



Briefing to Stakeholders from the AWAAG Riparian and Other Legal Issues Focus Area Panel (FAP)



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Auburn, AL



The “Drivers” of Water Policy in Alabama

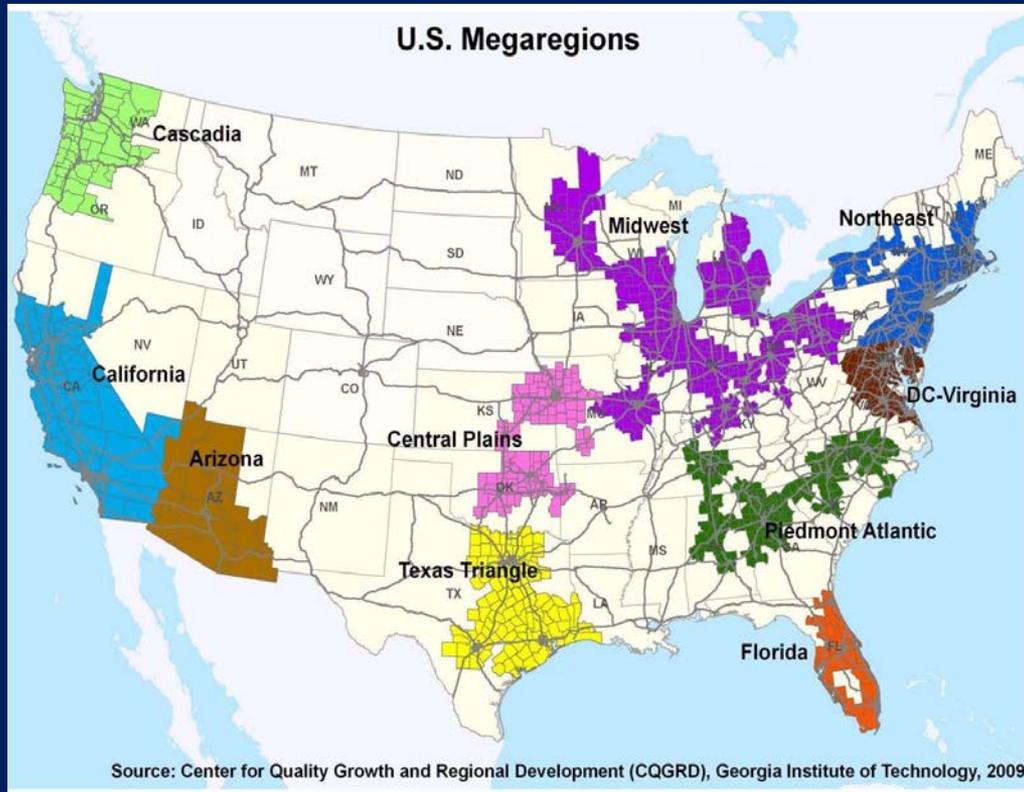
- It is clear that water will be *the* natural resources, science, engineering, and policy issue of the 21st century.
- The habits of a profligate past are colliding with ecological and economic limits (recurring drought, megaregions, and tri-state “water wars”).
- Overarching institutional framework and legal regime that treats water as a limitless resource East of the Mississippi River-myth of abundance is firmly entrenched and leading to “contested waterscapes.”
- Water flows uphill toward money.
- You pay for water projects with someone else’s money.

Drought



The historically low river levels of 2005-2007 have demonstrated that the Southeastern United States is vulnerable to water shortages resulting from extended drought, overuse, and water policies and water management plans that are not adequate to accommodate future levels of population growth.

USGS: Urban Areas in the Southeastern U.S. Will Double in Size By 2060-Where Will We Get the Water?



News Release

July 28, 2014 Adam Terando 919-515-4448 aterando@usgs.gov
Christian Quintero 813-498-5019 cquintero@usgs.gov

Scientists Predict Massive Urban Growth, Creation of 'Megalopolis' in Southeast in Next 45 Years

RALEIGH, N.C.—Urban areas in the Southeastern United States will double in size by 2060 unless there are significant changes to land development, according to a new study by the Department of Interior's Southeast Climate Science Center and North Carolina State University.

The predicted growth would come at the expense of agricultural and forest lands, creating an urban "megalopolis" stretching from Raleigh to Atlanta, which also raises a number of ecological concerns.

"If we continue to develop urban areas in the Southeast the way we have for the past 60 years, we can expect natural areas will become increasingly fragmented," said Adam Terando, a research ecologist with the U.S. Geological Survey, adjunct assistant professor at NC State, and lead author of the study. "We could be looking at a seamless corridor of urban development running from Raleigh to Atlanta, and possibly as far as Birmingham, within the next 50 years."

To understand how urban and natural environments could change, the researchers used NC State's High Performance Computing services to simulate urban development between now and 2060 across the Southeastern United States.

Among the expected impacts of such expansive urban growth, the fragmentation of natural areas would significantly limit the mobility of wildlife, making it more difficult for them to find mates, raise young, find food and respond to environmental changes.

"This, in turn, increases the likelihood that we'll see more conflicts between people and wildlife, such as the increasing interactions with bears we're seeing in our suburban areas," Terando said.

An increase in urbanization would also make urban heat islands—the warming of cities due to human activities and development—more common, favoring species that can take advantage of

Increase in Water Wars Among States Expected

On March 30, 2016, at the American Bar Association, Section of Environment, Energy, and Resources' 34th Water Law Conference, in Austin, TX, the Nation's leading environmental lawyer, DOJ Assistant Attorney General for Environment and Natural Resources, John Cruden, stated that SCOTUS is seeing an unprecedented number of original jurisdiction cases and that trend is likely to continue!

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Water Law & Policy Monitor™

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Water Resources

Increase in Water Battles Among States Seen, Cruden Says



By Paul Stinson

March 30 — The U. S. Supreme Court is seeing an unprecedented number of original jurisdiction cases concerning water allocation, and that trend is likely to continue, a top Justice Department official told conference attendees March 30.

"What I was stressing is that I am seeing more original jurisdiction water cases than I have in the past," John C. Cruden, assistant attorney general for environment and natural resources, told Bloomberg BNA on the sidelines of the 34th American Bar Association Water Law Conference in Austin, Texas.

Cruden delivered a keynote address on ground and surface water conflicts waged before the Supreme Court.

"I believe we're going to see more of these because there are so many of these Republican Rivers and Colorado Rivers that are multiple state issues," Cruden said in his address, referring to two river systems that span multiple states and have sparked conflicts over how the water should be allocated.

Quantity, Not Quality

"These cases reflect states' concerns about water as a resource issue and they're bringing actions in the Supreme Court to protect water as a resource for them," he said.

Cruden said the influx of state-versus-state cases is unlikely to taper off any time soon.

"I think it can be a trend in the future because every state no matter where you are really now recognizes the extraordinary importance of water not just as something we would think of as a pollution issue but also literally as a resource for irrigation, drinking water, recreation and to keep oysters alive," he said.

Posing the question as to whether a recent uptick in original jurisdiction water cases amounted to the "new normal" Cruden's presentation referred to four water-related cases are currently pending before the nation's high court, *Montana v. Wyoming* (2016 BL 85322, U.S., No. 137, ORIG., 3/21/16), *Texas v. New Mexico* (U.S., No. 141, ORIG., 1/8/13), *Florida v. Georgia* (U.S., No. 142, ORIG., 6/19/15) and *Mississippi v. Tennessee* (2015 BL 206220, U.S., No. 143, ORIG., 6/6/14).

Cruden told Bloomberg BNA such state water concerns aren't limited to drinking water, pointing to the *Florida v. Georgia* case, in which Florida contends the state's oyster industry is being adversely impacted as a result of less water flowing into their state (13 WLPM, 3/23/16).

Jurisdiction of Clean Water Rule Not Set

Acknowledging the conference's earlier panel discussing the Clean Water Rule, also known as the waters of the U.S. rule, Cruden said "we're still working our way through who has jurisdiction."

BNA Snapshot

Key Development: John Cruden, assistant attorney general, tells ABA Water Law conference of higher number of original jurisdiction cases among states in the U.S. Supreme Court over water allocations and says this could be "a trend in the future."

