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Modification of the Riparian Theory and Due Process in Missouri

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MODIFICATION OF THE RIPARIAN THEORY AND DUE PROCESS IN MISSOURI

I. INTRODUCTION

Until relatively recent years water rights legislation and litigation has primarily centered in the seventeen arid and semi-arid western states.[1] However, as a result of increased demands on water resources for agricultural, industrial, recreational and public uses, the more humid and traditionally water rich states of the East have expressed concern for and interest in the conservation and regulation of their water resources.[2] A significant number of these states have departed from the common law riparian theory[3] of water use law and have enacted comprehensive regulatory measures, modeled after the water acts common in the western states.[4] In accordance with this trend there appears to be an increasing interest in Missouri in state regulation and control of water uses and rights.[5] The purpose of this paper is to consider the constitutionality of a comprehensive water use act in Missouri.

The case law in Missouri is not extensive in the area of water use law[6] but

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1. 1 CLARK, WATERS AND WATER RIGHTS 153, 154 (1967).

2. Ten Eastern states have enacted comprehensive water use legislation; Arkansas, ARK. STAT. ANN. §§ 21-1301-15 (Supp. 1963); Delaware, DEL. CODE ANN. tit. 7, §§ 6101-05 (Supp. 1966); Florida, FLA. STAT. §§ 373.071-.251 (1965); Illinois, ILL. REV. STAT. ch. 19, §§ 52-78 (1961); Indiana, IND. ANN. STAT. § 27-1301-1408 (Supp. 1966); Iowa, IOWA CODE §§ 455A.1-39 (Supp. 1966); Maryland, MD. ANN. CODE art. 96A, §§ 1-58 (Supp. 1967): Minnesota, MINN. STAT. §§ 105.71-79 (Supp. 1967); Mississippi, MISS. CODE ANN. §§ 5966-01-115 (Supp. 1964); New Jersey, N.J. REV. STAT. §§ 58: 4A-1-28 (Supp. 1967); Wisconsin, WIS. STAT. §§ 30.18, 144.03 (Supp. 1967). The constitutionality of any of these acts has yet to be tested.

3. In all of the Eastern states which have adopted comprehensive water use acts the riparian theory was previously recognized as controlling water use law. *E.g.*, De Vore Farons, Inc. v. Butler Hunting Club, Inc., 255 Ark. 818, 286 S.W.2d 491 (1956); Clark v. Lindsay Light and Chemical Co., 405 Ill. 139, 89 N.E.2d 900 (1950); Greenwood v. Evergreen Mines Co., 220 Minn. 296, 19 N.W.2d 726 (1945); Jessup & Moore Paper Co. v. Zeitler, 180 Md. 395, 24 A.2d 788 (1942); Am. Sand & Gravel Co. v. Rushing, 183 Miss. 496, 184 So. 60 (1938); Harp v. Iowa Falls Elect. Co., 196 Iowa 317, 191 N.W. 520 (1923); Thiesen v. Gulf, R.&A. Ry., 75 Fla. 28, 78 So. 491 (1918); Paterson v. East Jersey Water Co., 74 N.J. Eq. 40, 70 A. 472 (1908); Huber v. Merkel, 117 Wis. 355, 94 N.W. 354 (1903); Dilling v. Murrary, 6 Ind. 324 (1855).

4. It is not within the scope of this article to discuss specific provisions or variations in the acts. They all provide for measures which substantially alter rights recognized under the riparian theory and as a result they all give rise to constitutional questions in those jurisdictions where previously riparian rights were recognized.

5. Concern for Missouri water resources led to creation of the Water Resources Board by the Missouri legislature. The Board was directed to coordinate plans for a program for the conservation, development and management of water resources. See §§ 256.180-.260, RSMo 1963 Supp.

6. The statement is somewhat inaccurate. There are a significant number of Missouri decisions concerning water use problems but a relatively few involve a determination of the extent or nature of riparian owners rights to utilize water.

where disputes have arisen with respect to surface or underground water rights the courts have consistently applied the common law riparian theory.[7] The precise nature of the riparian doctrine will vary from one jurisdiction to another, but in general the basic precepts of the doctrine are that the right to use or take water is an incident of ownership of land adjacent to a watercourse or lake.[8] The landowner may use all the water necessary for his domestic requirements but any use for artificial purposes must be reasonable in relation to the rights of the other riparian owners.[9] In addition, the doctrine prohibits the use of water on non-riparian lands.[10] The common law theory also comprehends that the landowners water rights are vested and cannot be lost or destroyed by nonuse.[11] Not surprisingly, in light of the valuable nature of water rights, several courts have declared riparian rights to be "property" rights.[12]

The riparian doctrine is criticized on the grounds that it is an inefficient and wasteful method of regulating water uses in that it prohibits the use of water on non-riparian land. As a result of this limitation the requirements of non-riparian landowners for water will go unfullfilled even though there may be an abundance of water available. The doctrine is also criticized for its indefiniteness. Riparian owners are entitled to make use of a reasonable amount of water but what is a reasonable amount can be determined only after litigation and even then the approved quantity is subject to change.

