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Beneficial Use of Water in a Riparian Jurisdiction

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BENEFICIAL USE OF WATER IN A RIPARIAN JURISDICTION†

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In many humid states, water uses are subject to rights of riparian owners—those whose property abuts a natural watercourse. What are the constraints on water uses imposed by traditional riparian doctrines? Are riparian rights property so that compensation is constitutionally required whenever there is a "taking" of this property? How can uses most beneficial to modern society be accomodated to riparian doctrine? Focusing on Wisconsin and Indiana, Professor Waite examines these problems. He suggests solutions "by application of administrative techniques which can help the courts implement already recognized riparian concepts."

In recent years people living in the humid area of the United States have become increasingly aware that water is a limited resource and demands for its use may outrun the supply. With this rising awareness have come demands for conservation and application of existing water supplies to uses most beneficial to society—demands that require intervention by government to be met.

Many beneficial uses will consume water at a site some distance from the spot where the water was diverted from its natural progress through the hydrologic cycle. Traditional riparian rights in water present difficulties if the diversion is to occur when the water is in a watercourse on the surface of the earth. State legislatures might alter the common law and allow such diversions for consumptive beneficial uses, but legislative solutions may be delayed or prevented by groups prefering that water remain in watercourses. New statutes also invite litigation of their constitutionality. Thus it is desirable to develop new water uses within traditional riparian doctrines.

This article examines some problems of riparianism and the possibility of solving them by applying administrative techniques to help the courts implement already recognized riparian concepts. Although the problems are common to riparian states generally, the focus is on Wisconsin and Indiana where differing programs

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for beneficial consumptive uses of water from watercourses may evolve.

Subjection of property rights to regulation under the police power requires that the regulations avoid arbitrary distinctions between land uses and landowners.[1] In the field of land use planning, the idea is contained within the requirement of enabling acts that zoning controls be the result of a comprehensive plan.[2] But fair, rational treatment of landowners is a basic requirement for any regulation of property rights to stand the tests of constitutionality.[3]

I. THE WISCONSIN APPROACH

In 1935, Wisconsin gave its Public Service Commission power to control the flow of water in all navigable waters of the state.[4] The statute also empowered the Commission to permit water diversion for the purpose of restoring normal lake and stream levels when lowered by drought,[5] and for purposes of agriculture or irrigation.[6] The Commission construed the statute as giving it power to determine whether a proposed diversion of water would injure riparians already making beneficial use of it and thus require their consent before the diversion might be permitted.

After several years of operation under this interpretation,[7] the Wisconsin Supreme Court determined the statute gave the Commission no such authority at all.[8] Interpreting the statutory

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[1] See Williams, *Legal Techniques to Protect and to Promote Aesthetics along Transportation Corridors*, 17 BUFFALO L. REV. 701, 704 (1968) for a general statement of the necessary conditions for proper regulation of private property rights through use of the police power.

[2] *See, e.g.*, WIS. STAT. § 62.23(7)(c) (1967).

[3] *See* U.S. CONST. amend. XIV; IND. CONST. art. 1, §§ 21, 23; WIS. CONST. art. I, § 1; Board of Zoning Appeals v. Koehler, 244 Ind. 504, 194 N.E.2d 49 (1963); State *ex rel.* Milwaukee Sales & Inv. Co. v. Railroad Comm'n, 174 Wis. 458, 183 N.W. 687 (1921).

[4] Ch. 287, [1935] Wis. Laws 426.

[5] Comment, *Wisconsin's Water Diversion Law: A Study of Administrative Case Law*, 1959 WIS. L. REV. 279, 284.

[6] [W]ater other than surplus water may be diverted with the consent of riparian owners damaged thereby for the purpose of agriculture or irrigation but no water shall be so diverted to the injury of public rights in the stream or to the injury of any riparians located on the stream, unless such riparians shall consent thereto.

Ch. 287, § 1, [1935] Wis. Laws 426. The statute defined surplus water as stream water not being beneficially used, permitted the Public Service Commission to determine how much of the flowing water at any point in a stream was surplus, and required, prior to diverting water, application to the PSC for a diversion permit on which a hearing was to be held.

[7] For analysis of the Public Service Commission work during this period, see the Comment, *supra*, note 5.

[8] Nekoosa-Edwards Paper Co. v. Public Serv. Comm'n, 8 Wis. 2d 582, 99 N.W.2d 821 (1959).

language logically and literally, the court concluded that since surplus water is defined to be water not being beneficially used, nonsurplus water is water being beneficially used. If water is being beneficially used, its diversion must necessarily harm a riparian, and hence, under the statute, his consent is required. There are hints that this construction may have been inspired by judicial concern that the PSC program of water use control operated arbitrarily.[9]

Administrative control of water diversion in Wisconsin remains confined to control of surplus waters and of those nonsurplus waters riparian owners consent to be diverted. The statute remains in force without amendment. Nor has there been any obvious legislative move to authorize a state administered water use permit system.

However, some powers over water use have been centralized at the state level in the Department of Resource Development.[10] In 1965 the department was given "general supervision and control" over waters of the state and directed to formulate "a long-range, comprehensive state water resources plan" for each of the regions[11] into which it was directed to divide the state for water planning and development purposes.[12] The plan is "to guide the development, management and protection of water resources," and is to be carried out by the Department.[13] The language might be

[9] The court suggests that riparian rights are property, *id.* at 589, 99 N.W.2d at 826; that if the statute were interpreted as urged by the Commission, the agency would be without an objective guide for its actions, *id.* at 589, 99 N.W.2d at 826; and that water users other than farmers would be arbitrarily excluded from participation in the permit scheme, *id.* at 594, 99 N.W.2d at 828.