What's Next: Clean Water Rule has been stayed while Sixth Circuit decides whether it is the appropriate venue for challenges.

Harris v. Brooks (1955)

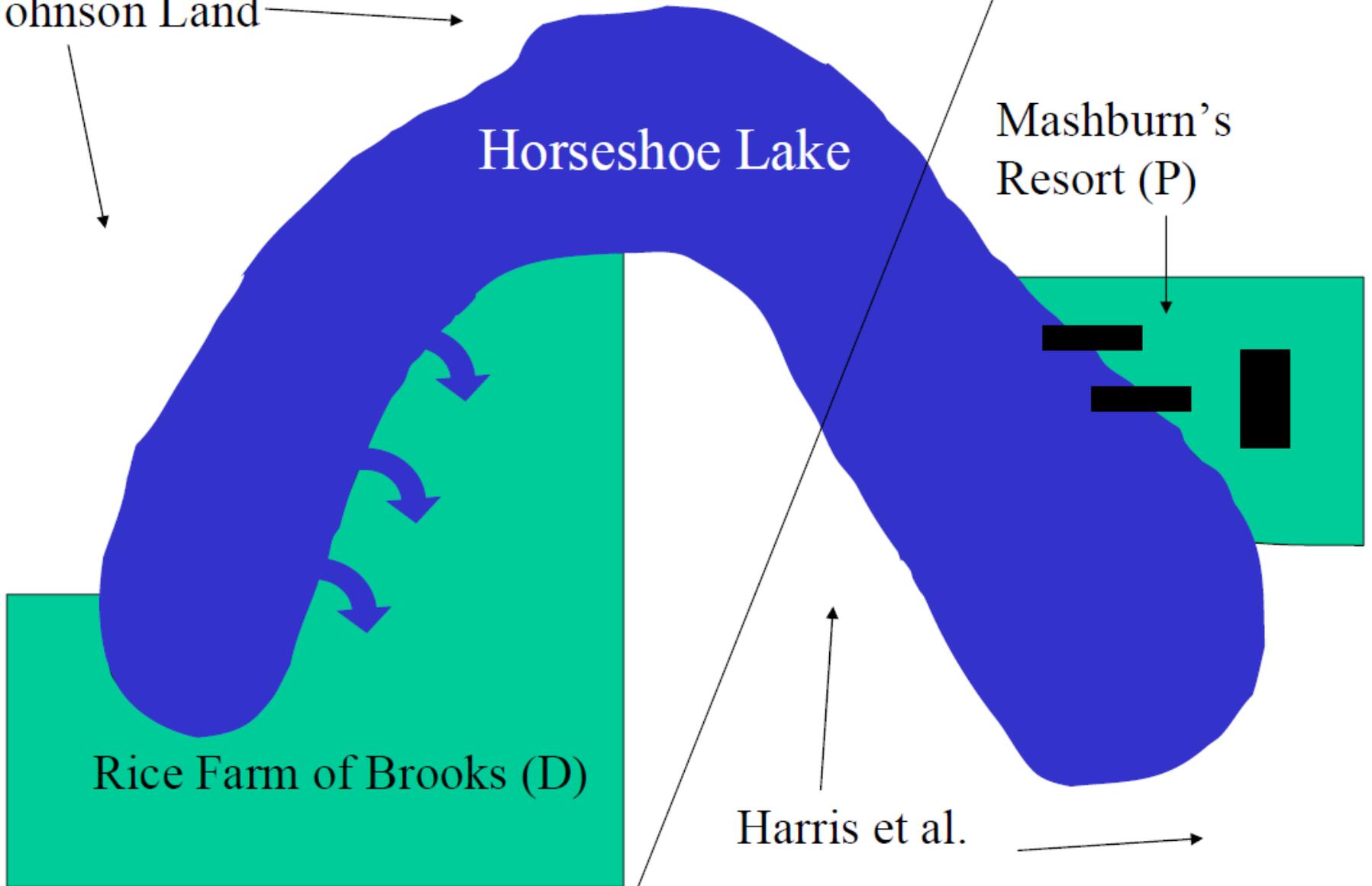
Johnson Land

Horseshoe Lake

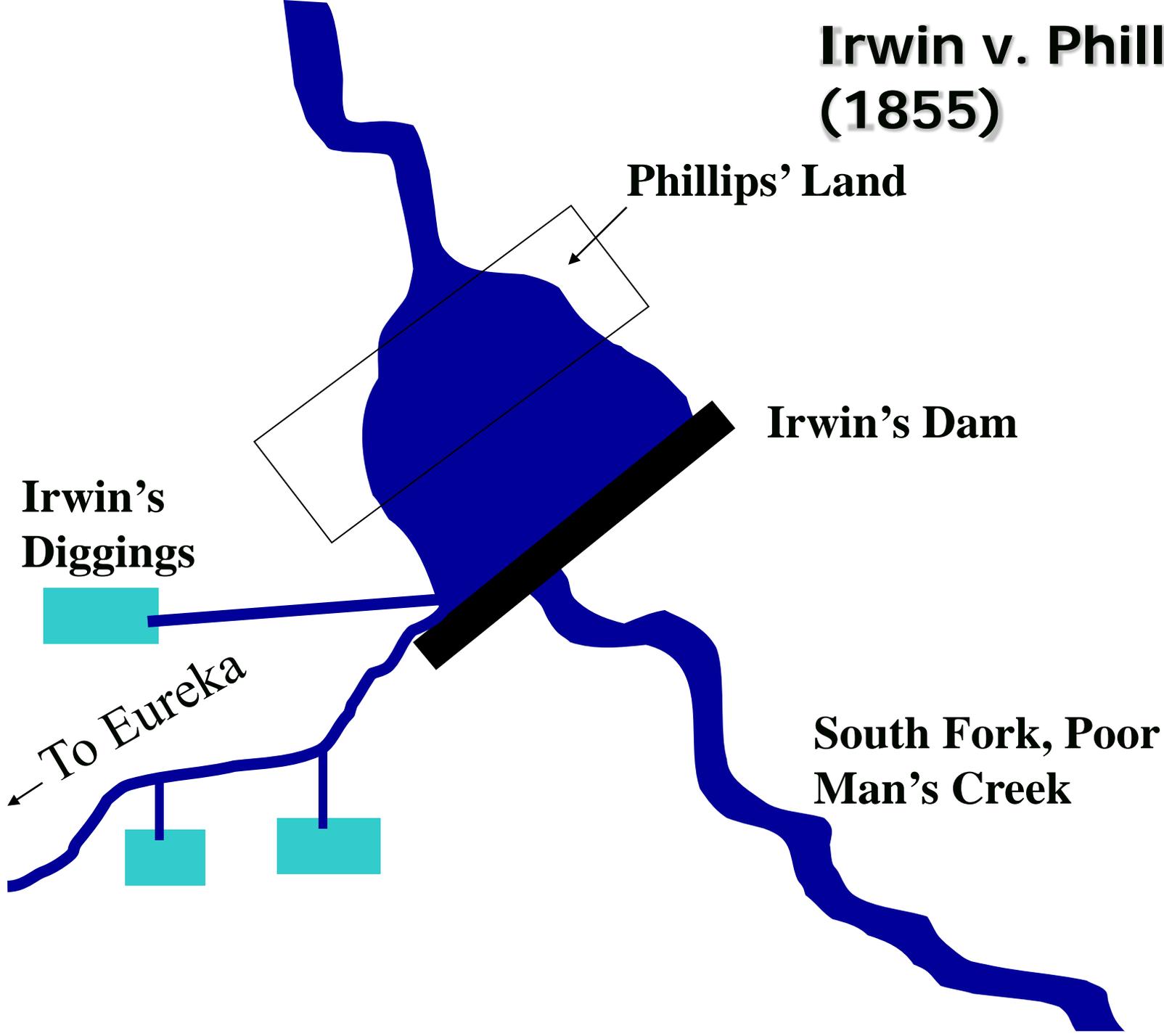
Mashburn's
Resort (P)

Rice Farm of Brooks (D)

Harris et al.



