

Water Law 2023.12.14
Professor Rob Fischman
Spring 2024 B768 & R531
Tuesdays & Thursdays 12:40 - 2:10
Baier Hall (main law building.) Rm 214

Communications:

You may email me directly at rfischma@indiana.edu, but I prefer the Canvas email function. Reserve emails for personal issues you might have with the class or non-curricular topics. Do not email me substantive questions about course materials. Instead use the Canvas discussion thread (“substantive questions and observations about course materials”) so that other students can weigh in and I can steer everyone in a productive direction. You can also ask me questions during class meetings. I will monitor the discussion boards and may post comments there from time to time. I recommend you have Canvas Inbox forwarded to your regular email so you don’t miss a message from me: go to your Profile→Notifications and click the check for “conversation message.”

You may also visit me in my office, Baier Hall rm. 276. With students scattered in two corners of campus with very different schedules, office hours do not work. However, unless I tell you otherwise, I am always available immediately after class to walk back together to my office and sit down for a conversation. Email me to make an appointment if you wish to meet at a time other than right after class. I welcome office visits simply to chat about common interests and career goals. I also welcome early morning coffee invitations!

Course Description:

Whiskey is for drinkin', water is for fightin'.

Water Law explores the ways in which the United States addresses *conflicts* over water use. This course examines the legal control of water resources, focusing on water's special status as partially public and partially private property. Topics include riparian water rights (eastern U.S. water law), prior appropriation water rights (western U.S. water law), historical evolution of water rights, federal water rights, the public trust doctrine, recreational uses, and groundwater use. With the exception of riparianism, most of the water law issues arise from disputes in the western United States; however, water scarcity is increasingly an issue in the East. Though the class will discuss the intersection of water quality and quantity concerns, Water Law focuses on access and allocation policy. Students principally interested in water pollution should take a course in environmental law instead.

This course meets the Maurer graduation requirement for an upper-level course in which writing is used as a means of instruction. Class grades will be based on participation and a variety of assessments, emphasizing frequent, short writing assignments. There will be no final exam.

Course Materials:

Please purchase the casebook, Thompson, Leshy, Abrams & Zellmer, *LEGAL CONTROL OF WATER RESOURCES* (6th ed. 2018). ISBN 978-1-68328-983-8. Make sure you have the 2018 edition! Don’t buy a previous edition by mistake—that will cause you all sorts of headaches. I will place any additional readings in the Files tab of Canvas. The campus bookstore has a spotty record with stocking law books. Unless you can find a copy in the bookstore before you leave

town for break, I suggest you order one online right away. You will need your book in hand to prepare for the very first class of the semester.

You are permitted to take notes on the online materials and lectures posted for this course for your personal use. You are not permitted to re-post in another forum, distribute, or reproduce content from this course without the express written permission of the faculty member. Any violation of this course rule will be reported to the appropriate university offices and officials, including to the Dean of Students as academic misconduct.

Course Objectives:

This course has two goals. The first deals specifically with **water law** and contains 4 learning objectives. The second deals with more **general legal skills** and also contains 4 learning objectives.

By the end of the semester you should expect to be able to evaluate issues and recommend reforms dealing with:

- 1) water allocation systems;
- 2) the role of statutes and administrative tools (e.g., permits) in limiting and defining common-law property rights;
- 3) the relationships between water allocation and environmental concerns; and
- 4) the relationship between individual preferences and collective interests in water use.

By the end of the semester, you should improve your ability to:

- 5) derive law from primary source documents, such as statutes and judicial opinions;
- 6) analyze how law applies to a set of facts;
- 7) advise clients and administrators;
- 8) create compromise solutions to contentious public policy problems.

Research and Study Aids:

Sometimes you may find that the casebook provides inadequate detail for your grasp of a topic. When that occurs, I suggest you supplement the required reading with either ZELLMER & AMOS, *WATER LAW IN A NUTSHELL* (West 6th ed. 2021) (general overview of subjects we cover) [on reserve at the law library and [available on Westlaw](#)], or TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* (more detailed focus on black-letter principles of water law) [available in Westlaw by searching title or under secondary sources→real property→real property texts & treatises]. Non-law students will receive Westlaw user codes for the semester.