[10] The Water Resources Act of 1966, provisions of which are scattered through WIS. STAT. ANN., ch. 144 (Supp. 1969), "transferred to the Department of Resource Development all of the public water supply functions of the Board of Health and all of the water pollution abatement functions of that agency and the State Water Pollution Committee which was abolished." Beuscher, *Current Trends in Wisconsin's Water Law*, 40 WIS. B. BULL. 19, 23 (April, 1967). Professor Beuscher pointed out the Act also transferred from the Public Service Commission the administration of the lake level and dam and irrigation permit laws; the setting of bulkhead lines; the licensing of stream straightening; construction of artificial watercourses and shoreland grading. Of these transfers, Professor Beuscher remarked that they "will unite in one agency not only the water pollution control functions as such, but also other water regulatory responsibilities, such as the power to control level and flow and construction and connection of artificial waterways. In addition the navigation stream permit and the high capacity well authority are merged into a single agency. From the point of view of rationalizing increasing water demands for expanding agricultural irrigation, this makes sense." *Id.* at 23.

[11] WIS. STAT. § 144.025(2) (1967).

[12] WIS. STAT. § 144.025(4) (1967).

[13] WIS. STAT. § 144.025(2) (1967). Reflecting apparently a legislative effort to ensure prompt, continuing attention of the state agency to water management, the statute also requires the Department to review and pro-

construed to authorize a water use permit system as a means of managing water resources. Because the statute seems primarily concerned with water pollution control, using the language as the basis of a diversion permit system might be criticized as an application not intended by the legislature.[14] But the criticism would not be apt in this context; a permit system might well contribute to pollution control. A considerable portion of diverted water will find its way back to a watercourse; hence, the extent to which the proposed use would pollute the water, would properly bear on the grant or denial of the permit. The Department's wide powers over water would allow the comprehensive approach to water use control so fatally lacking in the permit program invalidated by the Wisconsin Supreme Court. So far the Department has not set up a broad water use permit system, but one might evolve as the Department discharges its duty to formulate and implement a long-range, comprehensive plan for development, management and protection of water resources.

II. THE INDIANA APPROACH

As in Wisconsin, a basis for a state-administered permit system, allowing diversion of water from surface watercourses for consumptive uses, may be found in the Indiana statutes only by indirection. But where the Wisconsin statutes speak in terms of control, the Indiana statutes speak in terms of sale of water use rights. However, if the sale language is construed to mean control, the basis of a permit system exists.

Indiana authorizes[15] use of a portion of the water stored in state-financed reservoirs[16] to provide certain minimum quantities of stream flow or to provide water to purchasers. To accomplish those purposes, the Department of Natural Resources may make contractual arrangements, to endure no longer than fifty years, with virtually any person or organization capable of contracting.[17] The

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ject the plan every two years and to report to the governor by September 1 of each odd-numbered year.

14 *Cf.* Nekoosa-Edwards Paper Co. v. Public Serv. Comm'n., 8 Wis. 2d 582, 590, 99 N.W.2d 821, 826. Prior to this decision, an attempt to enact a comprehensive water use control statute failed in the legislature. See Coates, *Present and Proposed Legal Control of Water Resources in Wisconsin*, 1953 WIS. L. REV. 256 for a discussion of the basic scheme the legislature ultimately rejected. In considering whether the legislature in 1967 did indirectly what it had earlier refused to do directly, it is important to remember that prior to *Nekoosa-Edwards*, a considerable portion of stream diversions were effectively controlled by the permit system administered by the Public Service Commission. *See* note 5, *supra*. In 1967 the permit system had been weakened by *Nekoosa-Edwards* and rising demands for water use had heightened the need for a comprehensive system of water use controls.

15 IND. ANN. STAT. § 27-1409 (Supp. 1968).

16 IND. ANN. STAT. § 27-1403 (1960) allows reservoirs to be built.

17 IND. ANN. STAT. § 27-1409 (Supp. 1968) allows contracts with any

water so supplied may be put to virtually any use deemed in the public interest.[18] There are almost no limits placed by the legislature on departmental discretion in entering into the contracts.[19] Proceeds from the contracts are placed in a special, revolving fund for reservoir development and operation.

The Indiana program is just getting under way and has not yet been subjected to judicial review. When the courts review the program, the outcome will depend in large part on whether the Department of Natural Resources has established procedures ensuring that contracts are formed with a broad consideration of the public interest. If the procedures are lacking, it may be hard to rebut charges of discriminatory treatment of water users and potential water users similarly situated, and charges of failure to develop a sufficiently comprehensive plan of water use control.

III. PROBLEMS OF WATER USE PERMIT SYSTEMS IN RIPARIAN JURISDICTIONS

Any water use permit system in a riparian jurisdiction poses questions bearing on the rights to compensation of riparians along the watercourses covered by the system. May water be delivered for use outside the watershed? Must particular water uses be preferred in determining to whom a contract or permit should be issued? If an existing stream is used as the conduit to deliver water to an Indiana "purchaser," may riparians situated along the conduit be prevented from using the water? May use by well pumping—which may or may not occur on riparian land—be similarly prevented? What of riparians downstream from the contracting party or permittee—must they be compensated for not receiving the water delivered to the state-authorized user? So far as constitutional requirements are concerned, these questions are to be answered by determining whether the particular deprivation is a "taking" by the government of riparian property rights. If it is, compensation must be paid; otherwise not.

"person or persons." IND. ANN. STAT. § 27-1407(5) (Supp. 1968) defines "person" as "any natural person, firm, partnership, association or corporation [including but not being limited to] any local, county, state or federal unit of government or any special district created and authorized by law."

[18] IND. ANN. STAT. § 27-1409(1) (Supp. 1968) allows use for "water supply purposes." IND. ANN. STAT. § 27-1407(10) (Supp. 1968) defines "water supply" as "that volume of water designated for use in or by any beneficial process or purpose in the satisfaction of domestic, municipal, agricultural, industrial, commercial, recreational, power, transportation, stream pollution abatement, health and other uses and needs in a manner consistent with the public interest."

[19] Approval as to form must be obtained from the attorney general, and the price for water supplied a municipality or public utility is subject to review by the Public Service Commission. The governor also is to approve each contract, but it appears he receives no formal, explicit advice regarding a particular contract from any source independent of the contracting agency.