Irwin v. Phillips (1855)



Phillips' Land

Irwin's Dam

Irwin's
Diggings

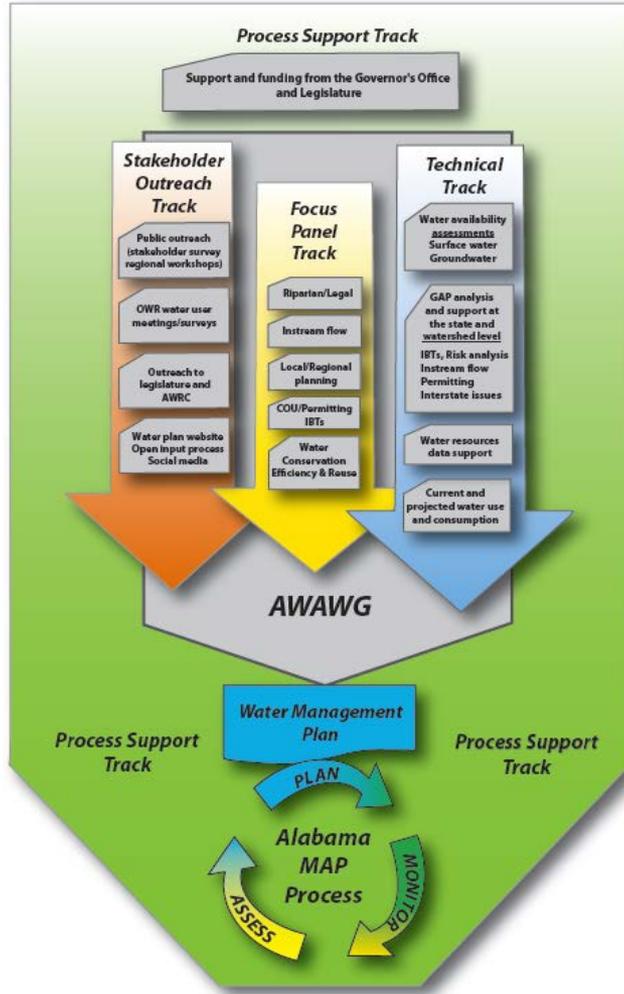
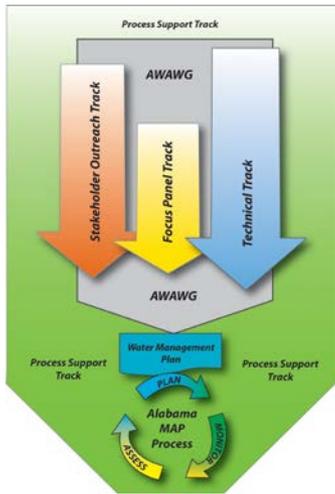
← To Eureka

South Fork, Poor
Man's Creek

POLICY OPTIONS AND RECOMMENDATIONS ON PAGES 3 AND 4 OF AWAAG REPORT

Summary of Part II Issue Area Policy Options and Recommendations	Summary of Part II Issue Area Policy Options and Recommendations
Surface Water and Groundwater Availability Assessments	Identify specific representatives from various stakeholder groups to facilitate more effective and efficient communication between policy makers and stakeholder groups. These distinct groups could include citizen-based environmental groups, universities, trade organizations, industrial sectors, public water systems, and various local/state/federal agencies.
Continue funding for on-going assessments and monitoring efforts.	Interbasin Transfers
Provide funding and support to enhance on-going scientific assessments and data collection efforts.	Create a Certificates of Use, Permitting and Interbasin Transfer Focus Panel.
Establish laws, policies, and regulations for surface and groundwater that are consistent with the MAP process.	Riparian and Other Legal Issues
Water Resources Management	Create a Riparian and Other Legal Concerns Focus Panel.
Continue the AWAAG, under the direction of the Governor, as the coordinating body for statewide water management planning activities.	Any proposed statutory or regulatory changes should take into consideration the results of the comprehensive assessment of surface and groundwaters of the state.
Direct the AWAAG, working with appropriate State agencies and with additional funding, after appropriate stakeholder input, to initiate the Alabama water management planning and implementation process using the proposed conceptual framework.	Consider the need to develop legislation establishing a Safe Dams Program in Alabama with appropriate funding.
Water Resources Data	Task the OWR with requesting advice from the Alabama Water Resources Commission, the Alabama Water Resources Council and other appropriate state agencies on how to address federal encroachment into water policy and its impacts on statewide water resources management in Alabama.
Continue integrated assessment of the State's surface and groundwater resources.	Drought Planning
Provide resources and support for instream flow studies to evaluate existing flow tools and to determine an acceptable framework for implementing future instream flow requirements, if deemed appropriate.	Consistent with the MAP process, any comprehensive water resources management plan should fully integrate the <i>Alabama Drought Management Plan</i> and incorporate state-level drought response processes into any proposed actions and activities.
Fund recommended monitoring activities described in this report.	Enact Senate Bill 20/House Bill 49, the Alabama Drought Planning and Response Act, which has been pre-filed for the 2014 General Session.
Develop cost estimates for operating and maintaining the State's water data collection and reporting capabilities.	The Governor and Legislature should provide adequate funding and staffing to State agencies conducting drought management and response activities.
Establish a water resources data clearinghouse accessible by the public via a web portal.	Water efficiency mechanisms such as water conservation and reuse should be in the State's Drought Management Plan.
Develop consistent and reliable data quality standards and protocols for the acquisition and management of water information.	Enhanced Certificates of Use/Permitting
Instream Flow	Create a Certificates of Use, Permitting and Interbasin Transfer Focus Panel.
Create an Instream Flow Focus Panel.	Interstate Coordination Issues
Provide support and resources to investigate instream flow needs of Alabama's aquatic ecosystems and evaluate the utility of existing flow assessment tools for management purposes.	Support staff efforts to maintain relationships with peers in neighboring states to improve coordination of activities relating to shared interstate watersheds, and maintain continuity and staff-level lines of communication if contentious issues arise between the states.
Water Conservation and Reuse	The Governor should continue to support agency activities that involve shared water resources.
Create a Water Conservation, Efficiency, and Reuse Focus Panel.	Maintain a clearinghouse concerning interstate water issues.
Ensure that adequate local voluntary and mandatory water conservation measures are established during times of drought and are in accordance with the State's Drought Management Plan.	
Support development of water reuse regulations to conserve water while being protective of human health and water quality and promote water reuse as a practical conservation measure.	
Develop a public education program presenting the need for and benefits of water conservation and reuse.	
Economic Development	
The MAP process and any State water resources management plan should include policies and guidance for water resources development programs.	
As water resource assessments are completed, communicate water capacity and availability information to industrial recruiters.	
The Governor's economic development strategic planning process should include consideration of water resources implications in any efforts to focus Alabama's business and industry recruiting efforts.	
The Governor should task the Inland Waterways and Intermodal Infrastructure Advisory Board to provide recommendations for water resource-related infrastructure projects that would provide direct benefits to economic recruiting efforts.	
ADECA and ADEM should review federal and State water supply development funding programs (including state funded seed monies).	
ADECA should create an information clearinghouse on their web site to summarize sources of potential funding for new water source development.	
Public and Stakeholder Education and Outreach	
Solicit the participation of stakeholders and the public. This would include maintaining contact information for all interested individuals and organizations.	
Develop a media campaign with media outlets and other advertising venues to target individuals who may not already have a foundational knowledge of water resources.	
Publicize and promote Alabama's water resources and the need to protect them for future generations.	

Alabama Water MAP Process



Focus Area Panels (FAPs)

- Riparian and other legal issues
- Local/regional planning
- Water conservation, efficiency, and reuse
- Certificates of use, permitting and interbasin transfers
- Instream flows



Purpose of FAPs

- To bring partners together to discuss difficult issues.
- To develop written reports for the AWAWG addressing specific questions and issues.
- To meet within a short time frame (\approx 12 months).
- Process and partners approved through Governor's Office.