Comprehensive water use acts have been adopted to permit more efficient regulation of water resources. The acts generally[13] provide for state control of the

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7. Armstrong v. Westroads Dev. Co., 380 S.W.2d 529 (St. L. Mo. App. 1964); Happy v. Kenton, 362 Mo. 1156, 247 S.W.2d 698 (1952); Dardenne Realty Co. v. Abeken, 232 Mo. App. 945, 106 S.W.2d 966 (St. L. Ct. App. 1937); Keener v. Sharp, 341 Mo. 1192, 111 S.W.2d 118 (1937); Greisinger v. Klinhardt, 321 Mo. 186, 9 S.W.2d 978 (1928); McIntosh v. Rankin, 134 Mo. 340, 35 S.W. 995 (1896); Meyers v. City of St. Louis, 8 Mo. App. 266 (St. L. Ct. App. 1880), *aff'd* 82 Mo. 367 (1884); Welton & Edwards v. Martin, 7 Mo. 307 (1842).

8. Lauer, *The Riparian Right as Property,* UNIV. OF MICH. LAW SCHOOL, WATER RESOURCES AND THE LAW 133 (Pierce ed. 1958).

9. The English rule or "natural flow" theory of riparian rights has been modified by the majority of jurisdictions in favor of the "reasonable use" variation. *See* 1 CLARK, *supra* note 1, at 291. The position of Missouri is not at all clear, the cases have not committed Missouri to either theory. Several writers have concluded that if the question arose today the courts would follow the majority and recognize the reasonable use variation. See Mann, McLarney, Angle and Miller, *Water-Use Law in Missouri,* UNIV. OF MISSOURI COLLEGE OF AGRICULTURE RESEARCH BULLETIN 889 at 30 (1965).

10. Armstrong v. Westroads Dev. Co., 380 S.W.2d 529 (St. L. Mo. App. 1964), 3 TIFFANY, LAW OF REAL PROPERTY 725, 125-26 (Supp. 1967).

11. Ziegler, *Water Use Under Common Law Doctrines,* UNIV. OF MICH. LAW SCHOOL, WATER RESOURCES AND THE LAW 49 (Pierce ed. 1958).

12. State *ex rel.* Peterson v. State Bd. of Agriculture, 158 Kan. 603, 609, 149 P.2d 604, 608 (1944); Hilt v. Weber, 252 Mich. 198, 225, 233 N.W. 159, 168 (1930); Philadelphia v. Commonwealth, 284 Pa. 225, 232, 130 A. 491, 494 (1925); St. Germain Irrigating Co. v. Hawthorn Ditch Co., 32 S.W. 260, 267, 143 N.W. 124, 127 (1913); Meyers v. City of St. Louis, 8 Mo. App. 266, 274-75 (St. L. Ct. App. 1880); *aff'd* 82 Mo. 367 (1884); Shamleffer v. Council Grove Peerless Milk Co., 18 Kan. 24, 31 (1877).

13. Provisions of the comprehensive acts of South Dakota, Kansas, Oregon, Minnesota and Iowa will be cited to illustrate the features of all the acts.

allocation and distribution of water under a permit system administered by a state agency.[14] The right to utilize water is divorced from the ownership of riparian land and the use of water is not restricted to riparian lands.[15] All waters of the state are dedicated to the state[16] and although the acts protect vested rights, these rights are defined and limited so as to protect only the rights being exercised in a beneficial manner at the time the legislation was adopted.[17]

Given the nature of water rights recognized under the riparian theory the provisions of the comprehensive acts give rise, in those states where previously the riparian theory prevailed, to objections that property is taken without due process of law in violation of state[18] and federal constitutions.[19] In an effort to determine the validity of these constitutional objections with respect to a Missouri comprehensive water use act the experience of other selected states which have adopted comprehensive legislation will be examined.

II. Experience of Selected States

A. *Oregon*

Prior to enactment of a water appropriation statute in 1909[20] the water use law of Oregon was based in part on the common law riparian rights theory.[21] The Oregon Supreme Court also recognized to a limited extent the doctrine of prior appropriation.[22] Under this theory the right to use water is divorced from the ownership of riparian land. Rights are acquired by the application of water to beneficial use with the priority of rights as between competing claimants being determined by the order in which appropriations occurred, the first appropriator

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14. S.D. Code § 61.0104 (Supp. 1960); Kan. Stat. Ann. § 82.706 (Supp. 1964); Ore. Rev. Stat. §§ 536.010, 537.135 (Supp. 1965); Minn. Stat. § 105.41 (1) (Supp. 1967); Iowa Code § 455A.4,A. 17 (Supp. 1966).

