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The Constitutional Sanctity of a Property Interest in a Riparian Right

NOTES

THE CONSTITUTIONAL SANCTITY OF A PROPERTY INTEREST IN A RIPARIAN RIGHT

The riparian doctrine of water law developed in the eastern United States when water was abundant.[1] The system is based on the "reasonable rights" of property owners adjacent to a stream to use the abundant water supply and its effect is to limit access to those persons who hold land adjacent to the water source.[2] But the abundant water supply has vanished. In its place is the need to completely maximize the use of the available water supplies.[3] This change gives rise to several specific criticisms of the traditional riparian system. First, it restricts water use to riparian lands. Secondly, it creates uncertainty, since it decides whether a water use is permissible in terms of reasonableness. Finally, its lack of administrative controls necessitates burdensome litigation to determine the "reasonableness" of a proposed new use.[4]

In response to these criticisms, legislation has been proposed which would alter the basic riparian system by providing for administrative

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1 1 CLARK WATERS AND WATER RIGHTS § 4.1 (1967) [Hereinafter cited as CLARK]; *see* F. TREATISE, II BLOOMENTHAL & J GERAUD, NATURAL RESOURCES 2 (1965); Ellis, *Water Law in the Eastern United States*, J SOIL AND WATER CONSERVATION 19 (1963).

2 Murphy, *A Short Course on Water Law for the Eastern United States*, 1961 WASH. U.L.Q. 93, 96.

3 See Saville, *Legal Problems Arising From the Changing Water Needs, Uses, and Availability of Water in the Eastern United States*, in WATER RESOURCES AND THE LAW 25, 28 (1958) [Hereinafter cited as WATER RESOURCES].

Professor O'Connell summarizes the development of the demands as follows:

> In 1900, the United States used 40 billion gallons of water per day; in 1930, it used 92 billion gallons, in 1940, 135 billion gallons; in 1955, 262 billion; in 1960, 312 billion. During these sixty years, the total supply of readily available fresh water has been 515 billion gallons per day. By 1975 it is predicted that the total daily use will reach 453 billion gallons of the available 515 (an increase, it will be noted, of more than ten fold since 1900). In order to maintain the present ratio of supply to use, 755 billion gallons will be needed. Thus shortages loom

O'Connell, *Iowa's New Water Statute: The Constitutionality of Regulating Existing Use of Water*, 47 IOWA L. REV. 549, 553 (1962).

The primary cause of these increased water consumption rates are population growth, industrial growth, and new and easier irrigation techniques for agriculture. *Id.* at 554-55. *See also* Murphy, *A Short Course in Water Law for the Eastern United States*, 1961 WASH. U.L.Q. 93.

4 See Plager & Maloney, *Emerging Patterns for Regulation of Consumptive Use of Water in the Eastern United States*, 43 IND. L.J. 383, 383-84 (1967-68) [Hereinafter cited as Plager & Maloney].

supervision of all future water allocation.[5] Since the riparian right is a property right,[6] any modification of it must be consistent with due process of law.[7] Under the proposed legislation, no compensation is given riparians for the modification of their rights. If the modifications are only a regulation, they are allowable under the police power without compensation. If the modifications amount to a taking of property, however, they require compensation to be consistent with due process.[8] To decide whether these changes are a taking which demands compensation, it is necessary to consider (1) the specific legal qualities of the riparian right and (2) the exact changes the proposed modifications will make in this property right.

I. CHARACTERISTICS OF THE RIPARIAN RIGHT

Because water moves with an everchanging flow and is in a constant state of flux,[9] the property right here considered is only a right to use the water while it passes by in a flowing stream.[10] This right is called

5. *See e.g.*, IOWA CODE ANN. tit. 17, § 455 A. 19 (Supp. 1969). *See also* Heath, *Water Management Legislation in the Eastern States*, 2 LAND & WATER L. REV. 99 (1967); Plager & Maloney 383-84. *See generally* Ziergler, *Statutory Regulation of Water Resources* in WATER RESOURCES 87, 97-103.

