Law and Policy on Water Resources in Kumaon and Garhwal

The region of Kumaon and Garhwal in Uttar Pradesh, India, is known for its rich land, forest and water resources. While the forest resources of this region have dominated the interests of the administrators, the scientific and academic community and the public since the beginning of the British rule, attention has been focused on the water resources of the region only in recent decades. There is a general acknowledgement, however, that the natural resources of the region in current times are at great risk.

Increasing urbanization and development over the last five to six decades have led to the emergence of water demand for new and distinct categories of water users. The institutional requirements of the

vast government apparatus, educational and research institutions, defence establishments and industry, particularly the tourist industry, etc., demand an increasing share in a resource which is not only finite but also decreasing. In addition to these, the rural demands for drinking and domestic use, animal husbandry, irrigation, water mills and fisheries pose a challenge to the water resources administration.

Rule of Law in Water Resources Administration

The objectives of the law on water resources administration would be: a) ensuring a rational and just allocation of water among competing users for current and future use; and b) conserving the resources.

Changes in Law Relating to Water Resources

When there is a condition of more supply than demand, water is taken and used as much as needed. In such a situation, there is no necessity to define water rights. However, when the demand for water increases compared to the supply, the issue of "water rights" and the need for "administration" emerge. Adjudication of competing rights is based on doctrines commonly or customarily in practice.

Two concepts commonly associated with water use are those of "riparian rights" and "prior appropriation" or "prior use."

Riparian Rights. Originating in the English Common Law, this is a right of property vested in the owner of land that abuts a water course. The right is to use water—a usufructuary right and not ownership in the corpus of water. The right is not dependent on any system of control, storage or diversion, but attaches to the natural flow of the stream. Riparian rights exist whether they are used or not. No priority is established on the basis of when the water was begun to be used. When lands not adjacent to flowing streams begin to demand irrigation, limitation is felt in the applicability of this doctrine.

Prior Appropriation Doctrine. Prior appropriation doctrine recognizes the rule established by custom that the first user has a prior right, i.e., "first in time, first in right." A later user of water may take water without interfering with the rights of the prior user.

Under the British colonial administration in Kumaon and Garhwal, there was no legislative enactment or rules governing the use of water till 1917. At a time when scarcity was not evident, the law that was existing in Kumaon was the custom of prior use. Disputes which were brought before the administration were mainly those relating to irrigation and the working of water mills or *gharats*. The role of the administration (in which both executive and judicial functions were combined) was not so much to control the rights on the basis of statutory or policy prescriptions, but to adjudicate upon conflicting claims among users. The basic legal principles of water use were elicited from a series of judicial decisions from the second-half of the nineteenth century to the beginning of the twentieth century. These were:

a. The doctrine of prior use applies in the hills. The law of riparian proprietorship in force elsewhere had no application to the condition in the hills. Easement was recognized.

b. Streams in the hills were the government property and so were the wastelands, unmeasured land and government-protected forest. While there was no clear indication of the status of water, spring or collection of still water in the assessed and measured land of the private owner, it was assumed that they were the property of the landowner.

c. In a specific case of 1900, when the issue of drawing water from a rural source for urban water supply arose, an administrative decision was made that when it was necessary to "buy out" the rights of persons whose supplies of water for field and garden irrigation and for water mills are interfered with, the principles laid down in Sections 23 and 24 of the Land Acquisition Act of 1894 would apply. In other words, compensation has to be paid for the damage done to individuals for the appropriation. The compensation was to be calculated as a reasonable multiple of a yearly loss that might occur. This was to be considered as the market value of the privileges taken. The number of years' purchase allowed was to be decided on the circumstance of each case.

d. The extension of irrigation by individuals was subject to other prior users.

e. No person could be compelled by judicial order to allow another to construct a *Gul* (an irrigation canal) through his *Nap* (measured and assessed) land.

Water Rules of 1917 and 1930

It was in 1917 that the government, for the first time, framed rules called the "Rules Relating to Water Mills and Use of Water in Kumaon." These rules laid down in clear terms the proprietorship of the colonial government over all water resources, declaring that "the water of all rivers and natural streams and of all lakes, natural ponds and other collections of still water within the hill tracts of the Kumaon Division are the property of and subject to the control of the State."

The Water Rules of both 1917 and 1930 acknowledged the custom relating to water use in the region—the right of prior use. All extension of the use of water was subject to this right. The government encouraged the development of irrigation by private investment, as was the custom in Kumaon. No permission was necessary to construct irrigation systems.

A change brought about by the Rules of 1930 from the law laid down in earlier judicial decisions was that the Rules provided for a right to take a water channel through the measured and assessed land of another on payment of compensation to be fixed by a revenue court.

Another change brought about by the Rules of 1917 and 1930 was that all disputes regarding water rights were made cognizable exclusively by the revenue courts. This provision, combined with the right to take water through the Nap land of another on payment of compensation, led to a concern about the adequate protection of private rights in law. It was felt that "revenue courts could not satisfactorily decide private rights of property which are essentially of a civil nature" (Tara Datt Gairole. Selected Revenue Decisions of Kumaon, Allahabad. 1983. Superintendent Printing and Stationery United Provinces, India.). Further, there was no indication of the nature of right to water in private assessed land.

Thus, the Rules did not clearly lay down the different categories of rights—private rights in water, rights in public water resources, and their relation to the use of civil and revenue courts in adjudicating water rights.