15. In general the acts make no distinction between use of water on riparian land and non-riparian land.

16. S.D. Code § 61.0101(2) (Supp. 1960); Kan. Stat. Ann. § 82a.702 (Supp. 1964); Ore. Rev. Stat. § 537.110 (Supp. 1965); Minn. Stat. § 105.41 (Supp. 1967); Iowa Code § 455. A27 (Supp. 1966).

17. S.D. Code § 61.0102 (7) (Supp. 1960); Kan. Stat. Ann. §§ 82a.703-04 (Supp. 1964); Ore. Rev. Stat. § 537.120 (Supp. 1965); Minn. Stat. § 105.41 (1) (Supp. 1967); Iowa Code § 455.A27 (Supp. 1966).

18. Mo. Const. art. 1 § 10.26.

19. U.S. Const. amend. V, XIV, § 1.

20. Ore. Laws 1909, ch. 216, currently Ore. Rev. Stat. §§ 536.010-990 (Supp. 1963).

21. Ore. Iron Co. v. Trullenger, 3 Ore. 1 (1867); Taylor v. Welch, 6 Ore. 198 (1876); Hayden v. Long, 8 Ore. 244 (1880); Coffman v. Robbins, 8 Ore. 278 (1880); Shiverly v. Hume, 10 Ore. 76 (1881); Weiss v. Oregon Iron & Steel Co., 13 Ore. 496, 11 P. 503 (1886); Jones v. Conn., 39 Ore. 30, 64 P. 855, (1901); Bauers v. Bull, 46 Ore. 60, 78 P. 757 (1904); Brown v. Gold Coin Min. Co., 48 Ore. 277, 86 P. 361 (1906).

22. Lewis v. McClure, 8 Ore. 273 (1880); Tolman v. Casey, 15 Ore. 83, 13 P. 669 (1887); Curtis v. La Grande Water Co., 20 Ore. 34, 23 P. 808 (1890); Brown v. Baker, 39 Ore. 66, 65 P. 799, 66 P. 193 (1901); Butt v. Reed, 42 Ore. 76, 70 P. 1029 (1902).

having the superior right.[23] The doctrine developed out of the customs followed on lands in the public domain.[24] Congressional acts[25] sanctioned this method of determining water rights and as the public domain passed to individuals the Oregon courts recognized these rights.[26] However, at the time of enactment of the Water Code the doctrine of riparian rights remained a significant part of the Oregon water law.[27] Therefore, the Oregon experience in modifying the prevailing water use law presented constitutional questions similar to those which would attend the adoption of a comprehensive water use act in Missouri.

The Oregon Water Code established a comprehensive prior appropriation system for regulating and administering the distribution and use of water.[28] All waters of the state were declared to be public and subject to control of the state.[29] An administrative agency was established to determine the rights of applicants to use water as well as to regulate its distribution.[30] The right to use water was divorced from ownership of riparian land and although the Code specifically provided that nothing should impair vested rights of any land owner to use water,[31] vested rights were defined and limited to include only the right to continue to use water in a beneficial manner to the exent that the water was actually used beneficially prior to passage of the Code.[32] The act also provided for loss of vestetd rights if the common law claimant failed to use his water rights for a period of two years.[33]

In *In re Willow Creek*,[34] the statutory change from a combined riparian and appropriation theory to an exclusively appropriation permit system of water use regulation was challenged by riparian owners as a taking of property without due process of law. In upholding the Code as a proper exercise of police power the court stated that the public interest and welfare required that Oregon water resources be used in a manner which would insure the highest development of the resources of the state.[35] The court commented on the provisions protecting vested rights[36] and then went on to hold that the Code was a purely regulatory measure.[37] The court emphasized that water rights, like all other property rights, are subject

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23. McCormick, *The Adequacy of the Prior Appropriation Doctrine Today*, UNIV. OF MICH. LAW SCHOOL, WATER RESOURCES AND THE LAW 33 (Pierce ed. 1958).
24. 1 CLARK, WATERS AND WATER RIGHTS 153, 154 (1967).
25. 9 STAT. 353 (1849); 16 STAT. 218 (1870); 19 STAT. 377 (1877).
26. Cases cited note 22 *supra*.
27. Williams v. Altnow, 51 Ore. 275, 95 P. 200, 97 P. 539 (1908).
28. Title to the Water Code states it is an act providing "a system for the regulation, control, distribution, use and right to use of water, and for the determination of existing rights thereto. . . ." ORE. LAWS 1909, Title to ch. 216.
29. ORE. REV. STAT. § 537.110 (Supp. 1965).
30. ORE. REV. STAT. §§ 536.010, 537.135 (Supp. 1965).
31. ORE. REV. STAT. § 537.120 (Supp. 1965).
32. *Ibid.*
33. ORE. REV. STAT. § 540.610 (Supp. 1965).
34. 74 Ore. 592, 144 P. 505 (1914), 146 P. 475 (1915).
35. *Id.* at 617, 144 P. at 512.
36. *Id.* at 616, 144 P. at 514. The court described the provisions protecting vested rights as essential to the validity of the Act.
37. *Ibid.*

to reasonable regulations enacted in the interest of the general welfare of the people.[38]