The majority of the proposed legislation follows those proposals made by the State Law Commissioners. *See* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, MODEL WATER USE ACT in WATER RESOURCES 566 [Hereinafter cited as MODEL ACT § ——].

6. *See* Lauer, *The Riparian Right as Property*, in WATER RESOURCES 133 [Hereinafter cited as Lauer]. Even under the modern definitions of property as an economic benefit, water is regarded as a property right. Cribbet, *Changing Concepts in the Law of Land Use*, 50 IOWA L. REV. 245 (1965); Note, *Diminishing Property Rights*, 69 W. VA. L. REV. 170 (1966-67).

7. U.S. CONST. amends. V. & XIV; Plager & Maloney 386. The constitutionality of acts modifying the basic water rights has been discussed before as early as 1935. Comment, 34 MICH. L. REV. 274 (1935).

8. It should be noted that no legislature will deliberately enact a law that is either certain to be declared an unconstitutional infringement of private rights or would require the payment of large sums from the public coffers to compensate the all too numerous injured riparian owners. LAUER, 138; PLAGER & MALONEY 386.

9. Water moves in a never-ending cycle from the ocean to the clouds, then to the earth in rain, and finally back to the ocean through the rivers. This is the hydrologic cycle. A final solution to the problems of water law must recognize the particular phenomenon and account for the impact that it has on any attempt to define the property right one has in water. *See generally* Piper & Thomas, *Hydrology in Water Law: What is Their Future Common Ground*, in WATER RESOURCES 7.

10. Mitchell v. Warner, 5 Conn. 497, 518 (1825); *see* Tyler v. Wilkinson, 24 F. Cas. 472, 474 (D.R.I. 1827). *See also* Pixley v. Clark, 35 N.Y. 520, 525 (1866). *See generally* Dilling v. Murray, 6 Ind. 324, 327 (1855).

a usufruct.[11] The positive attributes of the usufruct are the riparian's right to have a stream reach his land substantially undiminished[12] and the right to initiate at any time any use that is not unreasonable.[13]

The usufruct is restricted to the owners of land adjacent to the stream.[14] The owners of the adjacent property are restricted to uses permitted by the physical qualities of the land. For example, the riparian may not use the water of a stream on any land that is not in the watershed of the stream.[15] Riparian uses are restricted further by

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11 A usufruct is "[t]he right to enjoy a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substances of the thing." BLACK'S LAW DICTIONARY 1712 (4th ed. 1951).

12 Early in the history of riparian rights, the courts developed the "natural flow" doctrine. Under this theory each riparian had a right to have the full and natural flow of a stream reach his land undiminished either in quality or quantity. *See, e.g.*, Hendrick v. Cook, 4 Ga. 241, 248 (1848); Wharton v. Stevens, 84 Iowa 107, 110-11, 50 N.W. 562, 564 (1891); F. TRELEASE, H. BLOOMENTHAL & J. GERALD, NATURAL RESOURCES 116-17 (1965). The incompatibility of this rule with the riparian right to use the water of a stream led to its early abandonment in favor of the present rule of "reasonable use." 1 CLARK § 16.2. This rule was fully articulated in Dumont v. Kellogg, 29 Mich. 420, 422 (1874). It was first announced by Justice Story in Tyler v. Wilkinson, 24 F. Cas. 472 (D.R.I. 1827).

> As between proprietors, the right of each qualifies that of the other. The question is not whether one suffers damage from another's use, but whether under all the circumstances of the case one's use of the water is reasonable and consistent with a corresponding enjoyment of his right by another. 'In other words, the injury that is incidental to a reasonable enjoyment of the common right can command no redress.'

CLARK § 16.2 at 69, citing Dumont v. Kellogg, 29 Mich. 420, 425 (1874).

13 For the historical development of the right to the future as well as the current uses of water, *see* J. GOULD, LAW OF WATERS § 205 (1883); *e.g.*, Redwater Land & Canal Co. v. Jones, 27 S.D. 194, 130 N.W. 85 (1911); Redwater Land & Canal Co. v. Reed, 26 S.D. 466, 128 N.W. 702 (1910); Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S.D. 519, 91 N.W. 352 (1902).