In class, we will use the "black letter" rules as a *starting point* for discussion of issues that are less easily learned from books (such as how to create good arguments). You should review the settled rules in a particular area of water law before we deal with it in class so that you can focus on the applications and broader concepts that we will grapple with in discussion. Although I am happy to review and explain areas of confusion in class, I believe it is not good use of class time to lecture about rules and holdings that can be pulled from widely available reference material. Instead, it is a better use of class time to explore how the law applies seemingly definite rules or standards in flexible, surprising, and contradictory ways.

Throughout the course, we will be talking about conceptions of property and the extent of public and private rights therein. Many students find it helpful to review commentary about what property is and how it mediates public and private interests. This is particularly true for the O'Neill students who have not taken a class in property law. The IU library system has an e-version of a book, Eric Freyfogle, *On Private Property* (2007), here:

<http://iucan.iu.edu/catalog/13354400> and

<http://site.ebrary.com/lib/iub/docDetail.action?docID=10256101>

I recommend especially the first 100 pages, with special focus on chapter 1, "Correcting Half-Truths." If you want more background in property law, I'd also suggest reading the entire Goldstein article, which I've posted as supplemental reading on Canvas Files.

Some students may find helpful a variety of introductions to the law and legal analysis. I suggest the following with an eye toward helping the O'Neill students in the class better understand how we move from the primary source readings to the broader discussions in class. But these introductory sources are a good review for law students as well. The key parts of the sources below are available online or posted in pdf format on the Canvas site ("Study Aids and Background" folder in Canvas "Files" tab). I particularly recommend Fischl & Paul for the early weeks of this course.

- 1) Fischl & Paul, *Getting to Maybe* (1999) [though focused on exam performance, this book is nonetheless useful in helping students understand how to use primary source materials to make broader arguments in class and in written assignments. **Chapter 10 pdf in Canvas introduces students to methods of making policy arguments.**],
- 2) Johns & Perschbacher, *The United States Legal System* (2002) [**Chapters 3-5 pdf in Canvas describe the structure of legal institutions and methods employed in judicial analysis**],
- 3) Schauer, *Thinking Like a Lawyer* (2009) [best single source for a non-law student to catch up with the modes of thinking practiced in law schools].
<https://ebookcentral.proquest.com/lib/iub-ebooks/detail.action?docID=3300789>
- 4) Kenneth Vandeveld, excerpts from *Thinking Like a Lawyer: An Introduction to Legal Reasoning* (2d ed. 2011). A review of case briefing and legal reasoning:
<http://site.ebrary.com/lib/iub/detail.action?docID=10435884>

For students interested in a very quick introduction to legal method, I also recommend reading some of the following materials also posted in our Canvas supplemental files folder.

- 1) Orin Kerr, "How to Read a Judicial Opinion". A popular, concise guide designed for starting law students.
- 2) Fred Cate, "Method in Our Madness". Though the essay specifically addresses communication law research, most of its points are equally applicable to water law.
- 3) James Boyle, "Anatomy of a Torts Class." A 12-page categorization of common legal arguments from a longer article.

All students, but especially the O'Neill students, will regularly encounter unfamiliar legal terms in the primary materials. When that happens, look up the term's meaning. You all will have access to Westlaw, which includes the definitive **Black's Law Dictionary**. You can search Ballentine's Law Dictionary, 3rd ed. on NexisUni through the IU Libraries site:

<https://libraries.indiana.edu/resources/nexisuni>. You can also use free sites, such as **thelawdictionary.org**, which has the 2nd edition of Black's, good enough for general purposes.

Participation Requirements:

The students in this year's class come from a wide variety of backgrounds. You should expect to learn from your fellow students. Don't get upset if students contribute information and insights that you do not have. This course is designed to bring together students with varying levels of experience and different academic orientations. Use class discussion as a rehearsal for practice settings, such as the public sector, that call for interdisciplinary or collaborative work.

Try to teach your fellow students by providing your own perspective on the required readings and on your experiences.

To succeed in this class, you need consistent engagement. If you get sick (or have some other excused absence), let me (and your school's student affairs office) know before the class session you will miss. To sustain engagement, you have two participation requirements, described in the numbered paragraphs below.

1) You must **make at least one "substantive discussion post" each week**. I will start a Canvas Discussion topic with specific questions or prompts from our weekly reading for each of our two weekly classes. You will fulfill the weekly requirement by posting a reply on one of the two Discussion boards at least 60 minutes before the class in which we will discuss the question/prompt. In other words, if you want to post for a Thursday class, you must do it before 11:40am Thursday morning. We will spend time in each class discussing your responses.