If the court would have stopped there, the case would have strongly supported the proposition that comprehensive water use acts are merely regulatory and therefore do not impair property rights. However, the significance of the regulatory language was diminished by the courts development of an alternative theory to uphold the act. Setting forth reasoning which would be expanded on in a subsequent case[39] the court observed that the legislature had the inherent power to completely abrogate the common law rule of water use law and permit the appropriation of water for any purposes and in any manner the legislature considered wise.[40]

In the later case of *In re Water Rights of Hood River*,[41] the statutory definition of vested rights was challenged as failing to protect rights which were vested under the pre-existing law. The *Hood River* court acknowledged that the Code infringed on rights previously recognized under the riparian theory.[42] Nevertheless, the court sustained the validity of the legislation. Adopting the theory first suggested in *In re Willow Creek*, the court concluded that the legislature had properly exercised its police power in abrogating the pre-existing water use law and in conjunction with this change in redefining vested rights as well as the circumstances under which they are created.[43]

The question of the constitutionality of the Oregon Water Code was before the Federal Court of Appeals for the Ninth Circuit in *California-Oregon Power Co. v. Beaver Portland Cement Co.*[44] The court adopted a position similar to that taken by the Oregon Supreme Court in *In re Willow Creek*.[45] The federal court held that the Code was a purely regulatory measure which was developed out of a legitimate concern for the state's water allocation problems and was adopted in the interest of the economic well being of the community by the legislature in a proper exercise of its police power.[46] The court observed that implementation of regulatory measures such as the Water Code do not result in a loss or impairment of property without due process of law.[47] The opinion acknowledges that the complainant possessed substantial property rights as a consequence of being a riparian proprietor, but the court concluded that notwithstanding that these water rights are "property," they are like all other property interests,

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38. This would appear to be the justification the legislature had in mind; *See* 74 ORE. LAWS 1909, ch. 216.
39. *In re* Hood River, 114 Ore. 112, 227 P. 1065 (1924).
40. The court cited as authority for this proposition United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 702 (1898).
41. 114 Ore. 112, 227 P. 1065 (1924).
42. *Id.* at 167, 227 P. at 1068.
43. *Id.* at 181, 227 P. at 1087. The term "police power" was not used.
44. 73 F.2d 555 (9th Cir. 1934), *aff'd on other grounds*, 295 U.S. 142 (1935).
45. *In re* Hood River, 114 Ore. 112, 181, 227 P. 1065, 1087 (1924).
46. The court stressed that the Code was very desirable from the standpoint of assuring an adequate irrigational system.
47. California-Oregon Power Co. v. Beaver Portland Cement Co., 73 F.2d 555, 568 (9th Cir. 1934), *aff'd on other grounds*, 295 U.S. 142 (1935).

"subject to the police power of the state and within reasonable limits may be modified by the legislature in the interest of the general welfare."[48]

The Oregon experience demonstrates the significance of the police power as an instrument to sustain the validity of legislation which substantially changes water use law. The *Willow Creek* court[49] and the federal court in *California-Oregon River Co.* v. *Portland Cement Co.*[50] recognized the Code to be a purely regulatory measure, adopted in the public interest as a proper exercise of the police power. The court in *Hood River*,[51] apparently not satisfied with this reasoning, departed from it by holding that although the Code may result in an impairment of water rights previously recognized, these were modified by the legislature and accordingly the Code cannot impair rights which no longer exist. In effect the *Hood River* court held that the legislature could redefine water rights under its police power and this redefinition did not result in an impairment or deprivation of property without due process of law.[52]

B. *Kansas*

In 1945 Kansas adopted a water appropriation act based on the prior appropriation theory of water use law.[53] The Act provided that all the waters in the state were dedicated to the use of the people,[54] and subject to the vested rights of common law claimants, they could be appropriated for beneficial purposes according to procedures established by the Act.[55] Vested rights were defined as the right to continue the use of water which had been applied to beneficial uses prior to the effective date of the Water Act.[56] In addition, the Act provided that common law claimants who sustained loss because of appropriation under the Act could recover compensation to the extent of their loss.[57]

The Act represented a departure from the riparian theory previously declared controlling Kansas water use law.[58] The riparian doctrine prevailed in