A. Possible Exemption of Some Water from Riparian Rights

Both the Wisconsin and Indiana legislatures appear to intend riparians to have no rights at all in some of the water within state control. In Wisconsin, water not beneficially used may be the subject of a diversion permit without consent of riparians.[20]

In Indiana, the Department of Natural Resources may sell water from state financed reservoirs.[21] The reservoirs may be built by various entities—including any "unit of government"—owning land contiguous to a public water course.[22] They are to be filled by impounding water "when the flow in the stream or the level of the lake is in excess of existing reasonable uses at the time of such impoundments."[23] Riparians have no rights in "increased flowage beyond normal stream flow" caused by releases from the impoundments. Instead, the entity that "built and financed" the impoundment is entitled to use the increased flowage.[24]

Contract water from such impoundments delivered as part of the stream flow would be an increased flowage in which riparians have no rights; contract water delivered by other means would result in no harm to existing riparians' uses because the water was impounded when excess to the needs of then existing uses. Expansion of existing uses and creation of new uses involving withdrawal of water are subject "to any regulations on such uses or increased uses which may be enacted" by the legislature.[25] The authorization to "sell" water might be considered such a regulation. The net effect, it may be argued, is to free the water encompassed by these statutes from riparian doctrine, thus allowing use of the water at any place and for any purpose allowed by the statutes themselves.

Both the Wisconsin legislation and the suggested interpretation of the Indiana legislation raise constitutional questions. Must Wisconsin riparians be compensated for loss of water diverted under permit, even though the riparians were either making no bene-

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[20] WIS. STAT. § 30.18(1)(b) (1967).

[21] IND. ANN. STAT. § 27-1409 (Supp. 1968).

[22] IND. ANN. STAT. § 27-1403(2) (1960).

[23] IND. ANN. STAT. § 27-1403(2) (1960). Flood waters may also be impounded if no injury is thereby caused "landowners or the users of water in the watershed of the watercourse from which the flood flow is diverted." IND. ANN. STAT. § 27-1406(1) (1960). "Flood water of a watercourse" is defined as the water "flowing or standing above the top level of or outside of the banks of such watercourse." IND. ANN. STAT. § 27-1407(7) (Supp. 1968). Since much of this water if not diverted would return to the normal channel of the watercourse and form part of the supply to which riparian rights attach, its diversion pursuant to the permission given by section 27-1406 may result in a taking of riparian rights in the constitutional sense.

[24] IND. ANN. STAT. § 27-1403(3) (1960).

[25] IND. ANN. STAT. § 27-1405 (1960).

ficial use of water or the beneficial uses they were making were not actually harmed by the diversion? Must Indiana riparians be compensated for rights denied in flowage beyond "normal stream flow"?

The result seemingly intended by each legislature is to allow reduction of the water volume to which the riparian otherwise would be entitled. Traditional doctrine entitles the riparian to commence making actual reasonable use of the water anytime in the future.[26] Possibly permitting water to be diverted from a stream, thereby reducing the flow of water passing riparian land downstream from the point of diversion, is such a reduction of riparian rights as to be a taking of property, even though, at the time the diversion permit is issued, the downstream riparian is not actually using the stream. The same possibility is present in situations where the downstream riparian is actually using the stream, but the use is not affected by the diversion. The question has not been judicially determined in either state. When the problem is presented in court, its resolution will depend on the balance the court strikes between the harm each complaining riparian proves against the public benefit achieved by regulating water use.

Assuming the regulation is the product of thorough planning of a broad spectrum of water uses, it seems likely to be upheld in Wisconsin without need for compensation. The Wisconsin court has found denial, without compensation, of a roadside proprietor's direct access to an already existing highway to be a legitimate exercise of the police power.[27] Justice Currie observed in a concurring opinion that "highway access rights are but one of a bundle of rights which appertain to a parcel of real estate,"[28] and that in the field of land use zoning the test employed to determine the validity of a regulation "is whether, viewing the property as a whole, there has in reality been a taking without compensation in that confiscation of the property has in effect occurred by depriving the owner of all beneficial use of his property."[29] He concluded that whether denial of direct access required compensation depended on the effect of the denial on the parcel of land as a whole. If reasonable access to the highway remains by way of frontage or other connecting highways, no compensation is necessary.[30]

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[26] 1 WATERS AND WATER RIGHTS § 53.3 (Clark ed. 1967); F. TRELEASE, CASES AND MATERIALS ON WATER LAW 1 (1967).

[27] Nick v. State Highway Comm'n., 13 Wis. 2d 511, 109 N.W.2d 71 (1961).

[28] *Id.* at 518, 109 N.W.2d at 74.

[29] *Id.*

[30] *Id.* Justice Currie seems somewhat inconsistent in his remarks. His stated belief that highway access rights are only one of a bundle of rights appertaining to a parcel of realty suggests that access rights to a particular highway might be entirely extinguished and compensation will not be required if the remaining rights pertaining to the parcel allow reasonable beneficial use of the parcel. But his later remark that no com-

If the Wisconsin court as a whole adopts the view that highway access rights are simply among the myriad of rights pertaining to land, it may take a similar view of riparian rights and find that reasonable exercise of riparian rights remains possible when stream flow has been reduced without actually harming existing riparian uses. The result would be to expand the scope of proper control of riparian rights under the police power significantly beyond that possible if riparian rights are viewed as property separate from property in the upland. Total extinction of riparian rights without compensation would be possible under the former view so long as the court found reasonable use of the upland remained possible, whereas under the latter view the riparian rights themselves would comprise the property being "regulated" and their total extinction would clearly require compensation.[31]

The Indiana legislation, when implemented, also will eliminate the riparian right to start actual, reasonable use of the water at will[32] and therefore presents the constitutional problem just discussed. In addition the Indiana statute, by denying rights in "normal stream flow," denies two more traditional riparian rights. One is the right to make reasonable use of whatever water is in a natural watercourse.[33] The second arises when a reasonable use is made of water above normal flow but still within the stream banks —the right, subject only to the reasonable uses of other riparians,

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pensation is required if indirect access is provided suggests that extinction of all access rights would require compensation. Perhaps the later remark simply reflects the facts of *Nick*, that indirect access existed, and no inference is to be drawn from it. If the court subscribes to the view that access rights as a whole are only one of the bundle of rights in a parcel of land, the public authorities clearly will have considerably greater practical power over highway access rights than if, as the second Currie remark can be read to suggest, the access rights themselves comprise the relevant bundle.

