NOTES

The State v. the Riparian:* A Problem of Water Use and Control

It has always been recognized that our water resources serve to fulfill a great variety of needs. However, it is becoming increasingly apparent that in order to enable maximum utilization of these waters with minimum waste, more efficient management is required. The recreational aspects of water resources are important to the economies of some states.[1] Thus, public access for fishing, hunting, swimming and boating is important. Other states have problems dealing with uses for industry,[2] irrigation,[3] water supply[4] and navigation.[5] Pollution of streams and lakes is a hazard that must be met.[6] In an effort to solve the water management problem while allowing greater access to the public, state governments and their subdivisions are, more and more, asserting control over the use of water.[7] One of the most difficult problems that has arisen is the theory under which the states have asserted control over waters which previously had been privately administered. If the state claims ownership of the beds and

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* The term "riparian" as used in this note refers to both the owner of land bordering a stream and the owner bordering a lake (sometimes referred to as a littoral owner).

1. See, e.g., Duval v. Thomas, 114 So. 2d 791, 795 (Fla. 1959); State v. Adams, 89 N.W.2d 661, 687 (Minn. 1958), cert. denied, 358 U.S. 826 (1958).

2. State ex rel. Indiana Dept. of Conservation v. Kivett, 288 Ind. 623, 95 N.E.2d 145 (1950); Lake Land Co. v. State, 68 Ind. App. 439, 120 N.E. 714 (1918); Bissell Chilled Plow Works v. South Bend Mfg. Co., 64 Ind. App. 1, 111 N.E. 932 (1916); Petraborg v. Zontelli, 217 Minn. 536, 15 N.W.2d 174 (1944); Culley v. Pearl River Industrial Comm'n, 234 Miss. 788, 108 So. 2d 390 (1959).

3. Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129 (1955); Munninghoff v. Wisconsin Conservation Comm'n, 255 Wis. 252, 259, 38 N.W.2d 712, 715 (1949) (dictum).

4. Valparaiso City Water Co. v. Dickover, 17 Ind. App. 233, 46 N.E. 591 (1897); 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); Bino v. City of Hurley, 273 Wis. 10, 76 N.W.2d 571 (1956).

5. Sherlock v. Bainbridge, 41 Ind. 35 (1872); Martin v. City of Evansville, 32 Ind. 85 (1869); Peoples' Ice Co. v. Steamer Excelsior, 44 Mich. 229, 6 N.W. 636 (1880).

6. West Muncie Strawboard Co. v. Slack, 164 Ind. 21, 72 N.E. 879 (1904); City of Valparaiso v. Hagen, 153 Ind. 337, 54 N.E. 1062 (1899); State v. Wabash Paper Co., 21 Ind. App. 167, 51 N.E. 949 (1898).

7. E.g., Fla. Stat. Ann. § 370.10(1) and §§ 373.071—373.251 (1960); Ind. Ann. Stat. §§ 27-601—27-659 (Burns 1960); Minn. Stat. Ann. §§ 105.01—105.79 (West Supp. 1960); S.D. Code §§ 61.0101—61.1054 (Supp. 1960).

overlying waters of lakes and streams that have been considered private, there may be a problem of the taking of property without due process of law in violation of the fourteenth amendment.[8] If the state claims such ownership under the federal doctrine of state ownership of the beds of navigable waters, there is the problem of the various tests of navigability, some of which seem to have outlived their usefulness.[9] If the state tries to claim an easement over the waters, regardless of ownership of the beds, traditional views making control of water dependent upon bed ownership must be changed.[10] If the state claims a right to control waters by virtue of the police power, issues of due process and reasonable use must be resolved.[11] If the state asserts a right to control the water by virtue of a right to control navigation, the conflicting views of what constitute the incidents of navigation must be determined.[12] Then too, the commerce clause of the federal constitution gives the federal government broad powers in the area of controlling navigation;[13] the states can only act in the absence of conflicting federal legislation.[14] The theory chosen by the state may depend upon the uses for which the waters are desired. For swimming, boating and fishing, it would not be essential for the state to own the beds. However, for mining, drilling oil wells or erecting docks and other structures, bed ownership is vital. A look at the problems to be met by the assertion of control by the states may aid in an evaluation of the various theories and their utility in solving a wide variety of water use problems.

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8. U.S. Const. amend. XIV, § 1.