Stakeholder Outreach

Purpose of Stakeholder Outreach Track

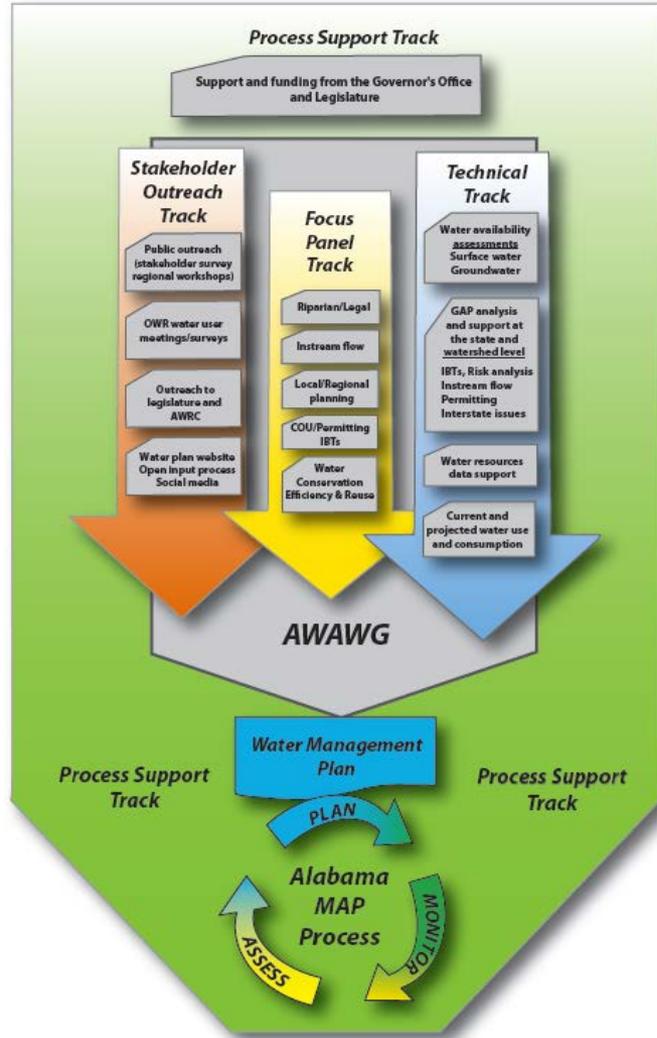


1. To inform and educate the public as to the need for and progress of water management planning.
2. To solicit input into the process.
3. Tools could include AWAWG website, symposia, surveys, workshops, social media, meetings with stakeholders.
4. Coordination with Permanent Joint Legislative Committee, AWRC, AEMC, Governor's Office.



Where Are We Now ?

April 5, 2016



Riparian and Other Legal Issues Focus Area Panel-Goals

- **To prepare a comprehensive report for the Alabama Water Agencies Working Group (AWAWG) and the Governor's Office on the significant riparian rights issues and other water law and policy issues in the State. The report will document: 1) where we've been-- the origin of the riparian rights paradigm and legal regime; 2) where we are--analysis of the 1993 Alabama Water Resources Act (Act) and current state of water law and policy in the state; and 3) where we're going---water policy and law for the 21st century in Alabama;**
- **To deliberate whether changes are needed in the Act to accommodate current conditions and what model should be used in making any necessary changes; and**
- **To create a substantive and procedural framework for integrating changes, if any are recommended and needed, into Alabama water policy and law and the statewide water management plan.**

Riparian and Other Legal Issues Focus Area Panel

MEMBERSHIP

Bennett L. Bearden, Chair
Special Counsel to the Governor on Water Law and Policy



Tom Littlepage



Seth Newton, Vice Chair
and Reporter



Vernon Barnett, Vice Chair



Will Gunter, Vice Chair



Richard McNider



Patrick Moody, Vice Chair

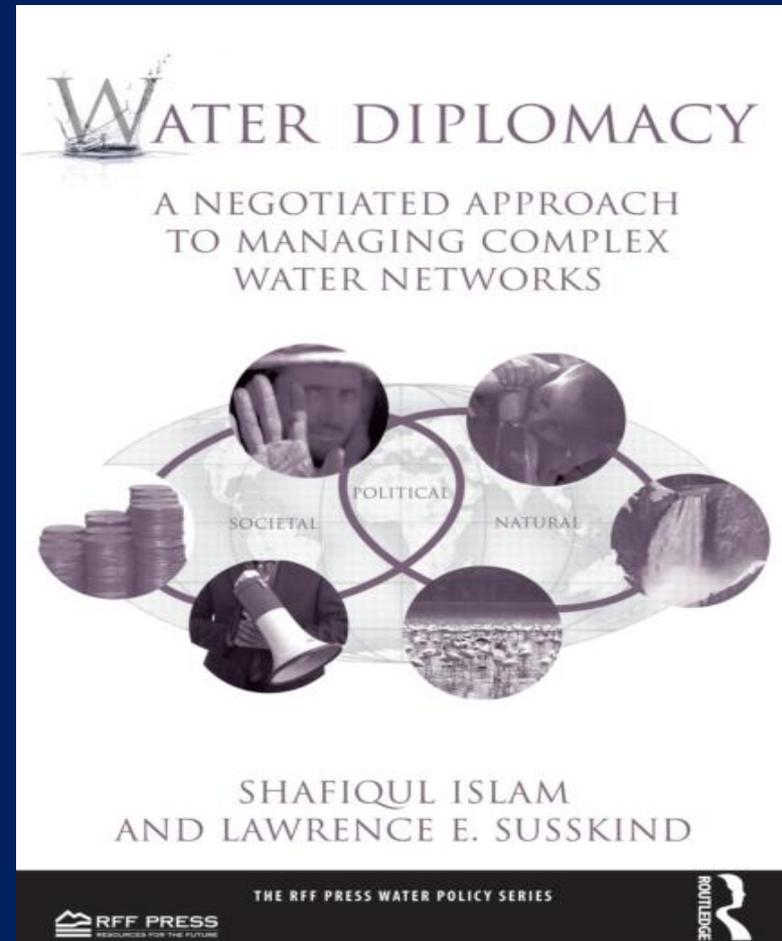
Riparian and Other Legal Issues FAP Members (20)

- Electric Utility- Tom Casey, Balch & Bingham LLP, Alabama Power
- Electric Utility- Arthur Brunson, PowerSouth
- Manufacturing- Ron Farley, Burr & Forman LLP, Manufacture Alabama
- Forestry- Scott Rouse, Alabama Forestry Commission and Tom Saunders, Alabama Forestry Association
- Coal- Milton McCarthy, Alabama Surface Mining Commission
- Business- Trevor Parrish, Business Council of Alabama
- Agriculture- Sid Belcher, ALFA
- Academic/Research- Heather Elliott, University of Alabama School of Law
- Water Utility- Robert Sasser, Sasser, Sefton & Brown, PC
- Environmental NGO- Mitch Reid, Alabama Rivers Alliance
- Conservation NGO- Kellyn Garrison, The Nature Conservancy
- Legal NGO- Gil Rogers, Southern Environmental Law Center
- Municipalities- Jeff McLaughlin, McLaughlin & Edmondson, LLC, for the League of Municipalities (delegated by Lori Lein)
- Economic Development Issues- Joel Kuehnert (with Dave Stewart), Bradley Arant Boult Cummings LLP
- Environmental Law Firm- Rebecca Pritchett, Pritchett Environmental & Property Law LLC
- Alabama Rural Water Association- Mike Cole, Wilmer & Lee
- Attorney General Office- Ward Beeson, AG Office
- Real Estate Law-Jesse Evans, Rumberger, Kirk and Caldwell

Riparian and Other Legal Issues FAP Reporting Committee

- **Dr. Bennett Bearden, FAP Chair, Special Counsel to the Governor on Water Law and Policy**
- **Seth Newton, Reporter and FAP Vice Chair, Geological Survey of Alabama**
- **Tom Casey, Balch & Bingham LLP, Alabama Power**
- **Heather Elliott, University of Alabama School of Law**
- **Ron Farley, Burr & Forman LLP, Manufacture Alabama**
- **Trevor Parrish, Business Council of Alabama**
- **Sid Belcher, ALFA**
- **Mitch Reid, Alabama Rivers Alliance**
- **Gil Rogers, Southern Environmental Law Center**
- **Jesse Evans, Rumberger, Kirk and Caldwell, Home Builders Association of Alabama**