On days when assignments are due, there will be fewer or no opportunities to make substantive discussion posts. You will know a week ahead of time if your option for posting will be constrained. The assignment submissions are a separate requirement from the weekly "substantive discussion post" (part of participation grade). Submitting an assignment does not satisfy a week's "substantive discussion post."

Pedagogical studies show that the more you contribute to conversation, the more you will learn and remember. In other words, what you retain is not what the professor said. It is what you, yourself, expressed in your own words. The "substantive discussion post" requires that each student has something substantive to say each week. If you really want to master this material, make sure you have something substantive to say each class. You are welcome to post replies to the Discussion thread for *each* class, even though that goes beyond the participation requirement.

Asking a series of questions or summarizing/describing required reading is not a substantive discussion post. A **substantive discussion post** will

- 1) be concisely written,
- 2) be original (not simply rephrasing what someone else wrote),
- 3) be relevant to the topic at hand, and
- 4) demonstrate that you reflected upon the assigned material (or your colleague's point of view in the case of a response).

Do not simply affirm an argument from the reading. But you can show how it might apply in surprising or counterproductive ways to a different situation. If you can't think of something substantive to add, extend, or criticize, do not post at all. Instead of stating what you find "interesting", explain **why** an aspect of a case is interesting. Consider not using the word "interesting" at all. Instead, just explain why a decision (of a court, agency, legislature, etc.) is counter-intuitive, unjust, illogical, unethical, poor policy, or supportive/contradictory of some principle we covered or in contrast to some other law/case. The key is explaining why and showing some analysis (legal or policy).

Read the replies that others posted before you. Make sure you are introducing a new interpretation, perspective, applications, or idea to the prompt. Despite your originality, you contribute nothing to the discussion if someone else posted the same idea first. Try arguing for a position you disagree with. I won't ever care if you truly subscribe to a position you argue for; I reward effective advocacy. The more difficult a position is to defend, the more I respect your taking that position--regardless of your true opinions.

If you would like individual feedback on your substantive post, please email me. If you

post a discussion reply that I judge not substantive for weekly credit, you will hear from me via Canvas email.

2) You must **make one current event presentation to the class** during the semester. I will post a sign-up for presentation times soon. Though this requirement involves a bit of research and preparation, it is not intended to be an intensive assignment. The “research” is minimal. Simply following the news on a regular basis and thinking about how an article might relate to our course readings will yield great returns. You can receive free access to the New York Times online, courtesy of IU Libraries. In addition to the NY Times, you will find good reporting on (western) water issues in the **High Country News**.

The presentation will be brief (5-10 minutes). You will summarize the news article and explain how it relates to a required course reading. Then you will pose **a single discussion question** for the class to grapple with. Students who are not presenting should read the post in Canvas prior to class; reading the news article itself is optional but encouraged. Students other than the presenter may opt to make their weekly substantive discussion post via a response to the discussion question posed by the presenter in the current events thread.

The best presentations are of news articles that relate to the material we are covering the week of the presentation. But news articles relating to material we recently covered are also acceptable. Do not present a current event relating to material we have not yet or are not currently covering. The day before your current event presentation, please post the following information as a reply in the Canvas discussion thread for “Current Event Presentation”. Post no later than 11:59pm the day before you present. Each post should contain four elements:

- 1) Your name.
- 2) Link to the news article. Either make the headline hypertext or include a separate link.
- 3) The course reading assignment(s) and topic(s) to which the news article relates.
- 4) A 1-3 paragraph analysis as to how the news article relates to our course materials. It should conclude with the discussion question. Try to relate the question to something we have already discussed in class.

Grading Policy:

Graded writing assignments require submission via Canvas “Assignments.” Plan to write a double-spaced page (approx. 250 words) for each 5 points available in an assignment (in other words, a 10-point assignment is about a 2-page, double-spaced assignment). Under no circumstance should your response exceed 300 wds/5pts of an assignment. I want you to edit and re-edit until you can convey key points succinctly. The first line of your submission must be your word count.