9. Tests of navigability such as the "saw-log" test, Whisler v. Wilkinson, 22 Wis. 572 (1868) have forced states into introducing into evidence such testimony as that of an elderly man who remembered seeing logs being floated in the lakes before the territory was a state. State v. Adams, 89 N.W.2d 661, 666, 251 Minn. 521, 526, (1957), cert. denied, 358 U.S. 826 (1958).

10. See, e.g., Sanders v. De Rose, 207 Ind. 90, 191 N.E. 331 (1934); State v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278 (1954); State v. Taylor, 358 Mo. 279, 214 S.W.2d 34 (1948).

11. Appleby v. City of Buffalo, 221 U.S. 524 (1911); Pounds v. Darling, 75 Fla. 125, 77 So. 666 (1918).

12. Compare Lamprey v. State, 52 Minn. 181, 53 N.W. 1139 (1893) and Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909), with Schulte v. Warren, 218 Ill. 108, 75 N.E. 783 (1905). In the *Lamprey* case the incidents of navigation were interpreted liberally to include pleasure boating and all other public uses for which the waters could be adapted. The common law incidents set forth in the *Broward* case included fishing and bathing. The *Schulte* case, in contrast, held that the rights of hunting and fishing are not incidents of navigation.

13. U.S. Const. art. I, § 8. Although lands underlying navigable waters are held by the states in trust for their citizens, the states' control is subject to the paramount power of Congress to control such waters for he purposes of navigation in interstate and foreign commerce.

14. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

A. NAVIGABILITY

Navigability has long been associated with the right of both the federal and state governments to control waters.[15] By a rule well-settled, the beds of all lakes and streams navigable at the time a state entered the Union are held by the state in trust for the public.[16] The federal test of navigability states that any lake or stream used or susceptible of being used as a highway for commerce is in fact navigable.[17] Thus, in order for the federal government to be able to control waters by virtue of the commerce clause of the United States Constitution,[18] the water course must meet the narrow federal test. Such a strict test prohibits the federal government from asserting authority over many state streams and lakes, thus giving the state authorities a wide range of control. Even in regard to waterways declared navigable under the federal test, a state may act in the absence of conflicting federal legislation.[19] Since a state holds the beds and overlying waters of navigable waterways in trust for the public, it seems clear that the state can control these waters under the power to control navigation in the absence of conflicting federal rules. However, many water courses unable to meet the strict federal test of navigability are suitable for public use. It had been the practice to apply broader state tests of navigability in order to establish a waterway as navigable and thus susceptible to public control by the states. For example, in *Lamprey v. State,* [20] the Minnesota court went so far as to assert that the term "navigable" should be discarded if it could not preserve and protect the rights of the public to all beneficial uses of inland lakes. It was suggested that a classification system of *public* and *private* waters might be needed. A recreational purpose in itself was sufficient to establish a waterway as public, or navigable. Wisconsin also adopted a broad view allowing the public to have rights in lakes navigable for any purpose, including recreation.[21] The state test was used in Minnesota until 1926 when

15. Daniel Ball, 77 U.S. (10 Wall.) 557 (1870).

16. See, e.g., United States v. Oregon, 295 U.S. 1 (1935); United States v. Utah, 283 U.S. 64 (1931); Oklahoma v. Texas, 258 U.S. 574 (1922). After the Revolution, title to all navigable waters was held by the states in which they were located, in trust for the people. Under the Constitution of the United States, the states continued to hold title to the beds, but the states' control was subject to the rights surrendered under the federal constitution. New states later admitted to the Union have the same rights in regard to the beds of navigable waters within their boundaries as do the thirteen original states.

17. Daniel Ball, 77 U.S. (10 Wall.) 557 (1870).

18. U.S. Const. art. I, § 8.

19. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

20. 52 Minn. 181, 53 N.W. 1139 (1893).

21. Muench v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514 (1952).

the Supreme Court of the United States ruled that the federal test had to be used since a claim was being made under the federal constitution.[22] More recent Minnesota cases have affirmed the holding that the federal test of navigability must be used in determining the ownership of the beds.[23] However, the Minnesota courts have refused to completely reject the *Lamprey*[24] test of public waters.[25] It has been said that the *Lamprey* test might still apply where Minnesota conveyed land, bordering non-navigable waters as defined by the federal test, to private riparians. For the state test to be applicable the land had to be granted to the state by the United States after the state's admission to the Union. In addition there has been a reassertion of the old rule that the characterization of the waters of a lake or a stream as public or private depends upon the ownership of the beds,[26] but this was coupled with an indication that the court was sympathetic toward greater public control.[27] In *State v. Adams*,[28] the Minnesota court also hinted that the question of bed ownership was an entirely different matter than the question of the right to control the overlying waters. Although the federal test had to be used in determining bed ownership, the issue of which test was to govern when ascertaining the state's right to control the waters not navigable under the federal test was left open.

