

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

Student Examination Number: \_\_\_\_\_

**Law 7230**

**Water Law**

**Professor Adler**

**Fall 2010**

**December 10, 2010**

**8:30 a.m. – 12:00 p.m.**

⌚ **Time Allowed:** 3 hours 30 minutes

**Authorized Materials:** Open book. Students may bring any books, notes, outlines, or other written materials into the exam.

**Special Instructions:**

1. Not including this cover page and the general instructions page, this exam consists of 3 pages, with 2 questions. Both questions have multiple subparts. (Question 1 has subparts a through h; Question 2 has subparts a and b.) Make sure you have the full exam.
2. You have 3 hours to answer the questions, and an extra 30 minutes to read through the exam and plan your approach. Although you may use your time any way you would like, you will probably do better if you use your extra time to read through and scope out the entire exam first and then begin to answer the questions.
3. There are 180 points on the exam (one point per minute). The exam indicates point values for each subpart of each question (e.g., “[15]” means the question is worth 15 points, and you should take approximately 15 minutes to write that answer). Point values are proportionate to the expected length and depth of the answers, *i.e.*, questions with fewer points should be answered more briefly, and questions with more points require more analysis and explanation. **Try not to exceed the time allotted for any question.** You will lose more points in the long run because you will run out of time or rush later answers, and if you spend too much time on a question, you are probably going beyond the scope of the expected answer.
4. Read the questions carefully and answer what is asked precisely, from the perspective of the party identified in the question. You will receive more credit if your answers are well-

organized and responsive to the question. You will not receive more credit for “data dumps,” *i.e.*, simply writing a lot of information that is generally relevant to the subject matter.

**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 return 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
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Fill in the bubbles corresponding to the numbers written.

1. Nolan Moniker owns a ranch on the No Name River, a fully appropriated stream in a large western state that follows the prior appropriation doctrine. His great, great grandfather first diverted water from the No Name and put it to beneficial use for irrigation and livestock watering in 1858. That vested water right has remained in the family ever since. In 1960, Nolan's father applied for a supplemental water right to irrigate additional acres of hay crops, which the ranch sells to other livestock producers. Over a period of approximately ten years, he then developed the necessary diversion structures and ditches to use that water for irrigation. Now, Nolan uses all of the water from the initial appropriation every year. His use of the water from the supplemental water right varies depending on the market for hay. In some years he uses all of the water, but in crop surplus years he uses little or none of it. In fact, he has used no supplemental irrigation water for the past four years, and for eight of the past 10 years. Although some neighboring farmers and ranchers have invested in more efficient sprinkler irrigation systems in recent years, Nolan continues to use the same flood irrigation methods as his great, great grandfather began in 1858.

In 1868, the United States signed a treaty with the Nonam'e Tribe of Indians, and simultaneously set aside a reservation as a permanent homeland for the Tribe along the banks of the No Name River. (The river's name reflects a misunderstanding of the Tribe's name by early white settlers.) The treaty establishing the reservation expressed an understanding that members of the Tribe would cease their nomadic lifestyle in order to develop agrarian communities. The reservation consists of approximately a half million acres. However, a large portion of that acreage is on lands that are unsuitable for farming due to poor soils, steep slopes, and other factors. The Tribe has never felt the need to seek judicial or other quantification of its water rights in the past because existing stream flows, augmented by return flows from other users, have always sufficed to meet its needs for irrigation and domestic water. Now, however, it is entertaining a proposal by a power company to build two nuclear power plants on Tribal land, and to lease water from the Tribe's unused federal reserved rights to use as cooling water. Note that cooling water is almost entirely a consumptive water use because the water used to cool the reactors evaporates and is released as steam.

The City of Nona has grown considerably in recent years. For most of its history, Nona obtained adequate water supplies from tributaries that flow into the No Name River from the surrounding No Name Mountains, and from groundwater wells adjacent to those tributaries. In 1965, it obtained a right to take additional water directly from the No Name River, which required the City to invest in an expensive water treatment plant because of the inferior quality of water from the main stem of the river. Recently, it successfully lobbied the state legislature to enact a municipal preference statute providing that any new appropriations of municipal water supply take preference over even existing agricultural water rights, so long as the City is using existing water from the same "stream system" in "reasonably efficient" way. Pursuant to this statute, Nona recently applied for a large additional water right from the main stem of the No Name.

Given impending conflicts over use of the No Name River, the State Engineer initiated a general adjudication in state court seeking to clarify the status of all existing and pending water rights on the No Name River.