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48. *Id.* at 562.
49. *In re* Willow Creek, 74 Ore. 592, 144 P. 505 (1914), *modified,* 146, P. 475 (1915).
50. California-Oregon Power Co. v. Beaver Portland Cement Co., 73 F.2d 555, 568 (9th Cir. 1934), *aff'd on other grounds,* 295 U.S. 142 (1935).
51. *In re* Hood River, 114 Ore. 112, 227 P. 1065 (1924).
52. *Id.* at 181, 227 P. at 1087.
53. KAN. LAWS 1945 ch. 390; currently KAN. STAT. ANN. § 82a (Supp. 1964). All subsequent citations to Kansas statutes will be to the current act.
54. KAN. STAT. ANN. § 82a-702 (Supp. 1964).
55. KAN. STAT. ANN. §§ 82a-703-04 (Supp. 1964).
56. KAN. STAT. ANN. § 82a-701d (Supp. 1964).
57. KAN. STAT. ANN. § 82a-716 (Supp. 1964).
58. The natural or continuous flow theory of the riparian doctrine was adopted in Shannleffer v. Council Grove Peerless Mill Co., 18 Kan. 24 (1877). This approach was modified in Emporia v. Soden, 25 Kan. 410 (1881) when the court announced that a riparian landowner could lawfully use water for his own domestic purposes including stock watering. In Clark v. Allaman, 71 Kan. 206, 80 P. 571 (1905), the reasonable use theory was held applicable in Kansas with respect to use of water for irrigation purposes and eventually the reasonable use theory of riparian rights was recognized as the controlling doctrine for all uses of water. Atchison, Topeka and Santa Fe Ry. Co. v. Shriver, 101 Kan. 257, 166

Kansas[59] although the state was exposed to the prior appropriation theory by statutes enacted in 1886[60] and 1891.[61] The statutes appeared to authorize acquisition of water rights by appropriation but were construed narrowly to permit the acquisition of rights only after condemnation proceedings.[62] The court declared that in absence of condemnation proceedings, the appropriation theory could not be used to impair previously vested common law property rights.[63] Because of the narrow construction given the early appropriation statutes the riparian doctrine remained a significant part of Kansas water law in 1945[64] and therefore the adoption of a comprehensive water use law in Kansas presented constitutional issues similar to those which would arise in Missouri if the theory of water use law were to be modified by statute.

Against a background in which Kansas courts had repeatedly recognized the priority of the riparian theory and had consistently rejected attempts to abrogate the doctrine, constitutional objections to the Act were certain to arise. In *State ex rel. Emery* v. *Knapp*[65] the first challenge to the constitutionality of the legislation reached the Kansas Supreme Court.

The *Knapp* court relied on the reasoning announced in the Oregon case of *In re Hood River*[66] to uphold the legislation.[67] Adopting the language of the Oregon case,[68] the court declared that if the pre-existing approach to water use law had to be modified or overruled in order to harmonize with the comprehensive legislation then this was a proper function of the legislature and one within the scope of its police powers.[69]

P. 519 (1917). For other cases applying the riparian theory in Kansas see Frizell v. Bindley, 144 Kan. 84, 58 P.2d 95 (1936); Smith v. Miller, 147 Kan. 40, 75 P.2d 273 (1938).

59. One year prior to adoption of a comprehensive act in Kansas the common law doctrines were reaffirmed as controlling Kansas water use law. *See* State *ex rel.* Peterson v. State Bd. of Agriculture, 158 Kan. 603, 149 P.2d 604 (1944).

60. KAN. LAWS 1886, ch. 115 § 1; *repealed,* KAN. LAWS 1941, ch. 261.

61. KAN. LAWS 1891, ch. 133.

62. In Clark v. Allaman, 71 Kan. 206, 239, 80 P. 571, 583 (1905), the court states:

> From these statutes it will be observed that the diversion and appropriation of water to beneficial uses has been recognized to be a public use, and the right of eminent domain may be invoked for the purposes sought to be accomplished. But manifestly proceedings under these statutes cannot operate to the destruction of previously vested common law rights. Property in the flow of water acquired under the old system is protected by the Constitution of the United States and can be condemned only under the same restrictions as apply to the taking of other private property for public uses.

For subsequent cases adopting a similar position see Feldhut v. Brumitt, 96 Kan. 127, 150 P. 549 (1915); Frizell v. Bindley, 144 Kan. 84, 58 P.2d 95 (1936).

63. State *ex rel.* Peterson v. State Bd. of Agriculture, 158 Kan. 603, 149 P.2d 604 (1944).

64. *Ibid.*

65. 167 Kan. 546, 207 P.2d 440 (1949).

66. *In re* Hood River, 114 Ore. 112, 227 P. 1065 (1924).

67. State *ex rel.* Emery v. Knapp, 167 Kan. 546, 555, 207 P.2d 440, 448 (1949).

68. *In re* Hood River, 114 Ore. 112, 227 P. 1065 (1924).

69. State *ex rel.* Emery v. Knapp, 167 Kan. 546, 555, 207 P.2d 440, 448 (1949).

The constitutionality of the legislation was challenged before a federal court in *Baumann v. Smrha.*[70] The three judge district court upheld the Act, reasoning that a state in the proper exercise of its police power could modify the doctrine of riparian rights if it became unsuited to conditions prevailing in the state and substitute a prior appropriation system, so long as existing riparian rights are recognized and protected.[71] With regard to the requirement that vested rights be protected the court approved the limited statutory definition of "vested rights,"[72] stating that is was within the province of the legislature and the courts to decide what rights are "property".[73] The court explained this holding by declaring that there is no vested property right in the prior decisions of Kansas courts and a change in decision or a change in legislative policy with respect to what rights are "property" does not deprive a person of property without due process of law.[74]

In 1962 the constitutionality of the legislation was again before the Kansas Supreme Court.[75] The complainant contended that the provision dedicating all the waters of the state to the public amounted to appropriation of property without due process of law. In addition the plaintiff argued that the artificial or limited definition of vested rights permitted the destruction of property rights previously recognized and was therefore objectionable.

