

AN OVERVIEW OF WATER LAW IN ILLINOIS



CATHERINE JANASIE, RESEARCH COUNSEL II

FEBRUARY 2020

NSGLC-20-04-02

Introduction

The law regulating the diversion and use of freshwater in Illinois is complex. This complexity is due to a mix of court-created common law with statutory and regulatory law for both surface and groundwater in the state. Most surface water diversions in the state are regulated by the common law reasonable use doctrine. However, diversions from Lake Michigan are regulated by Supreme Court of the United States decrees, the Illinois Level of Lake Michigan Act, and the Great Lakes Compact. Similarly, the Illinois Water Use Act subjects all groundwater diversions in the state to a reasonable use rule. However, courts and commentators have interpreted the statute to mean that the surface water doctrine of reasonable use applies to groundwater in the state, and not the common law groundwater reasonable use doctrine. This is significant, as there are important differences between the reasonable use doctrines for surface water and groundwater. Further complicating things is the fact that the Illinois Supreme Court has yet to rule on this point. Finally, some geographic areas of Illinois are exempt from certain portions of the Water Use Act. Each of these nuances is discussed below.

Surface Water

States in the Eastern United States follow the riparian doctrine for surface water. Riparians are those who own property along waterways, which gives them certain rights, including the right to use water. This use right allows riparians to use the water abutting their property as long as the use is reasonable and does not affect other riparians. This principle is known as the reasonable use doctrine. Essentially, under reasonable use, there is very little monitoring or governmental control over how much water a riparian owner is using until there is a conflict with other riparian users.

In Illinois, two different governance systems have evolved for surface water. The common law reasonable use doctrine applies to most diversions of surface water in the state. However, statutory law applies to diversions from Lake Michigan. Each of these is discussed below.

A. *Illinois Common Law*

The Illinois Supreme Court adopted the reasonable use doctrine for the state in 1842 in the case of *Evans v. Merriweather*.¹ In that case, the court declared that “[e]ach riparian proprietor is bound to make such a use of running water as to do as little injury to those below him as is consistent with a valuable benefit to himself. The use must be a **reasonable** one.”² In determining what constitutes a reasonable use, the Illinois Supreme Court made a distinction between natural and artificial uses.

Under the court’s decision, a natural use is one that is absolutely necessary for a person to survive. Natural uses include using water for drinking, cooking and other household tasks, and

¹ 4 Ill. 492 (1842).

² *Id.* at 495 (emphasis added by author).

for raising cattle.³ In contrast, artificial uses are not essential for survival, and include water for irrigation (since Illinois is not an arid climate) and industrial uses.⁴ Under this rule, natural uses are always reasonable, and thus it is possible for one riparian to use all the water in a stream if it is for natural uses. The court states:

there is no difficulty in furnishing a rule by which riparian proprietors may use flowing water to supply such natural wants. Each proprietor in his turn may, if necessary, consume all the water for these purposes.⁵

Thus, the reasonable use doctrine in Illinois protects domestic use of water. Artificial uses are only allowed if all the riparians have satisfied their natural needs. When there is not enough water for all riparians to make artificial uses, the conflict must be resolved on a case-by-case basis to determine what artificial uses and to what extent. In this situation, the question for the court to determine is whether a party is using “more than his just proportion.”⁶ What is just will depend on the facts of each case. Because of this, disputes between water users that cannot be resolved by the users themselves would have to be decided by a court.

B. Chicago Diversion

Since the beginning of the 20th Century, other states in the Great Lakes Basin have challenged Illinois’ use of water from Lake Michigan. After the flow of the Chicago River was reversed and the Chicago Ship and Sanitary Canal (CSSC) was completed in 1900, communities in Northeastern Illinois began to use Lake Michigan water for “domestic use, navigational purposes, and the dilution of sewage treatment plant wastewater.”⁷

The water system in the Chicago area is complex. The Illinois Waterway is comprised of rivers and canals that connect the Mississippi River to Chicago and Lake Michigan.⁸ Illinois Department of Natural Resources (DNR) regulations define the Chicago Area Waterway System as:

an engineered system of man-made canals and natural waterways that serves as both a navigation link between Lake Michigan and the Mississippi River system and an outlet for stormwater and effluent. It consists of the North Shore Channel, North Branch of the Chicago River (below the North Branch Dam), Chicago River, South Branch of the Chicago River, South Fork of the South Branch of the Chicago River (Bubbly Creek), Chicago Sanitary and Ship Canal, Cal-Sag Channel and portions of the Calumet River and Little Calumet River leading up to the O'Brien lock.⁹

³ *Id.*

⁴ *Id.* at 495-96.