[31] Bino v. City of Hurley, 273 Wis. 10, 76 N.W.2d 571 (1956) contains language suggesting the crucial question for compensation purposes is whether a particular riparian right has been eliminated. *Bino* arose from an attempt by the city of Hurley to protect the purity of its water supply by prohibiting, among other things, bathing, boating or swimming in the lake from which the city drew its water. A riparian owner challenged the prohibition as a taking of his property without just compensation. In sustaining the challenge, the court said, "Depriving a riparian owner on a lake in the use of the water for swimming, bathing, and boating does not result in but incidental damage to his property which need not be compensated for by a municipality adopting an ordinance prohibiting such an activity in the interest of public health and welfare. Such riparian right is a substantial and valuable one for which compensation must be given if the owner is to be deprived of it." *Id.* at 21, 76 N.W.2d at 578. The opinion does not discuss whether the upland to which the riparian rights pertained was still susceptible of reasonable use if the ordinance were sustained.

[32] *See* note 25, *supra*, and accompanying text.

[33] *See, e.g.*, Druly v. Adam, 102 Ill. 177 (1882).

to receive the above normal flow.[34] It is for the Indiana court to decide for its state whether the deprivations of riparian rights the statute may effect requires compensation of riparians.

B. Constitutional Problems Stemming from Riparian Rights in Diverted Water

1. LAND ON WHICH DIVERTED WATER MAY BE USED

The law of states accepting the riparian theory of water rights usually allows water from a natural watercourse to be used only on riparian land.[35] Indiana has never defined riparian land, nor has the Wisconsin court. The Wisconsin administrative practice in allowing diversions of surplus water has been to use the "source of title" definition of riparian land.[36] This definition makes riparian all that portion of a tract abutting a stream and held in one ownership that has never been severed from the stream, since the time of patent from the government, by sale to another who, prior to the sale, had no land itself contiguous to the stream and of which the purchased land became a part.[37] Two notable features of the source of title test are that it is unconcerned with the watershed[38] of the watercourse in question, and it has the effect of continually diminishing the area of riparian land as tracts are divided and sold.

Two other definitions of riparian land are unconcerned with prior severances. Under one, riparian land is all that portion of a tract held in a single title contiguous to the watercourse.[39] Where

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[34] In Indiana the right would be to receive even water outside the stream banks if it generally flowed with the water within the banks. Watts v. Evansville, Mt. C. & N. Ry., 191 Ind. 27, 129 N.E. 315 (1921).

[35] WIS. STAT. § 30.18(5) (1967) also allows a riparian permittee to use the water "on any other land contiguous to his riparian land." And large nonriparian diversions have commonly been allowed in Wisconsin for cranberry culture and for municipal use. *See* Harnsberger, *Preseriptive Water Rights in Wisconsin*, 1961 WIS. L. REV. 47, 55-59.

[36] *See* BEUSCHER, WATER RIGHTS 137-38 (1967).

[37] *See* Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P. 978 (1907); Boehmer v. Big Rock Irrigation Dist., 117 Cal. 19, 48 P. 908 (1897); Watkins Land Co. v. Clements, 98 Tex. 578, 86 S.W. 733 (1905); Yearsley v. Cater, 149 Wash. 285, 270 P. 804 (1928). See note 43 *infra* for an illustration of the test.

[38] Under any definition of riparian land, the watershed is defined with reference to each riparian tract of land. The watershed definition has two elements. First, the land within the watershed must be drained by the watercourse. Second, once the water the land supplies is in the watercourse, it must flow by the particular tract of riparian land whose watershed is in question. Thus only the riparian tract at the mouth of the watercourse would have a watershed comprising all the land drained by a watercourse. And a riparian whose land is located below a stream junction has not experienced a transfer out of the watershed when water is transferred from one of the stream branches to land drained by the other. *See* Rancho Santa Margarita v. Vail, 11 Cal. 2d 501, 81 P.2d 533 (1938).

[39] *See* Clark v. Allaman, 71 Kan. 206, 80 P. 571 (1905); Jones v. Conn,

this unity of title rule obtains, riparian land may expand as additional tracts adjoining the tract washed by the stream are purchased, and it may contract as parcels away from the stream are sold. This test also is unconcerned with the watershed. The other definition adds to the unity of title test the requirement that the land lie in the watershed of the watercourse.[40] As demands to use water rise, the likelihood that the courts of both states will be called upon to define riparian land increases as well.[41]

In defining riparian land for its state, each court should consider the relevant intent of the state legislature. The Wisconsin legislature has declared that water diverted pursuant to permit granted by the Department of Resource Development may be used on land "contiguous to . . . riparian land."[42] If the court finds riparian owners have no rights to receive surplus water, and if only surplus water is permitted to be diverted, riparians would have no standing to challenge the legislation. Otherwise, they might argue that the legislation invades their property right that use of stream or lake water be restricted to riparian land. The circumstances leading to the enactment of the language quoted suggest a legislative intent to eliminate anomalies created by the source of title test used by the Public Service Commission.[43] The Wisconsin court

39 Ore. 30, 65 P. 1068 (1901); RESTATEMENT OF TORTS, § 843, comment c (1939).

[40] *See* Sayles v. City of Mitchell, 60 S.D. 592, 245 N.W. 390 (1932). In 1 WATERS AND WATER RIGHTS § 53.5(c) (Clark ed. 1967) this is said to be the general rule. On the other hand, in 6A AMERICAN LAW OF PROPERTY § 28.55 (Casner ed. 1954) the unity of title definition is said to be used by the majority of jurisdictions.

[41] In Wisconsin there is a history of water use by the cranberry industry on land that would not fit within any traditional definition of riparian land. Harnsberger, *Prescriptive Water Rights in Wisconsin*, 1961 WIS. L. REV. 47, 55-56. Some applications of water for cranberry irrigation may have become rightful by prescription, although it is unclear in Wisconsin that prescriptive water rights can be obtained on nonriparian lands. *Id.* at 66. As the industry expands, new uses on possibly nonriparian land may be anticipated. And in Indiana, the City of Bloomington in the summer of 1968 was discharging some of the water it receives from a state reservoir (Monroe) into the Bean Blossom river. At the same time the city was discharging water from Lake Lemon in the Bean Blossom watershed into the watershed of Monroe Reservoir. Thus in both states possibilities exist that some riparian is or will be harmed by use of water on land the riparian could assert to be nonriparian.