In rejecting the assertion that dedication of the waters of the state to the state was unconstitutional, the court declared that it is well established that a legislature may in the proper exercise of its police power modify or reject the riparian theory in favor of some other more suitable water use doctrine so long as vested rights are protected.[76]

A considerable part of the opinion was directed at the claimant's contention that vested rights were not protected by the limited statutory definition. In upholding the statutory definition, the court observed that earlier cases may have established the riparian theory in Kansas and accordingly recognized water rights to be property. Nevertheless, these holdings may be overruled and the rights which were established under the common law disregarded in order to give effect to the modifications of the riparian theory enacted by the legislature under the police power.[77]

The court quoted with approval from *Baumann* v. *Smrha*:[78]

> There is no vested right in the decisions of a court and a change of decisions does not deprive one of the equal protection of the laws or property

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70. 145 F. Supp. 617 (D.C. Kan. 1956), *aff'd per curiam,* 352 U.S. 863 (1956).
71. *Id.* at 624.
72. It is limited in the sense that unexercised rights are not recognized.
73. Baumann v. Smrha, 145 F. Supp. 617, 625 (D.C. Kan. 1956), *aff'd per curiam,* 352 U.S. 863 (1956)
74. *Ibid.*
75. Williams v. City of Wichita, 190 Kan. 317, 374 P.2d 578 (1962), *appeal dismissed,* 375 U.S. 7 (1963) *rehearing denied,* 375 U.S. 936 (1963).
76. *Id.* at 334, 374 P.2d at 591.
77. *Ibid.*
78. Baumann v. Smrha, 145 F. Supp. 617 (D.C. Kan. 1956), *aff'd per curiam,* 352 U.S. 863 (1956).

> without due process of law. Even though prior decisions of a state court may have established a rule of property, a departure therefrom in a subsequent decision does not, without more, constitute a deprivation of property without due process of law under the 14th amendment.[79]

The Kansas experience in regulating water rights demonstrates that water use legislation substantially modifying pre-existing water rights can be upheld as a legitimate exercise of the police power.

C. *South Dakota*

In 1955 South Dakota enacted a comprehensive water appropriation act[80] patterned on the Kansas and Oregon statutes. The Act declared South Dakota water to be public property and subject to control and regulation of the state.[81] A permit system to regulate the appropriation of water was established under a state agency.[82] The Act also provided that vested rights in water uses were to be preserved.[83] Vested rights were defined and limited to include only those rights which were being exercised at the time the statute was enacted or three years prior thereto.[84]

The Act represented a significant alteration of existing common law doctrines of water use law.[85] Previously numerous courts had declared water rights to be property interest[86] and in *St. Germain Irrigating Co. v. Hawthorne Ditch Co.*,[87] the South Dakota Supreme Court emphatically rejected as unconstitutional a statute which substantially modified common law water rights. The court specifically held the Act to result in property being taken without due process of law.[88] With such a background the constitutionality of the 1955 Act was certain to be in doubt. However, the first case, *Knight* v. *Grimes*,[89] considering the constitutionality of the Act did not arise until 1964.

The *Knight* opinion presented alternate theories to overcome objections that the Act operates to deprive riparian owners of property without due process of

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79. Williams v. City of Wichita, 190 Kan. 317, 337, 374 P.2d 578, 593 (1962), *appeal dismissed,* 375 U.S. 7, *rehearing denied,* 375 U.S. 936 (1963).
80. S.D. CODE § 61.01-59 (Supp. 1960).
81. S.D. CODE § 61.010(2) (Supp. 1960).
82. S.D. CODE § 61.010(4) (Supp. 1960).
83. S.D. CODE § 61.0102(7) (Supp. 1960).
84. *Ibid.*
85. Stun v. Beck, 133 U.S. 541 (1890); Parsons v. City of Sioux Falls, 65 S.D. 145, 272 N.W. 288 (1937); Terry v. Heppner, 59 S.D. 317, 239 N.W. 759 (1931); St. Germain Irrigating Co. v. Hawthorne Ditch Co., 32 S.D. 260, 143 N.W. 124 (1913); 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).
86. Stenger v. Tharp, 17 S.D. 13, 94 N.W. 402 (1903); St. Germain Irrigating Co. v. Hawthorne Ditch Co., *supra* note 85.
87. St. Germain Irrigating Co. v. Hawthorne Ditch Co., 32 S.D. 260, 267, 143 N.W. 124, 126 (1913).
88. *Ibid.*
89. 80 S.D. 517, 127 N.W.2d 708 (1964).

law. The court observed that common law water rights were not property in the constitutional sense, and therefore, the water use law could be modified or rejected entirely without its resulting in a taking of "property."[90] In addition the court declared that even if water rights are vested property interests they are nevertheless subject to regulations which impair or completely abrogate existing water rights where the public welfare so requires.[91] In effect the South Dakota court held that the scope of the police power justified not only regulation of property but also permits a taking of property without compensation in certain instances.