⁵ *Id.*

⁶ *Id.* at 496.

⁷ Martin Jaffe, *Water Supply Planning in the Chicago Metropolitan Region*, 2:1 SEA GRANT LAW & POLICY JOURNAL 1, 7 (2009).

⁸ *Id.*

⁹ ILL. ADMIN. CODE tit. 17, § 3730.102.

When water is taken out of Lake Michigan, it leaves the Lake Michigan watershed and goes into the Mississippi River watershed, making the diversions controversial. In fact, the Supreme Court initially ruled in 1929 that the diversion was illegal.¹⁰ However, ensuing Congressional action and subsequent Supreme Court cases have allowed the diversion to continue.¹¹

In Illinois, the diversion of Lake Michigan water can be divided into three categories:

- 1) Diversions for domestic water supply;
- 2) A diversion to provide a safe level of water for navigation in the CSSC and maintain water quality in the canal system; and
- 3) Stormwater runoff that is diverted from the Lake Michigan watershed into the CSSC.¹²

To this day, the Chicago Diversion is limited to 3,200 cfs, even though the limit was first established by the Supreme Court in 1930 in *Wisconsin v. Illinois*.¹³ As is discussed below, the Chicago Diversion is also exempt from the terms of the Great Lakes Compact.

1. *Wisconsin v. Illinois Decrees*

Over the years, the Supreme Court of the United States has heard multiple challenges by the other Great Lakes states to the Chicago Diversion, as the Court has original jurisdiction in disputes between two or more states.¹⁴ Beginning in 1930, the Court has decided a string of cases that have upheld the diversion. In the 1930 *Wisconsin v. Illinois* case, the Court limited Illinois' diversion of water to 1,500 cfs, plus domestic pumpage, for a total of 3,200 cfs. The Court's decree required Illinois to meet this goal by 1938.

In 1956, due to a drought, the Court amended the 1930 decree to provide for a temporary increase in the allowable diversion to 8,500 cfs.¹⁵ This temporary increase caused the other Great Lakes states to sue once again. In 1967, the Court modified its 1930 decree. Major provisions of that decree include:

- Limiting the state's diversion to 3,200 cfs, which would be calculated using a five year running average;
- Defining domestic pumpage to include "water supplied to commercial and industrial establishments";
- Granting Illinois the discretion on how to allocate the 3,200 cfs;
- Placing Illinois in charge of measuring the amount of water diverted; and
- Providing Illinois with the authority to make an application to modify the decree in order to divert "additional water from Lake Michigan for domestic use when and if it appears that the reasonable needs of the Northeastern Illinois Metropolitan Region (comprising Cook, Du Page, Kane, Lake, McHenry, and Will Counties) for water for

¹⁰ *Wisconsin v. Illinois*, 278 U.S. 367 (1929).

¹¹ Jaffe, *supra* note 7, at 7-8.

¹² *Lake Michigan Water Allocation*, ILLINOIS DEP'T OF NATURAL RES., <https://www.dnr.illinois.gov/WaterResources/Pages/LakeMichiganWaterAllocation.aspx>.

¹³ *Wisconsin v. Illinois*, 281 U.S. 179 (1930).

¹⁴ U.S. CONSTITUTION, art. III, § 2, cl. 2.