[42] WIS. STAT. § 30.18(5) (1967).

[43] BEUSCHER, WATER RIGHTS 137-38 (1967) summarizes the history.

> The law as passed in 1935 (as Ch. 287) was principally intended to provide for diversions from one watershed to another at the behest of cranberry growers. See Kanneberg, "Wisconsin Law of Waters", 1946 *Wis. L. Rev.* 346, 373. After the law had been on the books for 14 years it was interpreted by the Attorney General (39 Wis. A.G. Op. 564 (1950)) and became, on the strength of this opinion, the basis for a reasonably active permit system for agricultural irrigators who wanted to take water from streams. The Attorney General concluded that riparian law applied to the issuance of permits and that permitted water could be used only on riparian land.

would implement such an intent if it adopts a definition of riparian land that includes more land than does the source of title test. The wider test would remove the possible basis outlined above for challenging the statutory provision, at least with respect to that land the legislature intended to affect.[44]

Arguably, the broad language in section 144.025(2) of the Wisconsin statutes[45] reflects a legislative intent to authorize a comprehensive water use permit system applicable to water resources generally. Moreover, the most effective development, management and protection of water resources is most readily achieved when the broadest areas of land are eligible to receive the water. So again, the widest possible definition of riparian land seems appropriate for implementing legislative intent.

The Indiana legislature has even more clearly declared its intention that water in Indiana be put to maximum beneficial use. The legislature has stressed the need for the "utmost efficiency in the beneficial management of surface water resources" so as "to promote and to regulate surface water resources for the proper beneficial uses."[46] They have declared that the general welfare of the people of the state requires that surface water be put to beneficial uses, that nonbeneficial uses be prevented, and that "public and private funds, for the promotion and expansion of the beneficial uses of surface resources, shall be invested to the end that the best interests and welfare of the people of the state will be served."[47]

> The Supreme Court of Wisconsin had never passed on whether the source of title or the unity of title test should be used to define riparian land . . . . The Public Service Commission on informal advice from the Attorney General decided to apply the source of title test. . . .
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> Suppose two cases. Each involves a 160 acre farm in an entire rectangular parcel—two forties on the river, two forties back from the river. Both farmers apply for permits to take water from the river to irrigate for potatoes. The first farmer is told he can have a permit to irrigate only the two forties on the river; the second is given a permit to irrigate his entire 160 acre tract. Why? Because the grandfather of the first farmer had sold off the two rear forties years ago only to buy them back later. This broke the chain of title. Riparian rights could not be restored as to those forties. But no one had ever sold off the rear forties on the second farm so they continued to be riparian land! Compare Application of Gorell, 2 W. P. 1105, 41 Wis. Pub. Serv. Comm. Rep. 354 (1956) and Application of Luther, 2 W. P. 1120, 41 Wis. Pub. Serv. Comm. Rep. 467 (1956).
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> Irrigators protested to the legislature which repeatedly in 1957, '59 and '61 approved the so-called "riparian-land" amendment authorizing each time on a temporary basis, use of permitted water on any land contiguous to riparian land. In 1963 the amendment was made "permanent." See § 30.18(5) (formerly § 30.14) Wis. Stats. 1963.

44 Of course, so long as any land remains nonriparian, the statute may be challenged in some instances.

45 *See* text at notes 14-17, *supra.*

46 Ch. 251, preamble, [1955] Ind. Laws 643.

47 Ch. 251, § 1, [1955] Ind. Laws 643.

Assuming that the greatest number of beneficial water uses today require the water to be removed from the water course in which it is found, the broadest definition of riparian land would seem best to carry out the legislative intent. At least such a definition would maximize the number of landowners eligible to use water found in a watercourse, thereby increasing both the chance that the resource would actually be used and that the uses made would be those most beneficial. A second indication favoring a broad definition of riparian land by the Indiana court is found in statutory language declaring the common law right of domestic use in the "owner of land contiguous to or encompassing a public watercourse."[48] The word "contiguous" used without reference to the watershed, and used in a statement declaring part of the common law of riparian rights, suggests the Indiana legislature intends the unity of title definition of riparian land to be used.

In addition to permitting riparian land to receive water, most riparian jurisdictions recognize that nonriparian land may develop prescriptive rights to particular water uses.[49] Such land is eligible to receive water to satisfy that particular use or other uses imposing no greater burden on riparian owners than did the particular use.[50] Thus, if both states were to allow prescriptive rights to be obtained for nonriparian land and the prescriptive right is to use a given quantity of water seasonally for agricultural irrigation, the user could receive the same quantity during the same season, but could not rightfully receive a larger quantity, or receive it at a different time of year.[51]

2. CONSEQUENCES OF USE ON NONRIPARIAN LAND

Use on nonriparian land has different consequences in different states. One view is that it is wrongful per se and riparians may obtain appropriate judicial relief regardless of actual damage.[52] Some cases require proof of actual damage before allowing relief.[53] A third view treats use on nonriparian land as simply a factor bearing on the over-all reasonableness of the use.[54] In most jurisdictions, a wrongful use on nonriparian land for which no judicial relief is sought and which continues unchecked, eventually ceases

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48 IND. ANN. STAT. § 27-1403(1) (1960).

49 *See* Harnsberger, *supra* note 41, at 66.

50 *Id.* at 78-79.

51 Wisconsin has departed from the general rule and has refused to allow the water to be applied to a different purpose from that which gave rise to the prescriptive right. Burkman v. City of New Lisbon, 246 Wis. 547, 19 N.W.2d 311 (1945).

52 *See* 6A AMERICAN LAW OF PROPERTY § 28.56 (Casner ed. 1954).

53 *See* Metropolitan Util. Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N.W.2d 626 (1966); Jones v. Conn, 39 Ore. 30, 64 P. 855 (1901); Texas Co. v. Burkett, 117 Tex. 16, 296 S.W. 273 (1927).