- a. Moniker argues that both of his water rights have priority over the Tribe's water rights because the Tribe's rights have never been quantified. The Tribe argues that its water rights have priority over both of Moniker's water rights. Analyze the validity of both assertions. **[15]**
  - b. How should the court analyze the amount of water to which the Tribe is entitled, and the uses to which it may be put? **[15]**
  - c. As between Moniker's supplemental water right and the City's 1965 water right from the main stem of the No Name, which has priority, and why? **[10]**
  - d. Moniker proposes to lease his supplemental water right to another growing city in another watershed during those years he does not use it all for irrigation. Can other downstream users along the No Name River prevent him from doing so, and does it matter that the leased water would be used in another watershed? **[10]**
  - e. Does the new municipal preference statute reflect sound legislative policy? Why or why not? (Discuss both sides of the issue.) In analyzing the "reasonable efficiency" requirement of the statute, should the court consider whether the City is using water taken from adjacent tributaries and groundwater efficiently? **[20]**
  - f. Moniker argues that a decision by the court to award priority to either the Tribe, or to the City under the new statutory preference provision, would constitute an unlawful taking of Moniker's valid existing water rights, in violation of the 14<sup>th</sup> Amendment to the U.S. Constitution. Analyze the validity of those arguments. **[20]**
  - g. The City argues that, even if the takings claim has some validity, it cannot apply to Moniker's supplemental water right because Moniker has abandoned those rights. (The State has a statutory forfeiture provision, which both parties agree does not apply. However, the State still recognizes common law abandonment as well.) Analyze the validity of the City's argument. **[15]**
  - h. The City also argues that, under the doctrine of waste, some of the water Moniker currently uses is open for appropriation by other users. Analyze the validity of that argument. **[15]**
2. Grand Pepper Lake is a major recreational tourism destination in the State of Bliss, a largely unknown state squeezed in between North and South Carolina. The waters of the lake originate in the Pepper Mill Mountains, with a series of small streams flowing through a string of small, shallow ponds until reaching Grand Pepper Lake. The major outlet stream, the Grand Pepper River, eventually flows into the Atlantic Ocean. At the time the State of Bliss was admitted to the Union as the 51<sup>st</sup> state, the lake and the river were used extensively to transport logs and other natural resources to markets in Bliss and other states. Now, however, the lake and its associated inflow streams, as well as much of the Grand Pepper River, are valued mainly for tourism, recreational boating and fishing, bird watching, and for protection of the pepper-necked phalarope, an endangered species of shorebird. Private parties own much of the land surrounding the

inflow streams and ponds for recreational second homes, and some of the ponds are surrounded entirely by individual pieces of private land.

In an effort to stimulate tourism, the State of Bliss also sold Resorts International (RI) the entire shoreline and lake access at the point at which the Grand Pepper River exits Grand Pepper Lake. RI plans to build marinas, condominiums, a lodge, and a water park surrounding the outlet point. Because it will own all of the land at the outlet point, it also intends to restrict public boating access through its channel, and to charge a “navigation fee” to all boat traffic that doesn’t purchase marina privileges. RI also plans to divert about half of the flow of the Grand Pepper River for its water park, and much of that water will be lost to evaporation and seepage into adjacent soils. Ecologists at the local university believe that the combined development and water diversion will further impair the habitat of the pepper-necked phalarope.

This set of facts gives rise to two separate lawsuits:

- a. Andy Intrepid wants to be the first person to navigate the Grand Pepper system from its headwaters to the ocean in a one-person kayak, and to publish a book that includes photographs of the journey and of the remaining population of pepper-necked phalarope. He is concerned, however, about access restrictions or fees that various landowners want to impose on these waters, and about the ecological impact of RI’s proposed development. He consults an attorney, who advises him to bring a lawsuit to clarify whether he has the right to traverse those waters, and to enjoin various aspects of RI’s proposed project. Evaluate his chance of success against the following parties, and explain what legal theories he might use to prevail. (If the applicable law varies, explain how your answer depends on what doctrines apply in any given state.) **[40]**
  - Upstream of Grand Pepper Lake, several private landowners own all of the land surrounding various small headwaters stream segments and ponds. They argue that these are “private” water bodies and that they have the right either to exclude other boaters entirely, or to charge them an access fee.
  - Between Grand Pepper Lake and the ocean, some landowners operate private fishing lodges, and assert the right to prevent other boaters from floating their “private” stretches of river.
  - RI believes that it has the right to unlimited resort development, and to restrict access to the channel between Grand Pepper Lake and the Grand Pepper River.
- b. Some downstream riparian landowners are concerned that RI’s water park diversions will impair the aesthetic amenity value of their property, reduce their boating access, and turn their previously pristine riverfront property to mudflats. Evaluate whether these landowners can successfully sue to enjoin the diversions under different versions of the riparian rights doctrine. **[20]**