14 Tyler v. Wilkinson, 24 F. Cas. 472, 474 (1827). There are several theoretcial bases for this limitation, none of which adequately explains its existence. The earliest theory, derived from Roman law, was that all of the water was "res communes," the use of which was free to all persons. Lauer at 177. Beginning in the early nineteenth century the doctrine of community ownership began to be restricted. The most logically sound theory for this restriction was that of the Wisconsin Supreme Court. "The riparians exclusive right to the use of water arises directly from the fact that non-riparians have no right of access to the stream without trespass upon riparian lands." Munninghoff v. Wisconsin Conservation Comm'n, 255 Wis. 252, 254, 38 N.W. 2d 712, 715 (1949). For a comprehensive development of this topic, *see* Lauer 178-85.

15 Murphy, *A Short Course on Water Law of the Eastern United States*, 1961 WASH. U.L.Q. 93, 96. The basic theory of this point of view is that "[t]he natural stream, existing by the bounty of providence for the benefit of the land through which it flows, is an incident annexed, by operation of Law, to the land itself." Tyler v. Wilkinson, 24 F. Cas. 472, 474 (D.R.I. 1827). The right of the riparian is subjected to numerous other limitations as well. *See generally* Lauer 223-54, Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1 (1963); Woodbridge, *Rights of the States in Their Natural Resources Particularly as Applied to Water*, 5 S.C.L.Q. 130 (1952).

the co-relative rights of all other riparians to the use of a stream. If there is a conflict between the riparian uses, it is settled by the application of the doctrine of "reasonable use."[16] If the riparian's use is "reasonable" in light of all the surrounding circumstances,[17] he may use,[18] and even divert,[19] the waters of the stream. Some uses that have been found unreasonable *per se* are pollution,[20] non-riparian use[21] and municipal use.[22] If conflicting riparian uses are not unreasonable *per se*, two approaches have been used to test reasonableness.[23] Some courts treat the problem as *sui generis* between the parties and determine the reasonableness of competing uses by the isolated facts of the case before the court.[24] Other courts refer to previous determinations of reasonableness and apply it to the facts before them.[25] No matter which approach is followed, reasonableness depends on the facts which individual courts consider important.[26] Specific facts to which courts have accorded weight in making this determination are the respective location of the parties on the stream,[27] priority in time,[28] and the value

16. *See* note 12, *supra*.

17. *See, e.g.*, Harris v. Brook, 225 Ark. 436, 283 S.W.2d 129 (1955).

18. Murphy, *A Short Course in Water Law for the Eastern United States*, 1961 WASH. U.L.Q. 93.

19. *Id.*

20. *See, e.g.*, Arminis Chemical Co. v. Landrum, 113 Va. 7, 73 S.E. 459 (1912). *See generally* Agnor, *Riparian Right in the Southeastern States*, 5 S.C.L.Q. 141, 144 (1952). Today this is handled primarily by statutory pollution control. *See* Beuscher, *Appropriation Water Law Elements in Riparian Doctrine States*, 10 BUF. L. REV. 448, 454 (1961).

21. *See, e.g.*, Williams v. Wadsworth, 51 Conn. 277 (1883); Town of Gordonsville v. Zinn, 129 Va. 542, 106 S.E. 408 (1921). Some states refuse to recognize this rule, *see, e.g.*, Gillis v. Chase, 76 N.H. 161, 31 A. 18 (1891); Lawrie v. Silsby, 76 Vt. 240, 56 A. 1106 (1904); while others hold that relief may be obtained only when non-riparian use interferes with a reasonable use, *see, e.g.*, Stratton v. Mt. Herman Boys School, 216 Mass. 83, 103 N.E. 87 (1913). However, non-riparians can acquire by prescription a right that is superior even to the rights of riparians. *See* Ellis, *Some Legal Aspects of Water Use in North Carolina*, in THE LAW OF WATER ALLOCATION 189, 336 (Haber & Bergan ed. 1956) [Hereinafter cited as WATER ALLOCATION]; Harnsberger, *Prescriptive Water Rights in Wisconsin*, 1961 WIS. L. REV. 47.