54 *See* Lawry v. Sillsby, 82 Vt. 505, 74 A. 94 (1909).

to be wrongful and a right to make the use arises by prescription.[55]

Acceptance of the third view by the Wisconsin and Indiana courts would make all land in the two states eligible for use of permit or reservoir water. If the courts concluded that use of water on nonriparian land was wrongful, but only on proof of actual damage to some riparian, many nonriparian uses at this time would probably not be wrongful. A serious consequence of the rule making nonriparian use wrongful if damage is proved is that as actual use of riparian rights becomes more intense, it may be expected that sometime a particular nonriparian use will actually damage some riparian and thereby become wrongful as to that riparian. The impossibility of predicting precisely when the transformation from rightful to wrongful use will occur may inhibit nonriparian uses of water virtually to the same extent that adoption of the wrongful per se rule would. In fact, some nonriparian users might prefer the wrongful per se rule. The chance of acquiring a prescriptive right to make a nonriparian use of water only exists while the use is wrongful.[56] Therefore, when riparians suffering no actual damage fail to vindicate their rights in court, the nonriparian user is on his way to a prescriptive right under the wrongful per se rule but not under the other rule.

3. USES TO WHICH DIVERTED WATER MAY BE PUT

Riparian owners have the right of reasonable use of the water in both Wisconsin and Indiana.[57] Whether a particular use is reasonable is a question of fact[58] and depends on all the circumstances of the use.[59] However, in Indiana domestic uses of water are preferred over other uses to the extent that a riparian may use as much water as he needs for domestic purposes, even if harm results to downstream riparians.[60] Prescriptive rights to use water also are exempt from the reasonable use limitation in both states.[61]

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[55] *See* Harnsberger, *supra* note 41, at 66.

[56] *See id.* at 54.

[57] *See, e.g.*, Penn Am. Plate Glass Co. v. Schwinn, 177 Ind. 645, 98 N.E. 715 (1912); City of Valparaiso v. Hagen, 153 Ind. 337, 54 N.E. 1062 (1899); Dilling v. Murray, 6 Ind. 324 (1855).

[58] Penn Am. Plate Glass Co. v. Schwinn, 177 Ind. 645, 98 N.E. 715 (1912); Muncie Pulp Co. v. Koontz, 33 Ind. App. 532, 70 N.E. 999 (1904); Apfelbacher v. State, 167 Wis. 233, 167 N.W. 244 (1918); Timm v. Bear, 29 Wis. 254 (1871).

[59] Dilling v. Murray, 6 Ind. 324 (1855); Apfelbacher v. State, 167 Wis. 233, 167 N.W. 244 (1918); Mabie v. Matteson, 17 Wis. 1 (1863).

[60] IND. ANN. STAT. § 27-1403(1) (1960). The domestic use preference may not exist in Wisconsin. *See* Hazeltine v. Case, 46 Wis. 391, 1 N.W. 66 (1879).

[61] Water rights acquired by prescription pertain to water uses that were originally wrongful but against which judicial relief may no longer be sought. Therefore the holder of a prescriptive right may use even unreasonable quantities of water indefinitely, without diminution because of

Another preferred use may be diluting effluent from a municipal sewage treatment plant.[62] So long as water diversions do not interfere with preferred water uses, and the diversions themselves give priority to such preferred water uses, they would seem proper if for water uses deemed reasonable under the law of riparian rights.

A permit system based on existing statutory law in Wisconsin, if valid at all, probably would allow some diversions that did interfere with preferred uses, or which were for uses unreasonable in the riparian context. Permits would issue only in pursuance of a comprehensive water use plan for a region of the state,[63] and only after public hearing on the application for each particular permit.[64] Thus the permits would be police regulations of conflicting private claims to use a common resource, and as such valid without compensation to private persons save those who proved particular permits interfered so greatly with some preferred uses they were making, or with some aspect of riparian rights, as to amount to a taking of property.

Turning to Indiana, it is doubtful that the current administrative practice of diverting water from reservoirs would withstand court action by a riparian actually harmed by the diversions. Interviews with knowledgeable officials of the Department of Natural Resources reveal that diversions had caused no interferences with preferred uses as of the summer of 1968. At that time the Department's Division of Water had felt no need to give priorities to preferred water uses, apparently because the "sales"—all of which then had been from Monroe Reservoir—had accounted for only a small portion of reservoir capacity.[65] Nor had the Division established criteria for determination that a sale is in the public interest. The thinking was that when demands to buy water threaten to

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riparian needs. *See generally* Trout v. Woodward, 64 Ind. App. 333, 114 N.E. 467 (1916); Walley v. Wiley, 56 Ind. App. 171, 104 N.E. 318 (1914); Seigmund v. Tyner, 52 Ind. App. 581, 101 N.E. 20 (1913); Gaskill v. Barnett, 52 Ind. App. 654, 101 N.E. 40 (1913); Mitchell v. Parks, 26 Ind. 354 (1866); Harnsberger, *supra* note 41.

[62] City of Valparaiso v. Hagen, 153 Ind. 337, 54 N.E. 1062 (1899). Municipalities also commonly draw their water supplies from a watercourse in spite of the usual view that they have no inherent right to do so. Injunctions against the practice, once established, are difficult to obtain because their issuance would cause serious harm to the municipalities and their inhabitants. Hence, as a practical matter actual municipal use may be preferred as well, even though water law theory generally does not permit it. *See* Harnsberger, *supra* note 41, at 57-60. Injunctions may be more easily obtained if sought while the projected municipal use is still in the planning stage.

[63] WIS. STAT. § 144.025(2) (1967).

[64] WIS. STAT. § 30.18 (1967).

[65] Monroe Reservoir has a capacity of 130 million gallons of water per day. Of this capacity, only 17.5 million gallons per day have been contracted.

exceed reservoir capacity, preference would be given public uses over private, and nonconsumptive uses over consumptive. The Division would include within public use the supplying of water to water utilities or other entities distributing water to private users. The city of Bloomington had contracted for the largest amount of water sold—12 million gallons per day—although it was then using only about half that amount.