The *Knight* court was somewhat more direct in sustaining the comprehensive water use legislation than the courts in the other decisions discussed above. The South Dakota court concluded that water rights were not entitled to protection of the constitutional provisions and even if they were vested property rights, the legislature's police power was not restricted to purely regulatory measures, but was also broad enough to sustain legislation which impaired vested water rights.

III. Alternatives Available to a Missouri Court to Sustain Comprehensive Water Use Legislation

The cases discussed above all rely on the police power[92] to sustain comprehensive water use acts in the respective states. The police power is properly exercised only when the legislation is required by and is substantially related to the public health, safety or welfare.[93] In considering the validity of this approach in Missouri, a more humid and water rich state than any of the states discussed previously, it must first be determined if the regulation of water rights is required by the public health, safety or welfare.

The regulation of water uses in the arid states is readily identifiable with the health, safety or welfare of the community and may quite appropriately be summarily recognized as a proper exercise of the police power.[94] Water use regulation in Missouri is less directly related to these factors but nevertheless, it appears that this type of regulation is within the scope of the police power as it has been developed in the State. The Missouri Supreme Court has described the scope of the police power as flexible and changing with the physical and social conditions of the state in order to accommodate all great public needs.[95]

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90. *Id.* at 525, 127 N.W.2d at 712.

91. *Ibid.* The court cited and quoted from Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908).

92. The term is a summarization of the legislature's inherent power to perform adequately all the necessary functions of government; *see* King, *Regulation of Water Rights Under the Police Power,* Univ. of Mich. Law School, Water Resources and the Law 271-72 (Pierce ed. 1958).

93. *Id.* at 282.

94. In the cases arising in the arid states this aspect of a proper exercise of the police power has not been given much consideration by the courts. It has been assumed that the regulation of water uses is a proper subject matter for the exercise of the police power.

95. St. Louis v. Baskawitz, 273 Mo. 543, 571, 201 S.W. 870, 873 (1918); Turner v. Kansas City, 354 Mo. 857, 867, 191 S.W.2d 612, 617 (1945).

Although the water resources of the State may currently be sufficient to meet all demands, the increaesd requirements for agricultural, manufacturing, recreational and public purposes forewarn of potential disputes between competing water users. To meet these increased demands for water the use of water must be administered in a more efficient manner than is possible under the prevailing theory.[96] Regulation of water resources would appear to be substantially related to the public interest and welfare.[97]

Notwithstanding that the public welfare may require legislative action to modify water use law, such legislation must be consistent with constitutional provisions which safeguard private property interests.[98] The legislature's inherent police power authorizes the reasonable regulation of property but it is generally accepted that the scope of the power does not sanction or permit legislation which results in a destruction of private property rights.[99] The cases cited and discussed above suggest several alternative theories which could be adopted by a Missouri court to sustain comprehensive water use legislation.

A. *Water Rights: a Non Property Interest?*

One of the more direct methods to sustain comprehensive water use legislation in Missouri was advanced in the South Dakota case of *Knight* v. *Grimes*.[100] There the court concluded that water rights do not rise to a sufficient property interest to merit the protection of the constitutional mandate. This approach would permit the modification and even actual impairment of water rights without the alteration being susceptible to an allegation that the legislation operates to deprive riparian owners of property without due process of law.

The comprehensive acts generally preserve rights being exercised as of the effective date of the legislation.[101] The primary question is therefore whether the impairment of unexercised riparian rights constitutes a deprivation of vested property rights.

It is arguable that the abrogation of unexercised riparian rights does deprive riparian owners of property. The traditional riparian theory comprehends that water rights are an incident of the land and exist even though unexercised. Despite this common law view of riparian rights, a Missouri court could very well conclude that unexercised rights are not vested in the constitutional sense. Missouri case law is not extensive in the area of water rights, and further a definitive statement by a Missouri court as to the precise nature of a riparian

96. The riparian theory is criticized because it restricts the use of water to riparian land and because it is too indefinite, both attributes resulting in the inefficient use of water.

97. The United States Supreme Court recognized in a case arising in New Jersey, that even in humid or water rich areas the legislature has within the scope of its police power the authority to regulate water resources; *see* Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908).

98. Mo. CONST. art. 1 §§ 10, 26.

99. King, *supra* note 92, at 283.

100. 80 S.D. 517, 127 N.W.2d 708 (1964).