Water Diplomacy: Building Consensus, Resolving Conflict with an Interdisciplinary Negotiation Approach

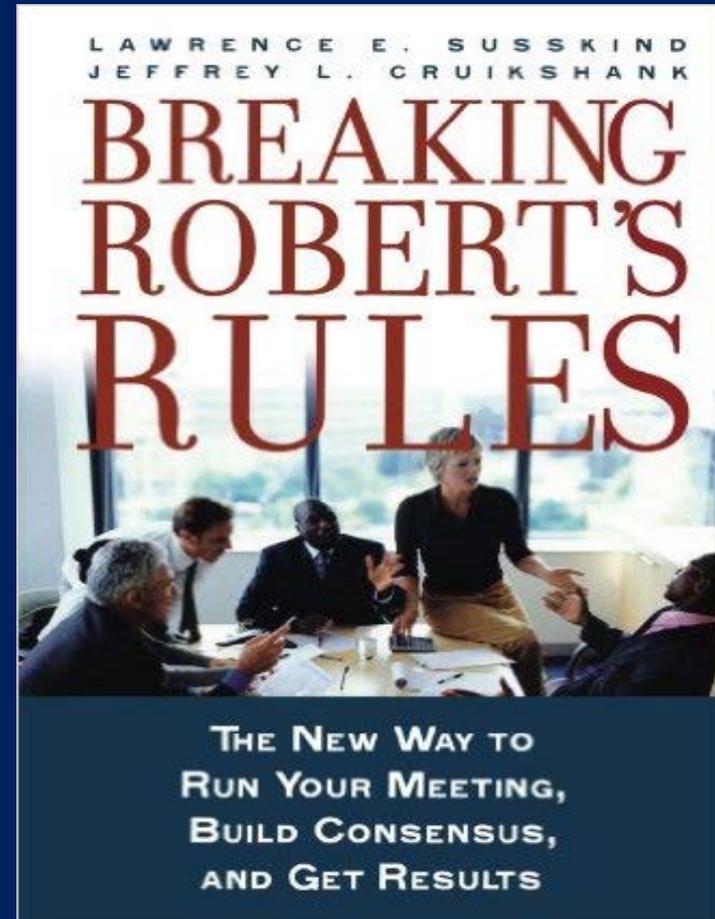


“Water Diplomacy: Managing the Science, Policy and Politics of Water Networks through Negotiation”

“Water conflicts occur when natural, societal, and political forces interact. Together, these interactions generate what we call water networks. As population growth, economic development and climate change impose pressures on finite water resources, management of these water networks becomes crucial. Science alone is not sufficient; nor can policy-making that does not take science into account yield sustainable management solutions. Rather, sustainable solutions may only be found through a diplomatic or negotiated approach that simultaneously takes science, policy, and politics into account.”

Water Diplomacy

- Provides forward-thinking institutions, organizations and governments with constructive resolution of emerging environmental challenges at the intersection of water law and policy; and
- Emphasizes strategic counseling, crisis management, mediation, creative dispute resolution and enhanced relations with stakeholders and community groups.



Issues

1. Are existing surface water and groundwater laws and regulations in Alabama adequate? Given the passage of time, changes in circumstances, new case law and Attorney General's Opinions since the Act was enacted in 1993, are there changes in the Act needed to accommodate current conditions?
2. If changes in the Act are needed, what are they and what model (Regulated Riparian Model Water Code, etc.), if any, should be followed in making any necessary changes?
3. The federal government appears to be moving into the water quantity area—an area traditionally addressed by states. How should Alabama respond?
4. Water quantity and water quality are closely connected. How should this connection be better emphasized at the State level?
5. Are the Critical Use Study and Capacity Stress Area designation provisions of the Act (Ala. Code sec. 9-10B-21 and sec. 9-10B-22) adequate as an alternative to a formal water withdrawal permitting system or should they be enhanced?
6. What is the applicability, if any, of laws and policies of surrounding states for potential consideration in Alabama?
7. Is there a need for enhancements to enforcement mechanisms for the Alabama Water Use Reporting Program?
8. What are the appropriate mechanisms for local and regional inputs into state agency planning and a review of other existing statutory authorities pertaining to water planning activities (i.e. Watershed Management Authorities, Resource Conservation & Development Districts, Regional Planning Agencies, Conservancy Districts, Irrigation Districts, etc.)?
9. What programs and processes should be used for stakeholder review, education, and input into any proposed recommendations for statutory or regulatory changes?
10. How should the data derived from the statewide water resources assessments of surface water, groundwater, baseflows, and instream flows be used to guide and inform any proposed statutory or regulatory changes in Alabama water law and policy?
11. Most if not all states other than Alabama, have a Safe Dam program which evaluates the risk and safety of dams within the state. What actions are needed, if any, to address this risk?



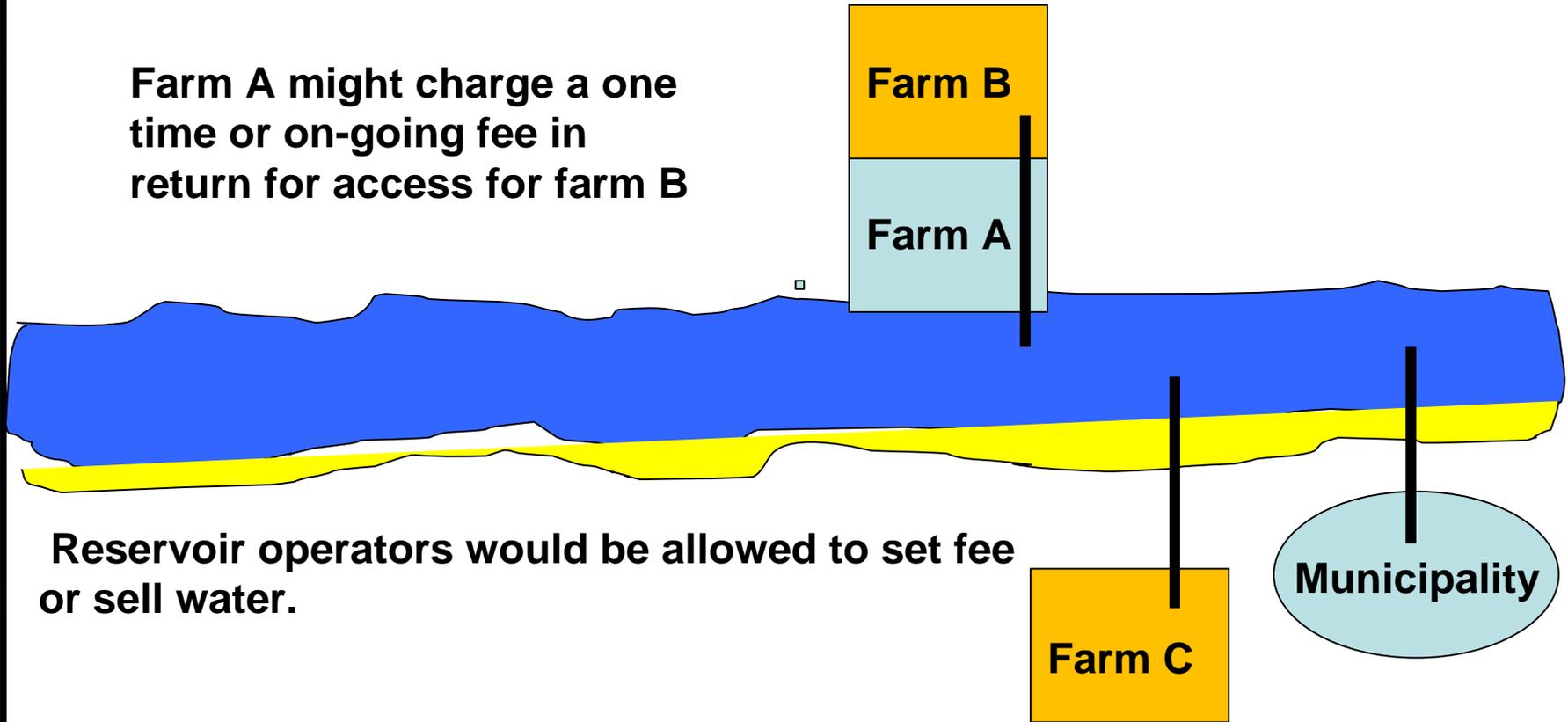
Farm A has riparian access but Farm B does not. Most farms don't have riparian access.