22. *See, e.g.*, Stein v. Burden, 24 Ala. 130 (1854); Pernell v. Henderson, 220 N.C. 79, 16 S.E.2d 449 (1941). *But see* Canton v. Shock, 66 Ohio St. 19, 63 N.E. 600 (1902). *See generally* Marguis, Freeman & Heath, *The Movement for New Water Rights in the Tennessee Valley States*, 23 TENN. L. REV. 797, 813 (1955); Sax, *Municipal Water Supply for Nonresidents: Recent Developments and Suggestions for the Future*, 5 NAT. RESOURCES J. 54 (1965). *See also* Lauer 196-211.

23. Lauer 196-98.

24. *See, e.g.*, Bollinger v. Henry, 375 S.W.2d 161 (Mo. 1964); Lauer 196.

25. *See, e.g.*, Taylor v. Tampa Coal Co., 46 So. 2d 392 (Fla. 1950); Lauer 197-98.

26. *See* J. SAX, WATER LAW PLANNING AND POLICY 204 (1968).

27. *See, e.g.*, Gehlen Bros. v. Knarr, 101 Iowa 700, 70 N.W. 757 (1897).

28. *See, e.g.*, Harris v. Brook, 225 Ark. 436, 283 S.W.2d 129 (1955).

of the use to society.[29] Courts consistently have granted priority only to domestic[30] or natural uses.[31] Thus, every riparian owner has an absolute right to the use of the water for necessities even if this use results in consumption of the entire stream.[32] No clear set of priorities has been developed for other possible uses.[33]

The right to initiate a use at any future time[34] and the possibility that a long established valuable use could be displaced or reduced in favor of another riparian's claim,[35] results in a lack of security for the riparians. This often precipitates litigation.[36] A riparian who has used the water of a stream for mining purposes for twenty years might have his use reduced or ended in favor of another riparian who wished to use the water for irrigation purposes.

II. STATUTORY MODIFICATIONS

The proposals to change the riparian system have aimed primarily at the restrictive characteristics of the old system. The proposed legislation attempts to regulate water use at its initiation.[37] The universal approach has been the adoption of a permit system patterned after the proposals introduced in the Model Water Use Act.[38]

The developers of the permit system had two objectives: abolition of

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29 *See, e.g.*, Taylor v. Tampa Coal Co., 46 So. 2d 392 (Fla. 1950).

Sax states that "courts usually give no weight to either priority in time, or to position on the stream." J SAX, WATER LAW PLANNING AND POLICY 204 (1968).

30 *See* Beuscher, *Appropriation Water Law Elements in Riparian Doctrine States*, 10 BUF. L. REV. 448, 452 (1961).

31 *Id. See also* 6A AMERICAN LAW OF PROPERTY § 28.57 (A.J. Casner ed. 1954).

32 *See* note 30, *supra*

33 J SAX WATER LAW PLANNING AND POLICY 206 (1968). For an example of the methods of statutory priority formation that have been used in the appropriation law states, *see, e.g.*, TEX. REV. CIV. STAT. ANN. art. 7471 (1959). The Texas approach follows the basic format of most western states when it uses the following priorities:

1 Domestic and Municipal Uses
2 Manufacturing Uses
3 Irrigation Uses
4 Mining Uses
5 Hydro-Electric Uses
6 Navigation Uses
7 Recreation and Pleasures Uses

34 *See* note 13, *supra*

35 J SAX, WATER LAW PLANNING AND POLICY 206 (1968).

36. *Id.*, Plager & Maloney, 383-84.