Rubrics are available on Canvas for students to examine before writing and submitting their assignment responses. I encourage students to meet informally to discuss their approaches to the problems and their analyses of applicable laws. But each student’s written response must be entirely their own. The assignment rubrics will reveal where students can earn points. Keep in mind that, apart from the individual rubric, I award or withhold points for an answer based on (in rough order of importance) how completely and precisely it responds to the question, accuracy, identification of relevant issues, inclusion of appropriate material (and exclusion of inappropriate material), thoughtfulness, clarity, persuasiveness, and brevity. Allow yourself enough time to proofread your answer before submitting it.

When asserting principles of law, cite to a primary source (e.g., case, statute, or regulation), indicating the page where you find it in the required readings. In other words, do not worry about formal citation format. For instance, cite to “*Pyle* at 68” (unless you specify otherwise, any pin cite is assumed to be to our casebook) rather than the complete, pinpoint case citation you would use in a research memo or brief.

If you miss the Canvas cut-off time for the submission deadline, then Canvas and I will **not accept your answer/response**. **You will not have an opportunity to make up the points you missed by failing to submit the assignment on time**. So, please do not wait until the last minute to submit—your clock may be slightly off from the Canvas clock. You are on notice of the risk of losing credit if Canvas thinks the clock has struck noon despite your contrary indication. Every semester students suffer when a Canvas glitch rejects a submission and they did not allow enough time to troubleshoot or just wait until Canvas recovers. It may not be your fault, but I do not accept late assignments. If you are ill, please contact me and your student affairs office so that we can arrange a make-up assignment.

General tip for performing well on assignments: Read the week's upcoming assignment first, and jot down key issues you'll need to resolve *before* hitting the weekly reading. That will help ensure you don't miss a key issue as you concentrate on the primary materials in the weekly readings. Written responses should be divided into sections that match rubric rows.

If you have a question or request for clarification on a pending assignment, please post it to the “Questions and Requests for Clarifications on Assignments & Syllabus.” I will want all students to see my replies to all such requests. That will save me from having to cut and paste your question and my reply from a Canvas email. I want all students to share the benefit of your questions and any reply I offer.

I will grade the assignments using the anonymizer feature of the Canvas grading app. Please do not put your name in the text or in the file name of the document you submit to Canvas. If you are responding in a role assigned to you, please do clearly state the role you are playing. Besides anonymizing student submissions, another nice feature of Canvas is that I can provide you with individual comments along with your grade. You can view the comments by going to the assignments page, selecting the desired assignment, and looking under the submissions tab on the righthand side of the page. You can also get everything displayed a bit nicer by clicking “Submission Details”. I tend to make more detailed comments in the rubric comment boxes than in the overall comments box at the end of the assignment. If you receive mostly full credit for a rubric criterion, then I will seldom comment. I am happy to meet with you individually to go over your score.

If Canvas insists on generating a letter grade to you based on the points I award you for your assignments, ignore it. I intend the raw score to show you how well you did against the rubric. I intend to spread the scores out much more than a letter grading scheme would allow. As a writing course, I expect you will improve over the course of the semester. I will not adhere to any kind of numerical correspondence between percentage of points available on a rubric and letter grades. To help you see how well you performed relative to other students in the class, I will post an announcement with the mean score for the class. Your final grade for the course will be based on the number of points you have accumulated. The graded assignments on Canvas will account for 80 points. I will award an additional 20 points based on your fulfillment of participation requirements (see section above). For each of the two class sections of this class, I will adhere to the grading policies of each respective school.

Semester Schedule

By the end of the first week of the semester, I will post a more detailed list of course topics and due dates for assignments throughout the semester. For now, here are key dates to be aware of. The law school and the campus graduate school operate on different schedules. We will have class meetings **only** on those days **when both schools are in session**. Read the schedule closely to avoid coming to class on a day when we do not meet. Our 90-minute class lengths make up for the reduced number of class sessions.

Before our first mandatory class meeting, please:

- 1) Post your response to the Canvas “Introductions” Discussion.
- 2) Review this syllabus and post any questions to the Canvas “Syllabus and other topics related to course expectations” Discussion.
- 3) Read the materials and consider the discussion prompts from the Canvas “Th. Jan. 11 Introduction to and goals of water law” Discussion.