Reservoir operators often have easements along the reservoirs so no farms have riparian rights

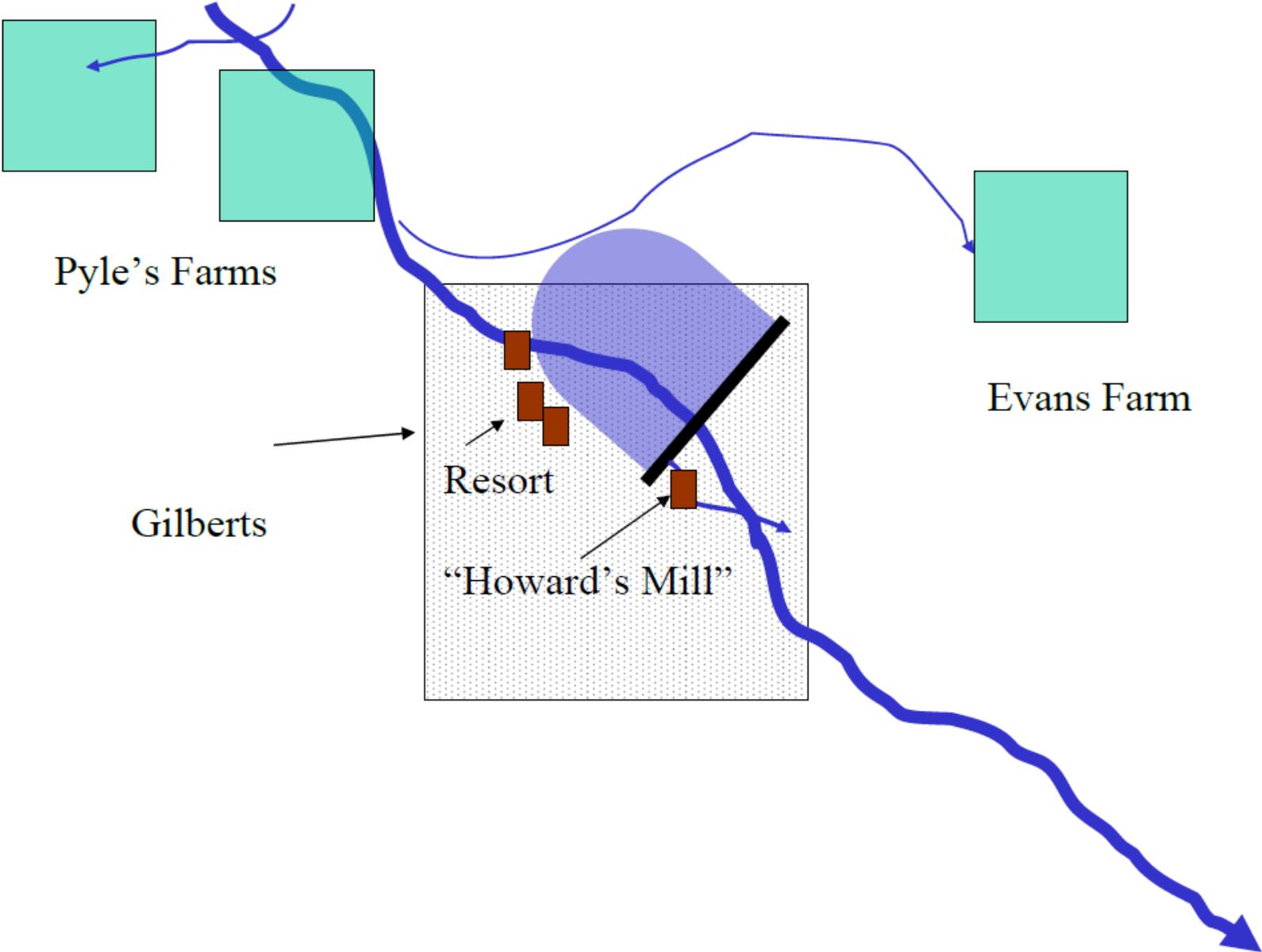


Farm A might charge a one time or on-going fee in return for access for farm B



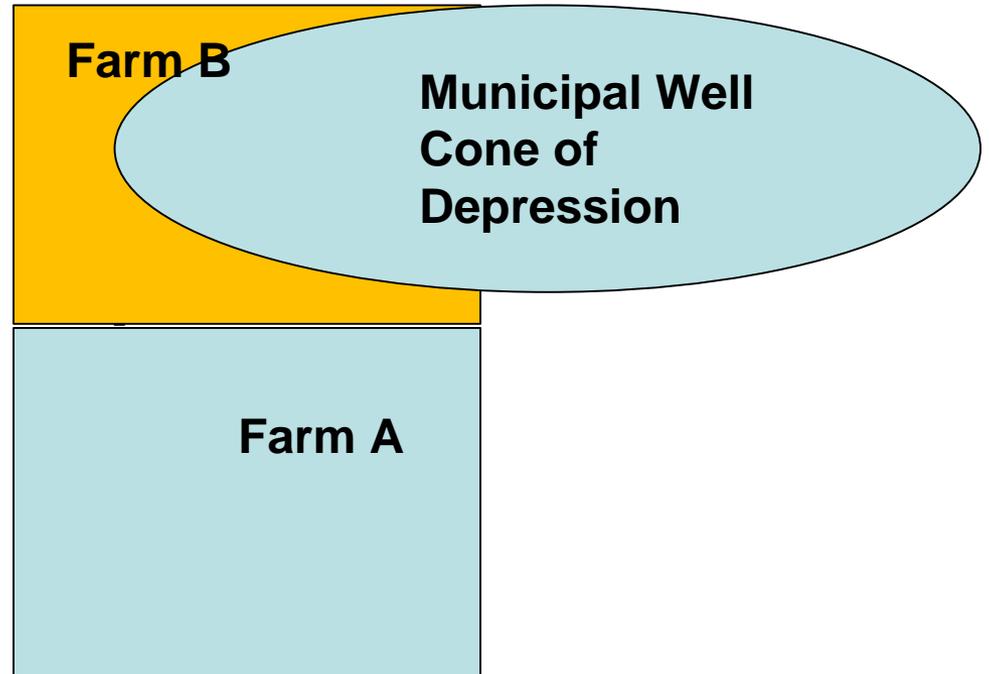
Reservoir operators would be allowed to set fee or sell water.

Pyle v. Gilbert (1980)