37 Heath, *Water Management Legislation in the Eastern States*, 2 LAND & WATER L. REV. 99 (1967); Plager & Maloney 383.

38 *See* note 5, *supra*

the riparian's right to institute any reasonable future use[39] and the creation of both security and flexibility within the system.[40] The need for security is the product of the dependence of the public upon private enterprises to develop natural resources.[41] Any system choosing private enterprise as the primary force for resource development[42] must provide sufficient security to attract capital investment.[43] Simultaneously, however, there must be sufficient flexibility in permitting the initation of different uses to encourage development and the maximization of beneficial use.[44]

To realize these objectives, the permit system freezes the existing uses of water at the time of the system's inception.[45] After a permit system becomes effective, a permit must be obtained from a central administrative agency charged with the supervision of water resource development in order to initiate a use.[46] Current uses must be registered to be preserved.[47] Failure to register a use may result in its restriction[48] or destruction.[49] In order to maximize the beneficial uses of water, the system gives broad discretion to the agency to establish priorities in the issuance of permits.[50] This also provides flexibility. Setting a fixed duration for the permit provides security.[51] The duration of the permit must be long enough to make capital investment feasible.[52]

The most significant alteration of riparian rights is the administrative agency's power to issue a permit for the use of water without regard to the common law restrictions on the riparian's use.[53] This provision, operating in conjunction with the provision abolishing

39. Plager & Maloney 386-87.

40. *Id.*

41. Trelease, *Policies for Water Law: Property Rights, Economic Forces, and Public Regulation*, 5 NAT. RESOURCES J. 1, 67 (1965).

42. *Id.*

43. *Id.* at 23.

44. Saville, *Legal Problems Arising From the Changing Needs, Uses, and Availability of Water in Eastern United States*, in WATER RESOURCES 25.

45. This is almost complusory in lieu of the property right held in an existing use, MODEL ACT §§ 301-304.

46. *See* IOWA CODE ANN. tit. 17, § 455A.25 (Supp. 1969); MODEL ACT Part II.

47. *See* FLA. STAT. ANN. § 373-101 (1965); MISS. CODE ANN. § 559, 56-13 (Supp. 1969); MODEL ACT § 303, COMMENT.

48. IOWA CODE ANN. tit. 17, § 455 A.28 (Supp. 1969); MODEL ACT §§ 304, 407-08.

49. *See* note 48, *supra.*

50. IOWA CODE ANN. tit. 17, § 455A.21 (Supp. 1969); MODEL ACT § 407.

51. IOWA CODE ANN. tit. 17, § 455A.20 (Supp. 1969) (10 year maximum); MODEL ACT § 406 (50 year maximum).

52. *See* note 41, *supra.*

53. IOWA CODE ANN. tit. 17, §§ 455A.1-26 (Supp. 1969) (removing restriction to riparian lands for domestic uses); MODEL ACT § 407(c).

the riparian's right to institute a future use[54] without a permit, could vest water rights in a non-riparian. The non-riparian, then, might be able to use a water right to the exclusion of the riparian. This amounts to taking a right from one individual and endowing another with its beneficial use.

The transfer of a use outlined here is not an immediate or absolute occurrence. The riparian under the permit system might be able to get a permit for a greater amount of water or for a use that formerly would have been found unreasonable. But this potential advantage for the riparian does not affect the losses he will suffer under the permit system. The riparian may lose (1) a use of water to a non-riparian with a more beneficial use; (2) the right to initiate any new reasonable use at any time in the future; and (3) a monetary advantage since, under the riparian system, the landowner can either sever his riparian right from the land and sell it separately[55] or receive a higher value for the land when the appurtenant water right is sold with it.[56]

As these losses demonstrate, the taking of the riparian property right will result in the diminution of the value of riparian lands. The question is whether this change in the riparian system requires the payment of compensation.[57]

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54 MODEL ACT § 303.

55 Duckworth v. Watsonville Water & Light Co., 158 Cal. 206, 110 P. 927 (1910); *cf.* Carlsbad Mutual Water Co. v. San Luis Rey Development Co., 78 Cal. App. 2d 900, 178 P.2d 844 (1947). Smith v. Stanolind Oil & Gas Co., 197 Okla. 499, 172 P.2d 1002 (1946).

