

**UNIVERSITY OF UTAH
COLLEGE OF LAW
EXAMINATION COVER SHEET**

Student Examination Number: _____

Law 7230 - 001
WATER LAW
PROFESSOR ADLER

Spring 2006

May 2, 2006 – 1:00 p.m.

Ⓢ Time Allowed: **3 Hours, 15 Minutes**

Authorized Materials: OPEN BOOK. You are allowed to bring any materials into the exam (including your case book, notes, and outlines).

Special Instructions:

1. This exam consists of 3 questions of varying length, all of which have multiple parts. **Grading points are directly proportional to the time assigned to each question, for a total of 180 points.** Points/estimated time are indicated in bolded brackets. **Do not exceed the time allotted for each question, or you will not have time to finish the exam.**
2. Answer all questions in your blue books or computer files. No credit will be given for answers that are not included in the submitted blue book or computer file.
3. Read the entire fact pattern and all questions carefully before proceeding. Make sure you understand what is being asked before you write. You will understand the questions better if you map or diagram the facts. You have **15 extra minutes to read and diagram the facts** before you begin to answer the questions.
5. The exam consists of 3 pages **NOT** including the instruction pages. Make sure you have all pages before proceeding.
6. Explain all of your answers fully. A “correct” answer will not receive full credit unless you explain the applicable law and how it applies.

GENERAL INSTRUCTIONS FOR ALL EXAMS:

1. Exams do not leave the exam room! Write your exam number on your copy of the examination questions, and returned it to the proctor at the end of the exam.
2. Students may NOT take any bluebooks or scratch paper from the examination room, whether blank or used. Return to proctor.
3. If you are using a bluebook print your exam number, the title of the course and the instructor's name on the front of each bluebook.
4. Number each bluebook (1 of 3, 2 of 3, 3 of 3, etc.) and place all bluebooks and examination questions inside the first numbered bluebook.
5. If the examination utilizes a computer answer sheet (Scantron):
 - You must use **BLACK** or **BLUE INK** only; no pencils
 - You may use **CORRECTION TAPE** only; no liquid paper
 - Print your examination number in the box found in the lower left-hand section of the form. Write the number in the first 4 spaces, and zero-fill any remaining spaces.

For example, if your examination number is 2983:

IDENTIFICATION NUMBER

2	9	8	3	0	0	0	0
---	---	---	---	---	---	---	---

Fill in the bubbles corresponding to the numbers written.

The following opening facts apply throughout the exam. Unless stated otherwise, all opening facts and facts added in individual questions also apply to subsequent questions.

In 1947, the U.S. government reserved a large parcel of land in western Nevada for purposes of secret weapons testing. The reserve abuts the Nevada-California border. Operated by the Department of Defense (DOD), the reserve was established by Presidential Proclamation (signed by President Truman) which reads, in relevant part:

“The Atomic Military Reserve (AMR) is hereby established for purposes of national defense, including, but not limited to, nuclear munitions testing. The Department of Defense is authorized to conduct all military activities which the Secretary of Defense deems necessary and appropriate to test munitions which can only be tested safely on large, remote parcels of land, and otherwise to ensure an adequate national defense.”

During the Cold War (until approximately 1985), AMR was used largely for nuclear weapons tests. For those purposes, AMR used only modest amounts of water for personnel and logistical needs. DOD withdraws water from the Irradiated River, which originates in the Sierra Nevada mountains in California, flows east through AMR, and ends in Phalarope Lake, a terminal Great Basin lake that supports tremendous numbers of resident and migratory birds. Two ranches also withdraw water from the river between AMR and the lake. Immediately downstream from AMR is Newfound Acres, an experimental bison ranch which first diverted water from the river in 1985. Downstream from Newfound is the Ponderosa, which began to divert water from the river in 1870 (although the river was then called the “Little Joe”).

After the Cold War, DOD initiated a policy of environmental restoration and protection on federal military reservations. (No, really. *See Army Environmental Policy Inst., Army Ecosystem Management Policy Study (1997).*) In 1994, President Clinton issued a supplemental Proclamation for AMR which states, in relevant part:

““The Secretary of Defense shall manage the Atomic Military Reserve in a manner which maximizes its use and potential for wildlife and other environmental resources, wherever consistent with the military purposes of the reserve.”

Water is in extremely short supply in this region, and even small increases in use are significant. All surface water and ground water basins are over-appropriated.