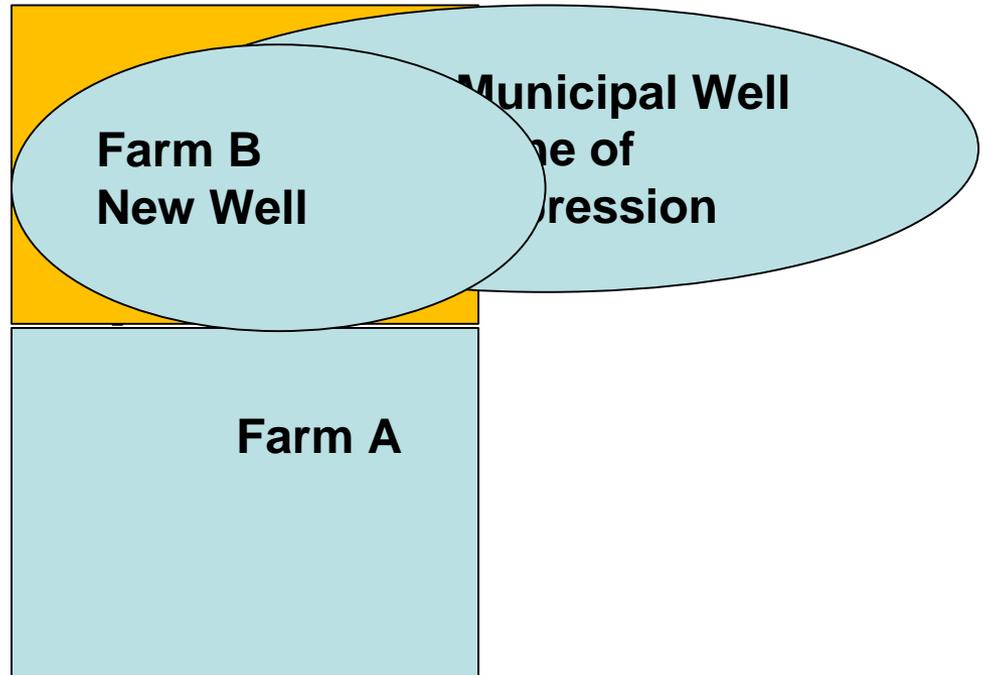


**Relaxation of Riparian
Access might also allow
improved use of ground
water**



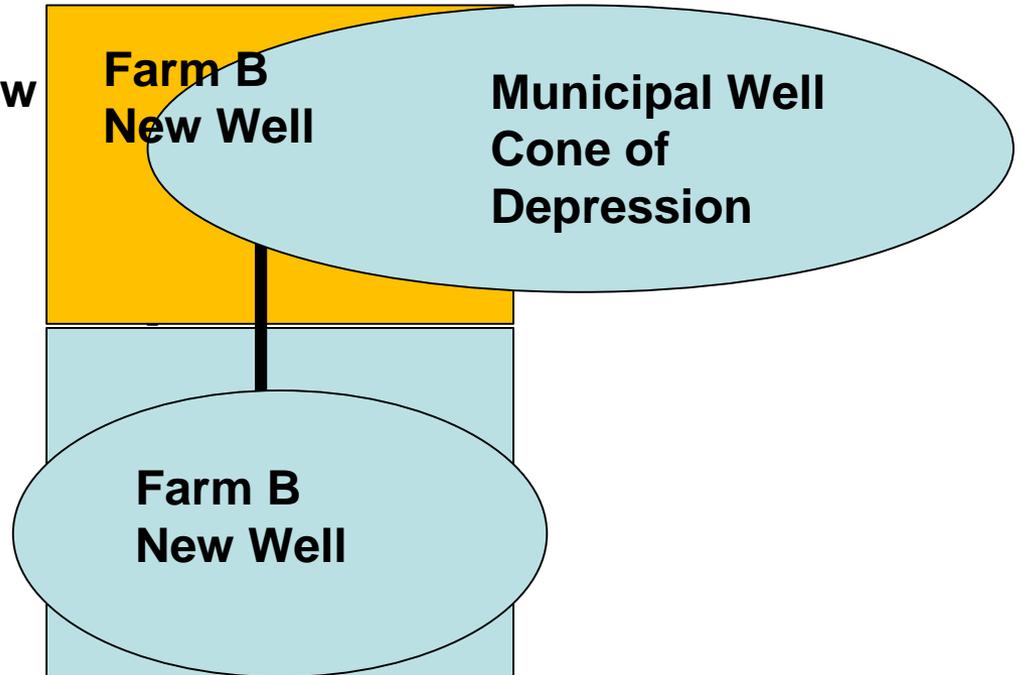


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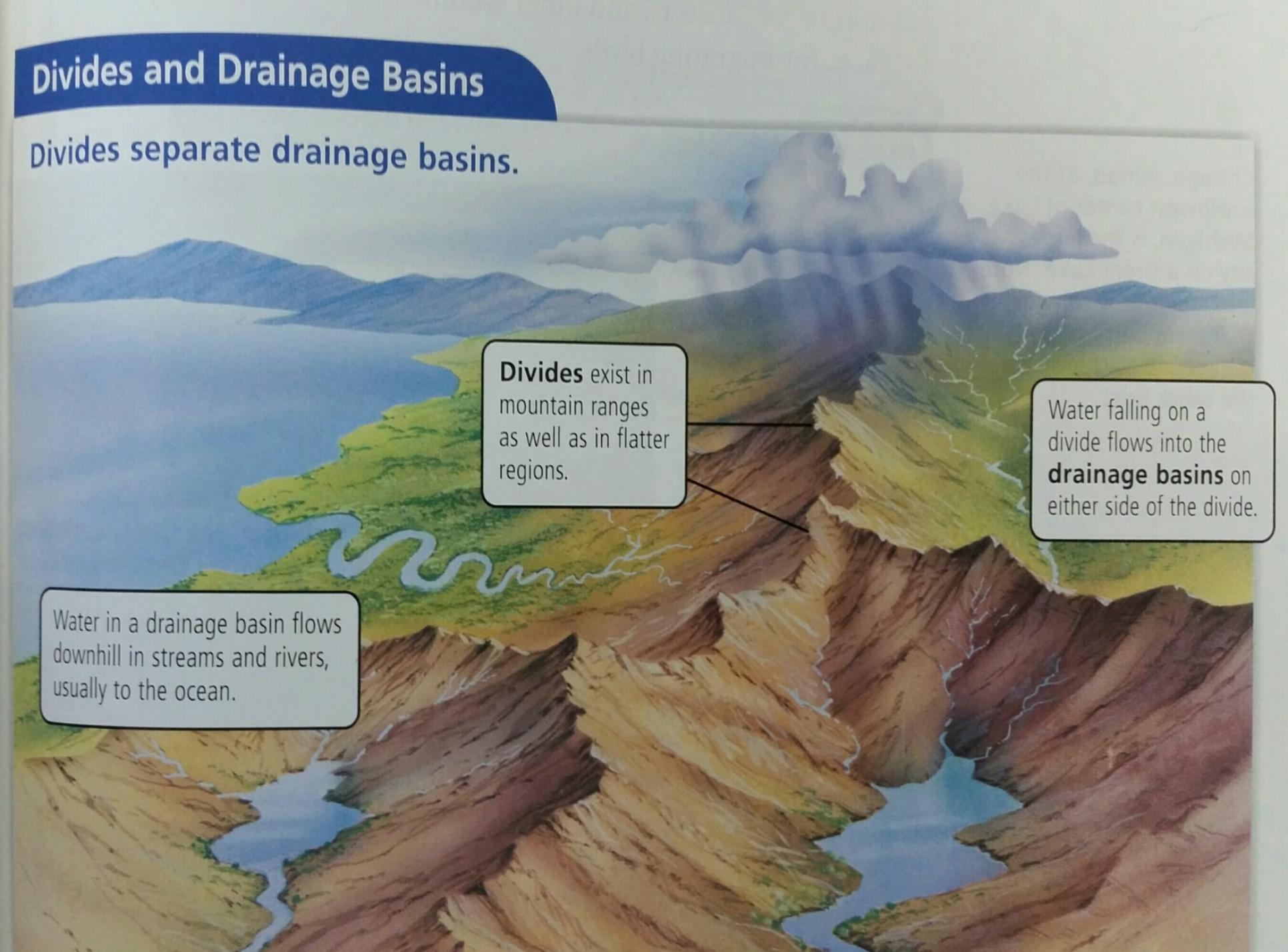


Relaxation might also allow improved use of ground water



Divides and Drainage Basins

Divides separate drainage basins.