The Rules of 1930 provided for the regulation of water mills, procedures for application and grant of permits, norms for deciding priority among applicants, protection of rights of other water mills and irrigation channels in the neighborhood, rents to be laid by mills and penalty for unauthorized construction and use of water mills. The revenue for water mills was to belong to the District Board.

An interesting provision in the Rules of 1930 relating to the construction of Guls was that whenever such construction by private persons was likely to damage any road or public work, it was likely to be prohibited on a complaint by the District Engineer, Chairman of the District Board or Divisional Forest Officer. This starkly contrasts with the situation today, when scores of irrigation channels are damaged by the construction of roads. The law today, however, affords no protection to channel users against damage to their water supply systems.

Current Law on Water Resources

It was only in 1975 that laws on water resources were enacted by the U.P. government, which are: 1) The Kumaon and Garhwal Water (Collection, Retention and Distribution) Act, 1975, applicable to Kumaon and Garhwal divisions, except the Terai and Bhabar regions of Nainital District and Garhwal Division; and 2) The Uttar Pradesh Water Supply and Sewerage Act, 1975, applicable to the whole of U.P.

The first legislation brought about a fundamental and drastic change in the law that prevailed until that time. Perhaps with the objective of overcoming the ambiguities created by earlier rules and judicial decisions, and faced with the challenges of providing for modern needs without being restricted by existing private rights to water, the government took the following extreme steps:

a. It abolished all existing rights (whether customary or other, whether vested in any individual or in village communities) of the use of water, if any.

b. It took upon itself the entire responsibility of regulating water (of rivers, streams flowing in natural channels, natural lakes, ponds or reservoirs, including rain water) and water sources (springs, channels and rivers, lakes, ponds, reservoirs and other collections of still water, including rain water) for the purposes of human and animal consumption, irrigation and industrial development.

c. The Act vested the State Government with the sole power to regulate and control the collection, retention, and distribution of water and water sources. It prohibited the construction of any water supply system by any person other than the *Jal Sansthan* (water supply agency) for any purpose without the previous permission of the Sub-Divisional Officer. The government reserved the right to exempt any person or class of persons from all or any provisions of the Act, and also protected itself from any court proceedings against it for any act done in furtherance of the legislation.

The Act had some positive features, such as the government's power to demarcate areas for protection of water sources, and to declare such areas as protected areas but the provision was diluted by reserving the power to amend or cancel any such declaration. Actions injurious to water supply or water sources and catchment areas or fish and aquatic life—whether committed by persons or companies were defined as offenses with attendant penalties. Authority to hear and settle disputes and procedures regulating such adjudication was also provided for.

d. The Uttar Pradesh Water Supply and Sewerage Act, 1975 created the Jal Nigam and Jal Sansthan. The purpose of these agencies was to supply water for domestic, industrial and other uses. They were vested with financial, supervisory and contractual powers. They could abstract water from any natural source, provide supply on a volumetric basis or otherwise and charge water rates and water taxes.

Conclusion

These two Acts on water resources in this region raise many questions on their appropriateness for the proper management of this resource in the hills. First, the fact that there are two separate Acts—one specifically for this region and the other applicable to the whole state—creates an uncertainty in the administration of water rights. This region has to be seen as distinct from the rest of the state in terms of water sources and water rights, and the administrative and judicial systems required for their management.

By these laws, the government has declared its control over the totality of the resource, while at the same time abolishing all rights which had evolved over time. The state has also declared itself the sole manager of the resource, with broadly defined discretionary powers to suit every possible occasion. This not only leaves room for misuse of powers but also places a very heavy financial and administrative burden on the government.

The law does not reflect any clear allocative principles. This clarity has to arise from, first, a proper assessment of the resource and, second, a policy framework specific to this region. A system of water rights can both encourage and prevent certain developments by withholding permits. Legislation in force in Kumaon and Garhwal addresses the issue of conservation of water by prohibiting wastage of water. However, this requires an effective monitoring system. Moreover, a great deal of wastage occurs as a result of poor maintenance and poor quality of infrastructure in government-created water supply systems, for which there is no remedy in law.

The abolition of customary rights is destructive of the principle of user participation. Customary law is a storehouse of legal principles on water use and skills of conservation and management which must be resorted to for the establishment of a management system appropriate to this region. In the emerging age of privatization, local communities must be given priority over commercial institutions in the development of the resource by protecting sources of 'prior use' rights and 'area of origin' rights. Rights of ownership and use are fundamental to efficient management and economic security. Therefore, the rights of local communities in water resources must be redefined and documented.

Water legislation also has to aim at ensuring equity among urban and rural users. As urban water resources diminish rapidly, more and more water is abstracted from rural areas affecting their present and future needs. Rights of rural commu-

nities can be protected in law through measures such as 'areas of origin' rights. This places outside users under the obligation of buying water from the original users* Urban areas may also be placed under an obligation to contribute to a specific developmenp fund which can compensate for the economic loss to rural areas.

Finally, the water-related legal powers and administrative systems have been distributed among several departments of the government—Irrigation, Land Revenue, Forest, Industry, Mining, Water Supply and Sewerage, etc. These need to be consolidated.

In short, a thorough review of the law and policy on water resources in Kumaon and Garhwal is called for.

[M.S. Vani, Project Director with Development Centre of Alternative Policies, New Delhi, India.]