Tuesday, Jan. 9, 12:40 – 2:10pm Room 214, Baier Hall Maurer Law Sch. ***Optional*** class geared toward O’Neill students, especially those with no experience analyzing judicial opinions. This class is not part of our regular semester. Law students interested in a basic review are invited to attend and tutor. Because this is an optional class, I do not wish to prepare for it unless at least two students are interested in attending. ***If you are interested, please email me.***

Review of case briefing, legal reasoning and the U.S. legal system.

Read pp. 1-4, 9-28, and 40-53 in Kenneth Vandeveld, *Thinking Like a Lawyer: An Introduction to Legal Reasoning* (2d ed. 2011). This book is available on-line (IU CAS login required) at <http://site.ebrary.com/lib/iub/detail.action?docID=10435884>. The pages I have asked you to read are also in a pdf in our “supplemental reading” folder under the Files tab of Canvas.

Read *Pyle v. Gilbert*, casebook pp. 67-71. In class we will work together to brief the case along the lines outlined by Vandeveld pp. 40-47. We will analyze the case more deeply next week.

Thursday, Jan. 11: Introduction to and goals of water law

First mandatory class meeting. As with all class sessions, the reading assignment and discussion prompts are found in the Canvas Discussion thread.

Tuesday & Thursday, **Mar. 12 & 14:** Spring break
No classes

Tuesday, Apr. 16: Last class meeting of water law. No final exam.

Additional Matters:

As your teacher, one of my responsibilities is to create a positive learning environment for all students. To that end, I share here some important university policies and resources. The Maurer School of Law is committed to providing a positive and supportive learning environment for all students. The following guidance provides additional details and resources for students. Should you have questions, please reach out to the Leonard D. Fromm Office for Student Affairs

at 812-855-4809 or at lawosa@indiana.edu.

DISABILITY ACCOMMODATIONS:

The campus Office of Disability Services for Students (DSS) assists students with physical, learning, and temporary disabilities in achieving their academic goals. DSS works with students and instructors to facilitate accommodation delivery and to link students to resources essential to success. To receive services or accommodations, please register with the office at <https://studentaffairs.indiana.edu/student-support/disability-services/get-help/index.html>. After meeting with DSS and receiving an accommodation memo, the student must present the memo to the law school Recorder. Please note that accommodations can sometimes take time. Please contact DSS as soon as you are aware that you may need accommodations for a course, assignment, or exam. Disability Services for Students at <http://disabilityservices.indiana.edu> or 812-855-7578. At Maurer, Alexis Lanham is the contact (adlanham@indiana.edu). What follows are general resources for help.

RELIGIOUS OBSERVANCES:

Indiana University seeks to reasonably accommodate students who want to observe their religious holidays at times when academic requirements conflict with those observances. Detailed campus policies can be found at <https://vpfaa.indiana.edu/faculty-resources/teaching-resources/religious-observances-information.html>. The law school does not require students to complete an accommodation form, but students are expected to inform their professors about potential conflicts within the first two weeks of the class.

BIAS INCIDENT REPORTING:

Bias incidents (events or comments that target an individual or group based on age, color, religion, disability, race, ethnicity, national origin, sex, gender, gender identity, sexual orientation, marital status or veteran status) are not appropriate in the classroom or on campus. If you witness or experience a bias incident, you can report it by submitting a report online at https://indiana-advocate.symplicity.com/care_report/ or reporting to the Division of Student affairs at incident@indiana.edu or 812-855-8187.

COUNSELING AND PSYCHOLOGICAL SERVICES

Find services offered by CAPS: <http://healthcenter.indiana.edu/counseling/index.shtml>.

SEXUAL MISCONDUCT

Title IX and our own Sexual Misconduct policy prohibit sexual misconduct. If you have experienced sexual misconduct, or know someone who has, the University can help. To speak to someone confidentially, you can make an appointment with the IU Sexual Assault Crisis Services at 812- 855-5711, or contact a Confidential Victim Advocate at 812-856-2469 or cva@indiana.edu. University policy requires faculty and staff to share certain information brought to their attention about potential sexual misconduct, with the campus Deputy Sexual Misconduct & Title IX Coordinator or the University Sexual Misconduct & Title IX Coordinator. In that event, those individuals will work to ensure that appropriate measures are taken and resources are made available. Protecting student privacy is of utmost concern, and information will only be shared with those that need to know to ensure the University can respond and assist. Visit <https://stopsexualviolence.iu.edu> to learn more.