101. The Iowa Act is somewhat unique in that it purports to preserve vested rights but does not define what rights are to be considered vested.

right in Missouri does not exist.[102] The absence of a prior decision specifically recognizing the unexercised right as a vested property right permits a court to define the nature of riparian right without being constrained by prior holdings.

The Missouri courts could follow the traditional riparian theory and recognize the unexercised right as a vested property right, but the conclusions Missouri courts have reached in regard to police power legislation in other fields is some indication that the court would conclude that unexercised rights are not vested and can therefore be restricted without an unconstitutional deprivation of property. The courts have repeatedly upheld zoning legislation which significantly restricts the future use of land.[103] The courts have concluded that future uses are too indefinite and uncertain to be considered vested property rights and they can therefore be significantly restricted without an unconstitutional deprivation of property.[104] Unexercised water rights are equally uncertain and indefinite and a similar conclusion with respect to the unexercised rights would only be consistent.

Once it is recognized that unexercised rights can be cut off without impairing vested rights, the comprehensive water use legislation can be upheld as a purely regulatory measure.[105]

B. *Retroactive Application of a Modification of Property .Law*

An alternative theory, if Missouri is unwilling to conclude that unexercised rights are not vested property interests, was raised by several Kansas[106] and Oregon courts.[107] The opinions suggest that no one has a vested right in the decisions of a court and therefore prior decisions may be overruled and the rights established under those prior cases completely abrogated by the legislature in a proper exercise of its police power. In effect, comprehensive water use legislation which concededly would impair rights recognized under the riparian theory can be sustained because the rights no longer exist after the decisions which recognized them are overruled or supplanted by legislation.[108]

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102. Dictum in one Missouri case has described the riparian right as a vested property right. *See* Meyers v. City of St. Louis, 8 Mo. App. 266, 274 (St. L. Ct. App. 1880).

103. State *ex rel.* Oliver Cadillac Co. v. Christopher, 317 Mo. 1179, 298 S.W. 720 (En Banc 1927), *appeal dismissed,* 278 U.S. 662 (1928); Women's Christian Ass'n of Kansas City v. Brown, 354 Mo. 700, 190 S.W.2d 900 (1945); Flora Realty & Inv. Co. v. City of Ladue, 362 Mo. 1025, 246 S.W.2d 771, *appeal dismissed,* 344 U.S. 802 (1952); Downing v. City of Joplin, 312 S.W.2d 81 (Mo. 1958).

104. Hoffman v. Kinealy, 389 S.W.2d 745 (Mo. En Banc 1965); cases cited Note 103 *supra.*

105. Knight v. Grimes, 80 S.D. 517, 525, 127 N.W.2d 708, 712 (1964).

106. State *ex rel.* Emery v. Knapp, 167 Kan. 546, 555, 207 P.2d 440, 448 (1949); Williams v. City of Wichita, 190 Kan. 317, 334, 374 P.2d 578, 591 (1962), *appeal dismissed,* 375 U.S. 7 (1963), *rehearing denied,* 375 U.S. 936 (1963).

107. *In re* Willow Creek, 74 Ore. 592, 616-17, 144 P. 505, 512, 514 (1914); *In re* Hood River, 114 Ore. 112, 181, 227 P. 1065, 1087 (1924).

108. This theory would permit abrogation of all water rights, exercised as well as unexercised.

It cannot be disputed that the people do not have a vested right in the decisions of a court and accordingly prior decisions may be overruled or modified. However, alteration of property rights is traditionally restricted to a prospective application. Adoption of this theory in Missouri could lead to confusion and uncertainty with respect to all manner of property rights.

If the modification of water rights can be given retroactive effect so as to abrogate previously vested rights, then all manner of private property may be taken without compensation. It is unlikely that such a proposition will be accepted by the Missouri courts.

C. *Expanded Police Power Theory*

The final theory developed in the cases reviewed involves a significant expansion and modification of traditional concepts as to the scope of a legislature's police powers. The South Dakota Supreme Court suggested that the police power authorized not only regulation but where the public interest required, an actual taking of property was permissible.[109]

Acceptance of the proposition that the scope of the police power authorizes the enactment of measures which not only regulate but in addition, destroy vested property rights is unlikely in Missouri.[110] Recognition of this theory renders the constitutional prohibitions meaningless and the eminent domain powers unnecessary.

IV. Conclusion

The unequaled importance of water as a vital resource to all facets of life and the increasing demands being made upon this resource, require that the legislature enact comprehensive measures to insure that our water resources are used in the most efficient manner possible.

The contention that unexercised water rights are not vested property interests is the most persuasive of the approaches suggested to sustain comprehensive water use legislation. Adoption of this approach in Missouri would be a proper method to sustain highly desirable water use legislation.

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109. Knight v. Grimes, 80 S.D. 517, 127 N.W.2d 708 (1964).

110. Missouri has been unwilling to expand the scope of the police power in zoning cases to permit destruction of vested rights. For a case making an inroad on this traditional approach to the police power see University City v. Diveley Auto Body Co., 417 S.W.2d 107 (Mo. En Banc 1967).