¹⁵ *Wisconsin v. Illinois*, 352 U.S. 984 (1956).

such use cannot be met from the water resources available to the region, including both ground and surface water....”¹⁶

Illinois petitioned the Court to modify the 1967 decree because it wished to deliver water to DuPage County. In 1980, the Court issued a modified decree. Although it kept the 3,200 cfs limit on the diversion, it provided mechanisms to allow the state to occasionally go past this limit.¹⁷ The major changes to the decree included:

- Increasing the period for calculating compliance with the 3,200 cfs limit to a forty year running average;
- Setting 3680 cfs as the maximum allowed diversion in any given year;
- Allowing for a diversion of up to 3840 cfs for any two years in the forty year period due to “extreme hydrologic conditions”;
- Setting a running “debt limit” of 2,000 cfs-years that cannot be exceeded, with one cfs-year equal to “the volume of water resulting from an average flow of one cfs for a period of one year.”¹⁸ Thus, Illinois exceedance of the 3,200 cfs limit cannot collectively go beyond 2,000 cfs-year throughout the forty year period of the decree.

It should be noted that the 40-year period under the 1980 Decree runs from 1980-2020. However, our research did not discover any guidance on what would happen once the 40-year period was completed. It is possible that the system would keep operating as is. Illinois regulations state that upon the expiration of a state-issued Lake Michigan allocation permit, the permit will automatically be renewed on a year by year basis under the same terms and conditions.¹⁹

2. *Level of Lake Michigan Act*

In order to comply with the 3,200 cfs limit on diversions from Lake Michigan, Illinois enacted the Level of Lake Michigan Act to allocate the water “among regional organizations, municipalities, political subdivisions, agencies or instrumentalities.”²⁰ Pursuant to federal law, Lake Michigan water can leave the Great Lakes Basin, but cannot leave the state of Illinois without the “approval of the other Great Lake states and the International Joint Commission.”²¹

Under this statutory regime, all users of water from Lake Michigan must obtain a permit from the Office of Water Resources (OWR), which is located in the Illinois DNR. The OWR grants permits on a priority basis, as shown in Table 1.

¹⁶ *Wisconsin v. Illinois*, 388 U.S. 426, 427-30 (1967).

¹⁷ *Wisconsin v. Illinois*, 449 U.S. 48 (1980).

¹⁸ *Id.* at 50.

¹⁹ ILL. ADMIN. CODE tit. 17, § 3730.308.

²⁰ 615 ILL. COMP. STAT. 50/1.2.

²¹ *Id.*

Table 1- Classification of Water Users²²

Water Use	Evaluation Criteria	Permit Granted?
<p>Category IA-</p> <ul style="list-style-type: none"> • Primary water needs are residential, commercial or industrial • Future or continued use of Lake Michigan water is the most economical source of supply <p>Category IB-</p> <ul style="list-style-type: none"> • Primary water demands are residential, commercial and industrial • Use of Lake Michigan water would reduce the regional use of the deep aquifer. 	<ol style="list-style-type: none"> 1) Adequacy of supply from sources other than Lake Michigan. 2) Economics of alternative supplies. 3) For new applicants, priority will be given to allocations for domestic purposes. 4) For new applicants, allocations of Lake Michigan water will be made with the goal of reducing withdrawals from the Cambrian-Ordovician Aquifer (deep aquifer). 	<p>Allocations normally made to meet the full water needs of Category IA and IB applicants as determined by the DNR before any water is allocated to applicants in Category IIA and IIB.</p>
<p>Category IIA-</p> <ul style="list-style-type: none"> • Primary water demands are for the minimum flows necessary to meet navigation requirements and minimum discretionary dilution flows necessary to maintain the Chicago Area Waterway System in a reasonably satisfactory sanitary condition <p>Category IIB-</p> <ul style="list-style-type: none"> • Water demands are for the minimum discretionary dilution flows necessary to meet water quality standards in the Chicago Area Waterway System. 	<ol style="list-style-type: none"> 1) The limitation of 270 cubic feet per second for discretionary dilution for water quality purposes in the Chicago Area Waterway System. 2) The need to meet navigation requirements in the Chicago Area Waterway System. 3) The minimum discretionary diversion needed to keep water quality in the Chicago Area Waterway System in a reasonable satisfactory sanitary condition. 	<p>Only after allocations made to meet the full water needs of Category IA and IB.</p>
<p>Category III-</p> <ul style="list-style-type: none"> • Applicants whose water demands do not fall into Category IA, IB, IIA, or IIB. 	<p>Applicants do not qualify for an allocation of water from Lake Michigan.</p>	<p>No</p>

²² Adapted from ILL. ADMIN. CODE tit. 17, § 3730.303.