56 Dugan v. Rank, 372 U.S. 609, 624-25 (1963).

57 There would seem to be little question as to the states' power to regulate or prohibit the exercise of riparian rights where the regulatory scheme is bottomed in public interest in the beneficial operation of the correlative rights of co-riparians. A similar relationship may be found between the overlying owners of a single petroleum deposit. Under the doctrine of correlative rights, the overlying landowners have the right to take as much oil and gas as may be captured from a drilling site on their land subject to a duty not to engage in extraction practices injurious to the common stock and, therefore, the other overlying landowners. *See* 1 W. SUMMERS, OIL AND GAS ch. 4, 5 (1954); 1A W. SUMMERS, OIL AND GAS ch. 5 (1954). In the leading case upholding the constitutionality of the regulation of petroleum extraction for conservation purposes, Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900), the court relied heavily on the existing overlying landowner's correlative rights as support for the imposition of restrictions on the individual right to exploit the common source. *Id.* at 204-11. It is questionable from the above decision whether the existence of the correlative rights of the overlying landowners or the "public interest" in the conservation of the natural resource, standing alone, would justify the imposition of regulatory measures. In all subsequent cases challenging the recognition of petroleum rights, the courts have relied at least in part upon the theory of correlative rights to justify the regulation. *See* 1A W. SUMMERS, OIL AND GAS § 106 (1954).

The analogy that may be drawn from this body of law and the statutory regulation of riparian rights as between co-riparians and overlying landowners is a function of the physical

III. COMPENSABLE TAKING

There can be no argument with the statement that the government is required to compensate for a "taking" of property but not for losses resulting from mere regulation.[58] The generality of the statement, however, prevents its use as a guide in deciding a specific case.[59] This area of the law has been aptly described as "a matter of confusion and incompatible results,"[60] leading to the accusation that the Court itself does not have a controlling standard for differentiating between regulation and a taking.[61] This confusion is the result of the Court's pragmatic, case-by-case approach.[62] This approach was developed by Justice Holmes and is based on his theory that the role of the law in these cases is to assure the "fair" resolution of the competing forces of public need and private loss. What is "fair" in a particular case must be determined by analyzing the exact effect of a regulatory measure on the property right involved.[63] The test is whether the regulation curtails the exercise of an established property right to

characteristics of the thing being shared. The constitutional validity of such regulation could hardly be questioned. Thus it is the creation of a right to use water on non-riparian land in derogation of riparian rights that poses the problem dealt with in the text.

58. Sax, *Taking and the Police Power*, 74 YALE L.J. 36, 37 (1964) [Hereinafter cited as Sax].

The history and development of the "compensation rule" under the Fifth Amendment has involved a multitude of different factual settings created by the tremendous growth of government activity in guiding and controlling the economic and environmental development of the country. *See* Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63 [hereinafter cited as Dunham]; King, *Regulation of Water Rights Under the Police Power* in WATER RESOURCES 271, 271-81; Sax 58-67.

The applicability of the due process limitation on the governmental power of the states to regulate property was settled in Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).

The problem being dealt with here is the effect of governmental regulation on private property interests. This must be distinguished from the destruction or diminution of property value resulting from government activity. *See, e.g.*, United States v. Causby, 328 U.S. 256 (1944); Richards v. Washington Terminal Co., 233 U.S. 546 (1914); Batten v. United States, 306 F.2d 580 (10th Cir.), *cert. denied*, 371 U.S. 955 (1962).

59. Sax at 37.

60. *Id.*

61. *Id.* The Court itself seems to admit the lack of consistancy in its results. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); United States v. Caltex Inc., 344 U.S. 149, 156 (1952). It should also be emphasized here that the considerations are not whether the taking is by eminent domain or regulation. The question is whether within the concept of regulation, the control of the harm by taking does not really confer a benefit on the public. This is not the eminent domain power versus the police power. The concern here is completely within the realm of the police power. The end is the same as payment. *See* Dunham 73-81.

62. Dunham 63-64.

63. Sax 40-41.

prevent its enjoyment from harming the public or only provides the public with a positive asset.[64] In the latter case, the regulation amounts to a taking, and compensation must be paid.[65] In the former, none is required.[66]

Historically, governmental power to regulate was further restricted by the diminution of value test. If the diminution of value resulting from governmental regulation approached complete destruction of the property right, compensation was required; that the regulation was aimed at removing a harm rather than securing a benefit was irrelevant.[67] The viability of this restriction, however, is questionable under recent case law.