Traditional doctrine modifies the riparian right to receive the flow of a stream only as the flow is affected by reasonable uses made by other riparians,[66] or by preferred uses. To be sure, most courts will require a showing of actual harm to the complaining riparian before concluding that his right has been invaded, but apart from that, the ultimate question under the law of riparian rights is whether the use modifying the flow of water is reasonable, not whether it is in the public interest. The difference becomes immediately apparent when considering the use of water for a municipal water supply. Such use might often be deemed in the public interest. Nevertheless, the great majority of courts have concluded use for a municipal water supply to be improper.[67]

From the foregoing, and since any riparian may start at any time to make actual use of the water,[68] it appears the need to develop water use priorities in contracting for the sale of reservoir water does not depend on the proportion of reservoir water remaining uncontracted. Rather it depends on the possibility that a riparian of the stream on which the reservoir is located can show, either presently or in the future, actual damage from contract water deliveries affecting the flow past his land. To provide the best chance of overcoming the challenge of such a riparian, the priorities should be established within the framework of existing water law by recognizing only the preferred water uses mentioned above,[69] and other water uses that are reasonable in the riparian rights sense.

The anticipated Division preference of public over private uses seems unlikely to assure that the contract use will be reasonable in the riparian right context. Of course, the sense in which the Division might use the term "public use" is now unclear. But it is doubtful that one sense of public use the Division appears to entertain—use for municipal purposes—will be deemed reasonable. The sense of public use associated with exercise of public rights in watercourses seems alien to riparianism although the Minnesota court once made the transposition[70] and Maine recognizes with-

66 6A AMERICAN LAW OF PROPERTY § 28.56 (Casner ed. 1954).

67 *See, e.g.*, Valparaiso City Water Co. v. Dickover, 17 Ind. App. 233, 46 N.E. 591 (1897). *See also* 94 C.J.S. *Waters* § 226 (1956).

68 6A AMERICAN LAW OF PROPERTY § 28.55 (Casner ed. 1954).

69 *See* text accompanying notes 57-62 *supra*.

70 St. Anthony Falls Water-Power Co. v. St. Paul Water Comm'rs, 56 Minn. 485, 58 N.W. 33 (1894), *aff'd*, 168 U.S. 349 (1897).

drawal of certain water to supply municipalities as being part of the public rights.[71] The sense of public use as being a use more beneficial to society at large than another use might be runs athwart the decided cases. In determining whether uses are reasonable in the riparian context, courts emphasize present competing uses and circumstances relatively immediate to their exercise, rather than primarily their benefit to society at large.[72] Indeed, considering the lack of facilities available to courts to develop information independent of that presented as evidence by adversary counsel, it could hardly be otherwise.[73]

The expected Division preference for nonconsumptive uses over consumptive also is unlikely to produce results in harmony with riparian rights except as the nonconsumptive or consumptive quality of a use bears on whether the use is reasonable.

A question may arise in attempting to make contracts for Indiana reservoir water in accordance with the domestic use, prescriptive right, municipal sewage effluent dilution, or any other preferred use. Suppose the contracting party will make the preferred use on land physically downstream from another riparian who is not contracting with the Division but who is diverting water from the stream to the same preferred use the contracting party contemplates. Might the Division supply so much water to the contracting party as to interfere with the other riparian's use without becoming liable to pay compensation? It probably could, so long as the interference was not unreasonable. The contract is let in the public interest, which suggests an exercise of the police power. This, in turn, suggests the contract is the tool by which the Division regulates conflicting claims to use a common resource,[74] particularly if an administrative hearing were held on the question whether the proposed use of reservoir water would be in the public interest.

Such a hearing would also help establish that a nonpreferred use of reservoir water was reasonable under the circumstances. Although ultimately the reasonable use question is for judicial decision, a reasoned determination by the Division, following opportunity for interested parties to be heard would carry weight with a court. The statute does not provide for a hearing, but, in requiring

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71 Kennebunk, Kennebunkport & Wells Water Dist. v. Maine Turnpike Authority, 145 Me. 35, 71 A.2d 520 (1950); Opinion of the Justices, 118 Me. 503, 106 A. 865 (1919); American Woolen Co. v. Kennebec Water Dist., 102 Me. 153, 66 A. 316 (1906); City of Auburn v. Union Water Power Co., 90 Me. 576, 38 A. 561 (1897).

72 RESTATEMENT OF TORTS at 341-346 (1939).

73 *See* O'Connell, *Iowa's New Water Statute—The Constitutionality of Regulating Existing Uses of Water*, 47 IOWA L. REV. 549, 572-74 (1962).

74 Bissell Chilled Plow Works v. South Bend Mfg. Co., 64 Ind. App. 1, 111 N.E. 932 (1916) preserved the status of an upper riparian, but is distinguishable because it involved a dispute only between private parties.

that the use of reservoir water be "consistent with the public interest,"[75] it implies authority to hold one as part of the deliberative process. It should be noted that the party attacking a Division-approved use of reservoir water bears the burden of proving it unreasonable.[76]

4. DURATION OF PERMITTED DIVERSION

Under riparian doctrine whether a use is reasonable depends on all the circumstances, including the demands of other riparians to use water. If at any time circumstances change, a previously reasonable use may become unreasonable, and therefore wrongful.[77] The extent to which this doctrine will limit the duration of Wisconsin permits or Indiana "contracts" is not yet clear. Some relaxation in applying the doctrine to state authorized diversions is essential to the utility of the permits. The uncertain duration of the right to make any particular use of water, under traditional riparian doctrine, has inhibited intensive development of water uses because it creates uncertainty that an investor would receive water in sufficient quantity for sufficient time to amortize his investments. In Wisconsin, the amortization period might be established at the hearing on the application. A permit then might be issued for the amortization period or the period of actual water use under the permit, whichever proved shorter. Such an approach, tailored to each permitted use, restricts the common law riparian right to challenge a water use as soon as it becomes unreasonable only to the extent necessary to allow the user to amortize his investment that is dependent on the use. Indiana, on the other hand, has chosen long term water supply contracts as the means of giving investors an assured water supply.[78] In effect, it may be argued, the legislature intends the determination made at the time of contracting that a use is reasonable to be conclusively presumed correct for the duration of the contract. If the contract period corresponds to the amortization period for the water user's investment the restriction of riparian rights is the same as under the approach Wisconsin might take. If the contract period is longer, the restriction is greater, and hence more difficult to sustain without granting compensation.