However, the DNR can make emergency allocations of water when there is a water emergency “threatening the public health, safety, and welfare” and the “applicant is making provisions to prevent the continuation or recurrence of such emergency allocations by developing alternative sources of water supply.”²³ Permit holders will be subject to conservation measures and other permit conditions.²⁴

3. *The Great Lakes Compact*

In 2005, the Great Lakes states (Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin), with the consent of the U.S. Congress, entered into the Great Lakes-St. Lawrence River Basin Water Resources Compact “[t]o act together to protect, conserve, restore, improve and effectively manage” and “remove causes of present and future controversies” in the Great Lakes Basin.²⁵ The Compact also aims to prevent the adverse impacts that withdrawals from the Lakes could have on the Basin’s watersheds and ecosystems. Under the Compact, “[a]ll New or Increased Diversions are prohibited,” with limited exceptions to this prohibition.²⁶ These exceptions include proposals by Straddling Communities or Straddling Counties and Intra-Basin Transfers.²⁷

Under the Compact, “[a]ll New or Increased Diversions are prohibited,” with limited exceptions to this prohibition.²⁸ These exceptions include proposals by Straddling Communities or Straddling Counties and Intra-Basin Transfers.²⁹ In order to be approved, these exceptions have to meet certain standards. For example, the new diversion must not be able to be fulfilled through the increased efficiency or conservation of an existing water supply and be limited to a reasonable quantity for the proposed use. Further, the water withdrawn has to be returned to the Basin, and the diversion cannot adversely impact the Basin’s water quality or quantity.³⁰

By its terms, the Great Lakes Compact exempts the Chicago diversion from its provisions. The Compact states that “current, New or Increased Withdrawals, Consumptive Uses and Diversions of Basin Water” are regulated by the *Wisconsin v. Illinois* decrees, and not the Compact. This is not limited to the Chicago Diversion itself, or even Lake Michigan water, but rather the entire Great Lakes-St. Lawrence River Basin under the jurisdiction of Great Lakes states. The Compact states that Illinois “is prohibited from using any term” of the Compact “to seek New or Increased Withdrawals, Consumptive Uses or Diversion of Basin Water,” including Intra-Basin transfers.³¹

²³ ILL. ADMIN. CODE tit. 17, § 3730.305.

²⁴ *Id.* § 3730.307.

²⁵ Great Lakes-St. Lawrence River Basin Water Resources Compact, Section 1.3 (2005).

²⁶ *Id.* § 4.8.

²⁷ *Id.*

²⁸ *Id.* § 4.8.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* § 4.14.

Groundwater

There are varying common law groundwater doctrines that states developed to regulate the use of groundwater. Unlike surface water regimes, groundwater rules are not simply based on use rights. Since groundwater pumping can have negative effects on neighboring property owners, the common law rules often also include rules of liability. The groundwater doctrines vary by state, and the ones that are implicated by Illinois law include the rule of capture, American reasonable use, and correlative rights.

The rule of capture, also known as absolute ownership, is the oldest doctrine. The capture rule allows a landowner to pump groundwater from his or her property. The rule also insulates a landowner who withdraws groundwater from beneath the surface of his land from any liability to neighboring landowners for the injuries that those withdrawals cause.³² With advances in groundwater science the rule of capture's popularity has decreased, but it is still used in several jurisdictions, including Texas and Maine. Illinois followed the absolute ownership doctrine until the state passed the Water Act of 1983.

The American Reasonable Use doctrine is a modification of the rule of capture. The doctrine began to replace the rule of capture in states beginning in the early 20th Century. Most simply, the American Reasonable Use doctrine is essentially the same as the rule of capture, but the doctrine requires that the groundwater be used on the overlying tract of land for a reasonable use.³³

Under a correlative rights approach, no person has a proprietary interest in ground water, only a usufructuary interest (i.e., a use right). With correlative rights, being a landowner does not necessarily give you a right to pump up water beneath your land. The doctrine requires that water be shared based on both the water's use (with some uses being given higher priority) and the rights of the other landowners in the area.³⁴