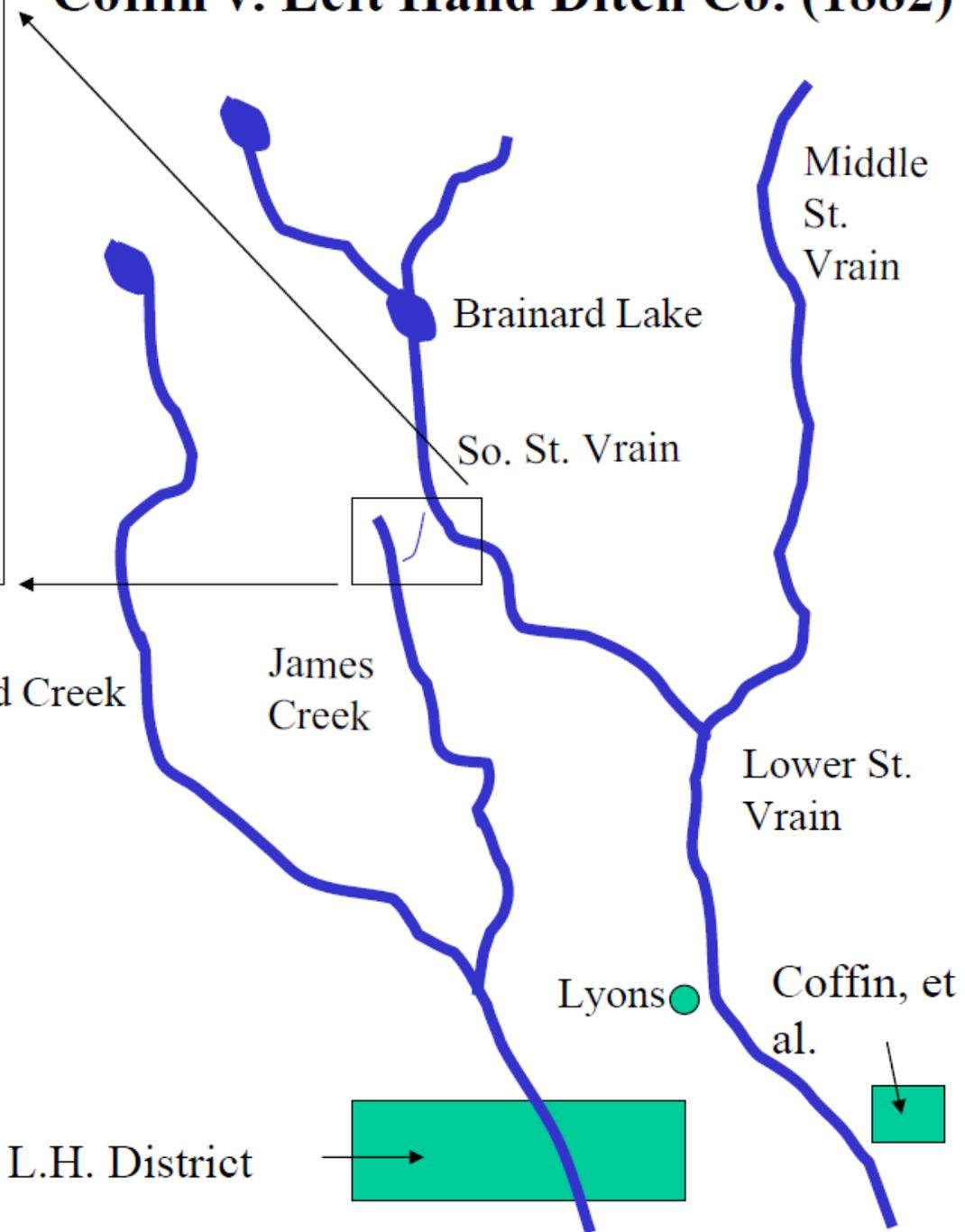
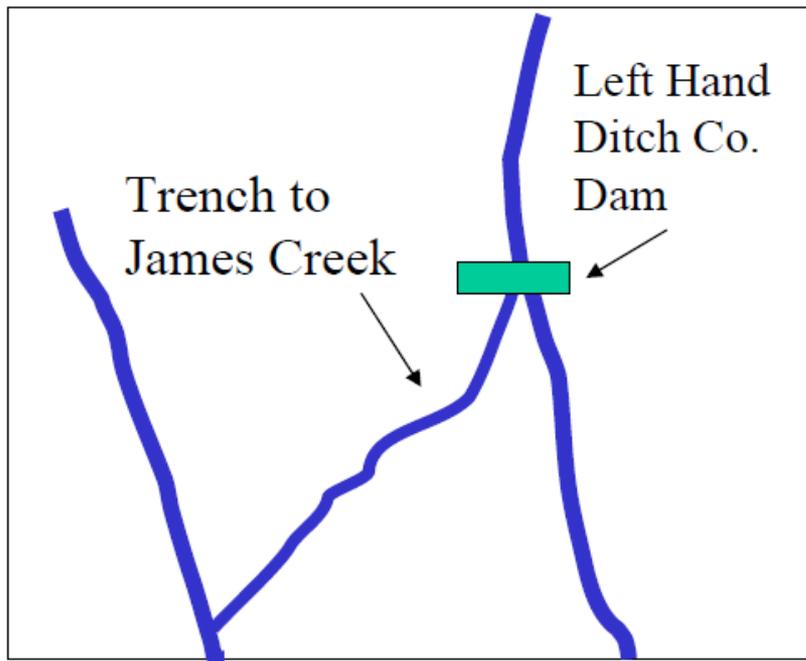


Divides exist in mountain ranges as well as in flatter regions.

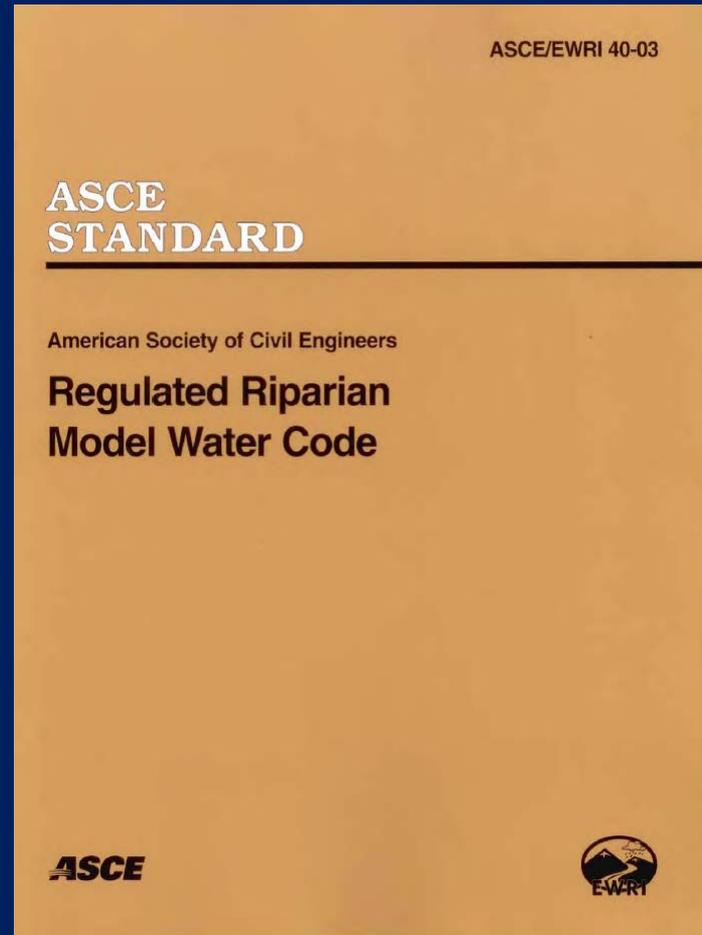
Water falling on a divide flows into the **drainage basins** on either side of the divide.

Water in a drainage basin flows downhill in streams and rivers, usually to the ocean.

Coffin v. Left Hand Ditch Co. (1882)



Regulated Riparian Model Water Code



Riparian and Other Legal Issues FAP Significant Dates

- Initial meeting and briefing by AWAWG-September 30, 2015 (ADECA-OWR, Montgomery, AL)
- Regular FAP meetings on November 12, 2015 (Bryant Conference Center, Tuscaloosa, AL); December 17, 2015 (Balch Bingham Law Firm, Birmingham, AL); January 28, 2016 (The University of Alabama School of Law, Tuscaloosa, AL); and February 17, 2016, (Alabama Department of Agriculture and Industries, Montgomery, AL)
- Final meeting on March 24, 2016 (The University of Alabama School of Law, Tuscaloosa, AL)
- Reporting Committee meeting May 6, 2016 with DRAFT reports.
- Goal: Delivery of Final Report to AWAWG Chair by July 1, 2016

Thank You!