Whether restriction of the riparian right to challenge an unreasonable use of water to permit amortization of the user's investment deprives riparians of property for which compensation must be paid may depend on whether a court focuses on the plural

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[75] *See* note 18 *supra.*

[76] *See* Penn Am. Plate Glass Co. v. Schwinn, 177 Ind. 645, 98 N.E. 715 (1912); Muncie Pulp Co. v. Koontz, 33 Ind. App. 532, 70 N.E. 999 (1904).

[77] Valparaiso City Water Co. v. Dickover, 17 Ind. App. 233, 46 N.E. 591 (1897); 6A AMERICAN LAW OF PROPERTY § 28.57 (Casner ed. 1954).

[78] IND. ANN. STAT. § 27-1409 (Supp. 1968).

nature of riparian rights.[79] If it does, it may well conclude that the right to object at any time that a use has become unreasonable is not sufficiently significant when viewed in context with the other valuable riparian rights their owner still may exercise, and with the public purpose served by the restriction—removal of a practical bar to water use.

A result of the above approach to the compensation problem, however, is to invite each individual riparian affected by a permit or long term contract to show that circumstances peculiar to his property prevent him from achieving sufficiently valuable benefit from its use to sustain the described rationale. Considerable litigation may occur, possibly following the issuance of each permit or the formation of each contract. Perhaps a more manageable approach, with proper authorizations, would be for the Wisconsin Department of Resource Development to acquire the right under discussion from all riparians, and for the Indiana Department of Natural Resources to acquire it from all riparians bordering a stream on which a reservoir was built. Considering the right condemned and the right remaining to the riparians to contest the reasonableness of a use before the issuance and after the expiration of a water permit or contract, the administrative agencies might well ascribe only a nominal value to the right being taken, with individual riparians being given a reasonable time following the proceedings to show otherwise.[80]

5. AN INDIANA PROBLEM OF WATER DELIVERY

The Indiana statute allows natural streams to be used as conduits for delivering reservoir water to parties who contract for its use.[81] But riparians in reasonable use states such as Indiana are entitled to make reasonable use of the entire flow of natural watercourses, as affected by the reasonable uses made by other riparians.[82] Creation of a reservoir on a stream does not end the natural status of the stream so far as the law is concerned,[83] and the reservoir itself will be considered a natural watercourse as well.[84] There is authority in Illinois that riparians below a reservoir have the same

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79 *See* text accompanying notes 27-31 *supra*.

80 Wisconsin now authorizes this type of payment procedure with respect to certain damages in highway condemnation. *See* WIS. STAT. §§ 32.19, 32.20 (1967).

81 IND. ANN. STAT. § 27-1409 (Supp. 1968).

82 It has been said that the riparian, under reasonable use doctrine, has an interest "in only so much of the stream as he can put to beneficial use"—subject to correlative rights of other riparians. 6A AMERICAN LAW OF PROPERTY § 28.56 (Casner ed. 1954). The riparian may commence actual use at any time. *Id.*, § 28.55.

83 *See* Plumleigh v. Dawson, 6 Ill. 544 (1844) discussed in Mann, Ellis and Krausz, *Water Use Law in Illinois* (1964), UNIV. OF ILL. AG. EXPER. STA. BULL. No. 703, at 31-34 (Econ. Research Serv., U.S.D.A. cooperating).

84 Mann, Ellis and Krausz, *supra* note 83, at 56.

right to use waters released from the reservoir and which pass by their land that they have to use stream water passing their land from another source.[85] However, dictum suggests that where the release of reservoir water and its withdrawal downstream are part of a single improvement or may be considered a single act,[86] riparians situated between the reservoir and the point of withdrawal have no right to use the water. If the Indiana court follows the Illinois dictum, a natural stream could be used to convey reservoir waters to a party contracting for their use.[87] Another rationale by which the Indiana court might bar riparians from using contract water passing their land is to view the contract as the means of effectuating a regulation of riparian rights under the police power. That is, the riparian right of use is limited to those uses that will not lower the quantity or quality of water contracted to be delivered. The need for an administrative hearing as part of the contracting process has already been discussed.

IV. SUMMARY

Authority for state management of water use may be inferred from existing legislation in both Wisconsin and Indiana. Both the language of the Wisconsin statutes and the administrative practice now followed in Wisconsin are consistent with techniques deemed appropriate in the land use control field for exercise of the police power. The statutes clearly contemplate that overall planning of water uses will form the basis of the regulations promulgated. The practice is to hold hearings on applications for individual water use permits. The Indiana legislation can be construed in police power terms, but the ordinary meaning of its language suggests sale rather than regulation. And no hearings are held on water use applications. Adoption of statutory language and administrative practice in Indiana, that is appropriate when the police power is used, would make the Indiana scheme of control more clearly constitutional.

State management of water use in either state entails curtailment of riparian rights in several respects, but compensation of a riparian owner probably will only rarely be required if good planning goes into the management program. The public purpose behind water management is strong—to conserve the water resource and achieve its beneficial use. The view that riparian rights are only a portion of the rights of land ownership tends to increase the number and value of riparian rights that may be

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85 *See* Druly v. Adam, 102 Ill. 177 (1882) discussed in Mann, Ellis and Krausz, *supra* note 83, at 52-54.

86 102 Ill. 177, at 201.

87 As discussed in the previous subsection, it is possible riparians are prevented by IND. ANN. STAT. § 27-1403 (1960) from using some contract water delivered through a stream.

obliterated without need to compensate their owner. The hazard that water management might take away riparian rights may be further reduced by administrative findings, wherever possible, that uses permitted by the management scheme are reasonable uses in the riparian sense, and by judicial adoption of the broadest possible definition of riparian land.[88]

[88] It is noteworthy that general abrogation of riparian rights and substitution of the appropriative system of water rights in their place has been upheld without requiring compensation, State *ex rel.* Emery v. Knapp, 167 Kan. 546, 207 P.2d 440 (1949), as has the abolition of absolute ownership of percolating ground waters, Knight v. Grimes, 80 S.D. 517, 127 N.W.2d 708 (1964).