A. Groundwater Law in Illinois

The Illinois Supreme Court established the common law of groundwater in the case of *Edwards v. Haeger* in 1899 by adopting the absolute ownership rule.³⁵ In *Edwards*, the court states that groundwater underlying land “belongs absolutely to the owner of the land” and the use of the water will be allowed even if the result is “to interfere with the source of supply of springs or wells on adjoining premises.”³⁶

The Illinois Appellate Court of the 4th District considered in 1981 whether *Edwards v. Haeger* was still good law in the state. In *Lee v. City of Pontiac*, the court decided to continue following the absolute ownership rule.³⁷ In rejecting the groundwater reasonable use or correlative rights

³² See *Sipriano v. Great Spring Waters of America, Inc.*, 42 Tex. Sup. Ct. J. 629, 1 S.W.3d 75 (1999).

³³ See *Meeker v. City of East Orange*, 77 N.J.L. 623, 74 A. 379 (N.J. 1909).

³⁴ See *Woodsum v. Pemberton Township*, 172 N.J.Super. 489, 412 A.2d 1064 (N.J. App. 1980).

³⁵ *Edwards v. Haeger*, 180 Ill. 99 (1899).

³⁶ *Id.* at 108.

³⁷ 426 N.E.2d 300 (1981).

doctrines, the court relied on a couple of factors. First, the court noted that it favored the absolute ownership rule based on an exception to the doctrine. While the rule insulates a landowner who withdraws groundwater from beneath the surface of his land from any liability to neighboring landowners, the court favored the doctrine because it does not provide protection to a landowner who pumps water out of malice or due to ill will.³⁸ Second, the court believed both the groundwater reasonable use and correlative right doctrines presented difficulties in application. For instance, the court stated it was troubled by the requirement of the reasonable use rule requiring the water to be used on the overlying land. Similarly, it found that the correlative rights rule does not adequately account for the “the relative value of competing uses.”³⁹

Soon after the *Lee v. City of Pontiac* case, the Illinois Legislature passed the Water Use Act of 1983 to regulate groundwater within the state. The act declares “[t]he rule of ‘reasonable use’ shall apply to groundwater withdrawals in the State.”⁴⁰ The Act’s purpose:

is to establish a means of reviewing potential water conflicts before damage to any person is incurred and to establish a rule for mitigating water shortage conflicts by:

- (a) Providing authority for County Soil and Water Conservation Districts to receive notice of incoming substantial users of water.
- (b) Authorizing Soil and Water Conservation Districts to recommend restrictions on withdrawals of groundwater in emergencies.
- (c) Establishing a “reasonable use” rule for groundwater withdrawals.⁴¹

Originally, the act was written to expressly excluded the Chicago metro region, stating:

The requirements of Section 5 and 5.1 of this Act shall not apply to the region governed by the provisions of ‘An Act in relation to the regulation and maintenance of the levels in Lake Michigan and to the Diversion and apportionment of water from the Lake Michigan watershed’, approved June 18, 1929, as amended.⁴²

However, the Illinois legislature amended the Water Use Act in 2009 to remove this language. Thus, all groundwater in the state is now subject to a requirement of reasonable use pursuant to the Act’s terms. As mentioned above, the Water Use Act only applies to groundwater.

Importantly, both commentators and lower courts in Illinois have found that the term “reasonable use” as used in the Water Use Act refers to the surface water doctrine, not the groundwater doctrine discussed above.⁴³ This is due to the fact that the definition of

³⁸ *Id.* at 302.

³⁹ *Id.*

⁴⁰ 525 ILL. COMP. STAT. § 45/6.

⁴¹ *Id.* § 45/3.

⁴² See 1988 Ill. Legis. Serv. P.A. 85-1330 (West).

⁴³ See *Bridgman v. Sanitary Dist. Of Decatur*, 517 N.E.2d 309 (Ill. App. 4th Dist. 1987). See also GARY R. CLARK, DIV. OF WATER RES., ILLINOIS DEP’T OF TRANSP., ILLINOIS GROUNDWATER LAW: THE RULE OF REASONABLE USE 21 (1985).

reasonable use in the Water Use Act of 1983 tracts the language of natural and artificial uses stated by the Illinois Supreme Court in *Evans v. Merriweather*, which established the reasonable use doctrine in Illinois in connection to surface water.⁴⁴ The effect of this interpretation is to make the common law as it applies to both surface water and groundwater the same in the state, with the exception of the Lake Michigan withdrawals that have specific statutory requirements as discussed above. It is important to note, however, that the Illinois Supreme Court has not definitively ruled on this point.