Upstream from AMR, in California, two other entities withdraw water from the Irradiated River. Farthest upstream is Yoga City. Originally a small enclave used by a San Francisco Bay Area yoga society beginning in the (you guessed it, 1960s), the area has grown into a booming community hosting retreats for every kind of “personal growth” group imaginable, along with expensive associated vacation and retirement

homes. Recently incorporated as a municipality under California Law, water supply needs for this community are growing rapidly. Between Yoga City and the Nevada border is Riparian Acres, a large, four season resort community (condominiums, vacation homes, and hotel lodging) that uses water for domestic uses, to irrigate golf courses and gardens, and for snow making during the winter. Title to Riparian Acres dates to 1860, when the original private landowner received a patent directly from the federal government. The Irradiated River passes through the property.

1. **[80 points total]** This year, DOD initiated weapons tests at AMR involving the largest conventional (non-nuclear) explosives ever assembled, to evaluate the efficacy of so-called “bunker buster” weapons. To assess the impact of those explosives on the kinds of makeshift underground structures used by terrorist organizations, DOD constructs similar facilities before the tests, but then needs significant additional amounts of water to put out the resulting fires. To support those uses, DOD withdrew approximately twice as much water from the Irradiated River as in previous years.
 - A. **[10 points]** If the river no longer contains enough water for the Ponderosa to fulfill its historical withdrawals given increased usage at AMR, can the Ponderosa force Newfound to curtail its withdrawals, and why?
 - B. **[10 points]** Consistent with its focus on experimental, sustainable ranching, Newfound uses the most efficient irrigation system possible. The Ponderosa uses the same flood irrigation methods as it has used since 1870. Can Newfound avoid curtailment of its withdrawals on grounds that the Ponderosa uses water so inefficiently?
 - C. **[20 points]** Can either Newfound or the Ponderosa prevent DOD from continuing its increased water withdrawals for purposes of the new weapons tests? Why or why not?
 - D. **[30 points]** Assume that either the Ponderosa or Newfound obtain an order from a Nevada court ordering DOD to curtail its new water withdrawals to protect downstream water rights. Finding that the weapons tests are essential to national security, and that no other site is readily available for those tests, Congress passes the “Weapons and Water Act of 2006,” which provides: “Notwithstanding any other provision of state or federal law, the Secretary of Defense may withdraw such amounts of water as she deems necessary to conduct essential weapons testing at the Atomic Military Reserve; Provided, that the Secretary shall ensure that state water rights are protected to the maximum extent possible consistent with national security needs.” Can the owners of Newfound or the Ponderosa challenge this federal statute on constitutional or any other grounds? Explain fully.

- E. **[10 points]** Upstream withdrawals by Yoga City and Riparian impair habitat for the rare Glowing Cutthroat Trout within AMR. Can DOD prevent upstream withdrawals by Riparian or Yoga City to protect Glowing Trout habitat based on water rights claims? Why or why not? (Do not address this issue under federal environmental statutes or other principles of law aside from water rights.)
2. **[70 points total]** Continue all facts from above, except for the Weapons and Water Act of 2006. (Depending on your answer to 1.D, you can either assume it never passed, or that it was invalidated in court.)
- A. **[15 points]** Increased withdrawals for the Yoga City public water supply begin to decrease river levels to the point where Riparian Acres can no longer meet its needs. Does Riparian have any valid basis to curtail Yoga City's withdrawals? Why or why not? (Remember that California is a mixed doctrine state.)
- B. **[15 points]** Assume that Riparian succeeds in forcing Yoga City to curtail its water withdrawals from the river. Yoga City begins to pump groundwater from wells to make up the deficit. Riparian hires groundwater hydrologists who provide evidence that this pumping also reduces flows in the river itself. What is the likelihood that Riparian can prevent this pumping, and why?
- C. **[20 points]** Assume that Riparian fails in its efforts to prevent Yoga City's groundwater pumping. Riparian decides to fight pumping with pumping, and drills its own wells instead. But groundwater supplies and recharge are not sufficient to support both sets of wells. How would California's doctrine of correlative rights apply to this pumping war? How would your answer change under the other four doctrines of groundwater law?
- D. **[20 points]** As growth continues, Yoga City decides that the only way to meet its increasing water needs is to purchase water rights from other parties. Can it purchase water rights from Riparian Acres or any other party? If so, how, and what conditions might apply to any sale of rights?
3. **[30 points]** Because of all of the upstream uses identified above, water levels in Phalarope Lake have been plummeting, causing significant harm to bird habitat and to fish populations in the lake (which supply food for the birds). A group called "Phriends of Phalarope" wants to curtail upstream water withdrawals to reduce those impacts. Assuming that no federal environmental statutes provide

any viable relief, under what legal theory or theories might Phriends achieve this goal? How likely are they to succeed, and why or why not?