Because the Court uses a case-by-case approach in determining whether a regulatory scheme results in a compensable taking, any attempt to predict the result of a new regulation requires extrapolation from existing cases with facts analogous to those being considered in the new regulation.

The cases most analogous to the proposed modifications of riparian rights are those in which the government regulation or prohibition of a land use result in the reduction of the value of the land to the owner. The first two cases to be considered are *Goldblatt v. Town of Hempstead*[68] and *Consolidated Rock Products Co. v. Los Angeles.*[69] Both cases involved ordinances which prohibited the use of the land for mining and resulted in almost total destruction of the land's economic value to the owner. In both, the ordinances were justified by the public's need to eliminate a potentially harmful condition.

In *Goldblatt,* after finding the evidence of loss insufficient to reach the taking issue, the Court proceeded to discuss it at length. Though paying tribute to the diminution of value test, the language of the decision did not resolve the question of whether the complete destruction of the economic value of the property would by itself necessitate compensation.[70] In *Consolidated Rock Products,* with the

64 Trelease, *Policies for Water Law: Property Rights, Economic Forces, and Public Regulation,* 5 NAT. RESOURCES J. 1, 37 (1965). *See* Dunham 63, 68-71.

65 *See, e.g.,* Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935).

66 Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Consolidated Rock Products Co. v. Los Angeles, 57 Cal.2d 515, 370 P.2d 342, 20 Cal. Rptr. 368, *appeal dismissed,* 371 U.S. 36 (1962). *See generally* Sax.

67 Sax 41.

68 369 U.S. 590 (1962).

69 57 Cal.2d 515, 370 P.2d 342, 20 Cal. Rptr. 368, *appeal dismissed,* 371 U.S. 36 (1962); *see* Note, 50 CAL. L. REV. 896 (1962).

70 369 U.S. 590 (1962); *see* Sax 42.

total destruction of the economic value of the property having been conclusively proved below,[71] the issue of compensability was squarely presented on appeal. The Court dismissed *per curiam* for want of a substantial federal question.[72] Using the language of *Goldblatt* and the result in *Consolidated,* it can be argued that even the total destruction of property value alone is insufficient to require compensation if there is a public need to eliminate an undesirable condition.

In both of these cases, the "public need" necessitating the "regulation" was the result of a changed population distribution causing the once acceptable physical condition of the land to become a source of potential harm to the members of the community. In this respect, they illustrate the proposition that "a prohibition or regulation without compensation must compel an owner to eliminate a public evil resulting from his activities and cannot compel him to act only to promote the public interest by providing without cost something the public wants."[73]

Nashville, Chicago & St. Louis Railway v. Walters[74] illustrates the situation in which a right was appropriated for the public benefit. A statute required the railroad to separate a grade crossing from a state highway allocating one-half the project's cost to the railroad. The state's power to do this under the proper conditions was not questioned.[75] However, the railroad's position was that the present requirement was founded not upon the need to elimate a hazardous condition for the benefit of local traffic, but rather upon a program designed to foster the public interest in the development of an improved nation-wide automotive transportation system. The Court agreed. It held that the objective did not justify compelling one individual to bear the burden of an improvement benefitting the public at large. The Court explicitly found that there was no harmful condition to be eliminated.[76]

71. Note, 50 CAL. L. REV. 896 (1962).

72. While there is always some question about the significance of dismissal for want of a federal question, it is technically a decision on the merits, and often used for precedent. *See,* Note, *Supreme Court Per Curiam Practice: A Critique,* 69 HARV. L. REV. 707, 712 (1956); Note, *The Insubstantial Federal Question,* 62 HARV. L. REV. 488, 494 (1949).

73. Dunham 75. The evils being eliminated may be such that the total destruction of the property is warranted. *See, e.g.,* Miller v. Schoene, 276 U.S. 272 (1928).

74. 294 U.S. 405 (1935); Comment, 27 U. CHI. L. REV. 128, 161 (1959).

75. Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 412 (1935). *See* Atchison, T. & S.F. Ry. v. Public Utilities Comm'n, 346 U.S. 346 (1953) (reaffirming the power to assess a railroad for 50% of the costs under the proper circumstances).

76. Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935); *see* Dunham 73.

A third line of decisions are those dealing with the acquisition of easements on the airspace over private property.[77] In 1958, Congress revised the Civil Aeronautics Act and defined navigable airspace belonging to the public to include the space needed for approach lanes.[78] The question was whether the effects resulting from this use of airspace, pursuant to the statute, constituted a taking requiring that compensation be paid. In *Griggs v. Alleghany County*,[79] the noise and vibrations of low-flying aircraft in an approach path to a municipal airport rendered the complainant's property uninhabitable for residential purposes. This was the only use made of the land. The Court held that this constituted the taking of an air easement over the complainant's land requiring compensation.[80] The effect of this case is that the expectations of a private property holder to the enjoyment of his land free from the above interferences may not be destroyed without compensation. The public need for an approach to the airport to augment the development of an air transportation system did not justify the destruction of the private property holder's expectation of quiet enjoyment of his land.[81]

These decisions make clear that in order to decide whether the proposed water right modifications are going to require compensation, the relationship of the public to the property interest must be evaluated before and after its impairment. This analysis must be made in terms of the conflicting uses that the property owner and the public desire to make of the property right. Applying this analysis to the proposed modifications in the riparian system, the public's relationship of the riparian's property interest before the change must be established first. The riparian has the right to exclude all persons with the exception of his co-riparians from the enjoyment of the use of the stream. The public has no right to the use of a stream in the absence of ownership of land contiguous to the stream. Even this provides the owner with no more than the right to make a reasonable use of the water only upon contiguous land. Thus, one of the expectations of the riparian owner is freedom from competition from any source other than co-riparians

77. Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946)

78. 49 U.S.C. §§ 1301 *et. seq* (1964).

79. 369 U.S. 84 (1962).

80. *Id.* *See also* United States v. Causby, 328 U.S. 256 (1946).

81. Dunham 90.

who are subject to the restrictions of the reasonable use doctrine. The public's expectation in the right to use a stream may be considered the converse of this.

The proposed modification would potentially result in the creation of a public right to use a stream that would derogate the riparian's rights. This may definitely be treated as an asset providing a positive improvement in the public welfare. But, if the increasing needs of the public for an available supply of water are severe enough and there exists an inability to meet this need as a result of the riparian's rights, the enjoyment of such rights may be treated as producing a harmful effect in terms of social value and it would be arguable that the *Goldblatt* and *Consolidated* cases would control. When changed conditions have caused a once-acceptable use of property to become a source of potential harm to the public, then its destruction does not require compensation. Alternatively, if the existing demands for water may be met under the present system and modification of the riparian rights would provide simply a cheaper, more efficient source of supply, then the effect of the modifications is to provide the public with an asset for the improvement of the general welfare.[82] This would be analogous to the situations presented in the *Griggs* and *Nashville* cases and compensation would be required.

CONCLUSION

The ultimate determination of the constitutionality of the permit system method of modifying the riparian right will depend primarily upon the weight that the Court is willing to give to the changed social values at the time the decision must be made. The relatively small loss to be suffered by the riparian, the inchoate nature of the property right itself and the impending shortages of water necessitating its maximum beneficial use[83] all seem to indicate that the sounder conclusion would be that reached in *Consolidated* and *Goldblatt*. A conjectural value of the right to a future use as well as an indeterminate change in the present value of the land seem weak grounds upon which to block the assertion of a valid public interest.

82. The Supreme Court as recently as 1963 seems willing to admit without question, that the taking of the riparian right is *per se* compensable. Although they cite the Supreme Court of California, the Court's approval of the position of the California Court would seem to reflect their current thinking. Dugan v. Rank, 372 U.S. 609, 624-25 (1963).

83. The volume of literature and the tremendous expenditures directed at the problems of water allocation in the East are indicative of the seriousness of the impending shortages in available water. Renne & Fulcher, *Legal Research in Water Resources*, 4 LAND & WATER L. REV. 145 (1969). *See also* WATER ALLOCATION; WATER RESOURCES.