The Water Use Act defines reasonable use as “the use of water to meet natural wants and a fair share for artificial wants. It does not include water used wastefully or maliciously.”⁴⁵ While there is very little case law interpreting what this definition means in practice, in the context of groundwater, the Illinois Department of Agriculture has defined what natural and artificial means through regulation.

- Natural wants mean “the use of water that is necessary for existence of man or beast. Natural wants include, but are not limited to, quenching thirst; household uses of cooking, washing, bathing, and sanitation purposes; watering animals or livestock; and fire protection.”⁴⁶
- Artificial wants mean “a use of water that may increase comfort, aesthetic, and propriety, but is not essential for existence. Artificial wants include, but are not limited to, street cleaning, washing vehicles, and watering lawns.”⁴⁷

B. Additional Requirements

Besides establishing a reasonable use rule of groundwater, the Water Use Act has some additional purposes, including:

to better manage and conserve water, to establish a mechanism for restricting withdrawals of groundwater in emergencies, and to provide for public notice of planned substantial withdrawals of water after the effective date of this Act from new points of withdrawal before water is withdrawn.⁴⁸

Additional requirements under the act include notification and registration requirements, as well as emergency restrictions.

- Notification Requirements: Those proposing a high capacity well must notify the relevant Soils and Water Conservation District (District) of the planned well, and the District will conduct a review of the proposed well’s impact on other water users.⁴⁹

⁴⁴ *Id.* at 312-13.

⁴⁵ 525 ILL. COMP. STAT. § 45/4.

⁴⁶ ILL. ADMIN. CODE tit. 8, § 675.10.

⁴⁷ *Id.*

⁴⁸ 525 ILL. COMP. STAT. § 45/2.

⁴⁹ *Id.* § 45/5.

- *Illinois regulations exempt the counties subject to the Level of Lake Michigan Act (i.e., Lake, McHenry, Cook, DuPage, Will, and Kane) from the notification requirements of the act.*⁵⁰
- A high capacity well is “a well located on a parcel of property where the rate or capacity of water withdrawal of all wells on the property is equal to or in excess of 100,000 gallons during any 24-hour period.”⁵¹
- Emergency Restrictions: The Act authorizes Soil and Water Conservation Districts to recommend to the Department of Agriculture emergency restrictions on groundwater withdrawals.⁵²
 - *These provisions only apply to counties in Illinois:*
 - *Through which the Iroquois River flows.*
 - *Through which the Mackinaw River flows with a population in excess of 100,000.*
- Water Use Reporting: High capacity wells, high capacity intakes, and withdrawals for public water supply must report their water use by participating in the Illinois Water Inventory Program.⁵³
 - High capacity intakes are intakes “where the rate or capacity of water withdrawal of all intakes for the property is equal to or in excess of 100,000 gallons during any 24-hour period”⁵⁴

In addition to legislation, the Illinois Department of Agriculture has adopted additional regulations that only apply to the Kankakee, Iroquois, Tazewell, and Mclean County Soil and Water Conservation Districts.⁵⁵ These regulations cover registering existing high capacity wells, recommendations for well construction and pump setting, and restricting groundwater withdrawals.

Conclusion

Water law in Illinois is a mixture of court-created common, statutory, and regulatory law. The state has decided to regulate both surface water and groundwater under the surface water reasonable use doctrine. However, these rules are modified by the above-discussed statutory and regulatory regimes in the state. The law is not likely to change until the Illinois Supreme Court rules on the reasonable use doctrine as it applies to groundwater or until the state enacts statutory or regulatory changes.

⁵⁰ ILL. ADMIN. CODE tit. 8, § 675.20.

⁵¹ 525 ILL. COMP. STAT. § 45/4.

⁵² *Id.* § 45/5.1.

⁵³ *Id.* § 45/4.

⁵⁴ *Id.*

⁵⁵ ILL. ADMIN. CODE tit. 8, § 675.60-140.