim allocation scheme requires that the applicant own the intake facility and that DENR determine, upon consideration of an environmental impact document, "that there will be no major adverse change in the environment or conflicts concerning alternative uses of available natural resources as a result of the proposed withdrawal."

The bill’s permanent allocation scheme allows the Department to “modify allocations and permits to prevent or eliminate overallocation,” and would establish the following order of preference:

[3] Expanded withdrawals that propose expansion within the limits imposed by past capital investment and treatment capacity and that will be operated in accordance with the standards for approval of permits . . . ;
[4] New or expanded withdrawals that clearly and convincingly demonstrate attainment of the standards for approval of permits . . . ;

Again, this allocation system will substantially change the common law rights of riparian owners. It is clearly intended to favor public water supplies over other uses, and thus overcome the limitation in the common law that a withdrawal of water for drinking water supplies is not a riparian use.

B. North Carolina Needs a Comprehensive Water Allocation Scheme

The common law’s riparian doctrine has worked fairly well for North Carolina until now, presumably because the state’s ample supply of water has minimized the doctrine’s problems—uncertainty and inefficiency. However, those problems are amplified when supply is unable to meet demand, and policymakers must therefore confront the question of whether North Carolina’s current law is adequate to pro-

95. Cf. discussion of common law riparian rights accompanying supra notes 22-33.
97. Id. at sec. 3.3.
98. Id. at sec. 2.1 (internal quotation marks omitted).
99. Id. at sec. 2.2.
vide for the state's future needs. In making that decision, legislators are confronted with several sobering factors that suggest the time is fast approaching where North Carolina's citizens will require more than the common law caveat of reasonableness to ensure enough water to sustain economic growth and continuation of the uses protected by the public trust.

For example, North Carolina's population is projected to grow by roughly fifty percent over the next twenty years. Much of this growth is projected to occur in the state's existing urbanized areas, with the most dramatic increase forecast in the Raleigh-Durham area. By 2029, that region's 1.3 million residents will be joined by more than one million new people, and Wake County alone will be home to an estimated 1.6 million. This increase in population will translate into an unprecedented demand for water.

As an illustration of the problem, the City of Raleigh's new water treatment plant, expected to begin service in the winter of 2010, will increase the city's water supply by approximately twenty million gallons per day. Raleigh estimates that this added capacity, along with new conservation measures, will satisfy the city's water needs only until 2020, when a small reservoir in Eastern Wake County will increase the supply by an additional twenty million gallons per day. With that additional resource, the city projects a sufficient water supply only through 2030. Conservation and technology will help to offset some of the problem, but the sobering reality is that over the long term, the city will reach a point where the water supply simply cannot meet the water demand. The increasing demand, plus the state policy of finding water within the basin, means future growth in Wake County could be stymied due to lack of potable water resources in as little as twenty years.

While the future of North Carolina's water supply is uncertain, it is increasingly clear that the state and its local governments cannot adequately face that future with the tools provided by the common law and the mishmash of legislative acts that make up the current allocation method. A system like that envisioned in Senate Bill 907, which recognizes that the needs of the present can no longer be guided by the

100. See WHISNANT ET AL., supra note 82, at 10.
102. Id.
demands of the past, would best serve North Carolina's ever-more-thirsty population.

Conclusion

The next fifty years will present North Carolina with water resource challenges unimaginable at the time many of the laws governing the resource were developed. How the state chooses to address these challenges will determine whether there is enough water for irrigating crops, for growing communities, for producing energy, for swimming and boating, and for ensuring the stability and continuation of the environment and wildlife. Unfortunately, existing users may be threatened by such legislation and there does not appear to be a building consensus by businesses or agriculture for such legislation.103

Water rights and ownership are critical issues for North Carolina's local governments. Senate Bill 907 would greatly advance efforts to implement an effective and rational allocation system for the increasingly scarce uncommitted water. In developing a new statutory scheme of this significance, it is important to recognize and reconcile the existing water rights duly established by the General Assembly. It is equally important for local governments to understand their individual source of water rights.