So far as Minnesota is concerned the final separation of issues of

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22. United States v. Holt State Bank, 270 U.S. 49 (1926). In dealing with federal grants, which include waters, made to private individuals before the territory became a state, it was earlier held that questions of the navigability of such waters in order to ascertain bed ownership must be decided under federal law, since the validity and effect of an act done by the United States is necessarily a federal question. Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 87 (1922). In the *Holt* case, the actual holding would have been the same even if the state test were applied. The decision pointed out that disposals by the United States of lands under navigable waters, during the territorial period, should not be regarded as intentional unless the intention was made very clear. Due to the policy of the federal government of holding the beds of navigable water courses for the ultimate benefit of future states, and by virtue of the constitutional doctrine of equality with other states upon admission to the Union, navigability was asserted to be a federal question. 270 U.S. at 55. Navigability is a federal question in such instances even though the waters may not be capable of use for navigation in interstate or foreign commerce. United States v. Oregon 295 U.S. 1, 14 (1935).

23. State v. Adams, 89 N.W.2d 661 (Minn. 1958), cert. denied, 358 U.S. 826 (1958); State v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278 (1954).

24. Lamprey v. State, 52 Minn. 181, 53 N.W. 1139 (1893).

25. State v. Bollenbach, 241 Minn. 103, 118, 63 N.W.2d 278, 288 (1954).

26. Id. at 103, 63 N.W.2d at 278.

27. Id. at 123, 63 N.W.2d at 291.

28. 89 N.W.2d 661, 687 (Minn. 1958), cert. denied, 358 U.S. 826 (1958).

bed ownership and control of overlying waters was made in *Johnson v. Seifert.*[29] The court said:

> The Federal test of navigability is designed for the narrow purpose of determining the ownership of lakebeds, and for the additional purpose of identifying waters over which the Federal government is the paramount authority in the regulation of navigation. Whether waters are navigable has no material bearing on riparian rights since such rights do not arise from the ownership of the lakebed but as an incident of the ownership of the shore.[30]

Cases in other jurisdictions have also held that the overlying waters of lakes and streams are subject to various public rights even though it is found that the beds are privately owned.[31] However, merely adopting a more liberal state test of navigability and applying it to establish navigability and thereby public control on a lake-by-lake or stream-by-stream basis would be too costly and uncertain. In some states a determination of navigability would allow the public to use a lake or stream not only for commercial transportation purposes, but also for boating, fowling, skating, bathing, domestic and agricultural uses, and cutting ice to be sold.[32] However, since other jurisdictions have held that the general right of navigation does not necessarily include as incidents the rights of fishing, hunting and trapping,[33] a mere determination of navigability would not be a certain criterion for an assertion of governmental control for other public uses. In addition, although Michigan, for example, has allowed private ownership of the beds of inland navigable waters while still enforcing an easement in favor of public navigation and fishing rights,[34] this view is in the minority.[35] Michigan allows the public to

29. 100 N.W.2d 689 (Minn. 1960).

30. Id. at 694.

31. E.g., Swan Island Club v. Yarbrough, 209 F.2d 698 (4th Cir. 1954); Ne-Bo-Shone Ass'n v. Hogarth, 81 F.2d 70 (6th Cir. 1936); Collins v. Gerhardt, 237 Mich. 38, 211 N.W. 115 (1926); Luscher v. Reynolds, 153 Ore. 625, 56 P.2d 1158 (1936).

32. Nelson v. De Long, 213 Minn. 425, 7 N.W.2d 342 (1942).

33. Sewers v. Hacklander, 219 Mich. 143, 188 N.W. 547 (1922) (trapping and hunting declared not to be incident to the right of navigation). As a general rule, rights of hunting and fishing are said to be based upon bed ownership and not incident to navigation. 3 Tiffany, Real Property §§ 936, 937 (3d ed. 1939).

34. Collins v. Gerhardt, 237 Mich. 38, 211 N.W. 115 (1926).

35. Although such state courts as those in Michigan, Minnesota, and Wisconsin, as well as the federal court in eastern North Carolina, have indicated their preference for enforcing a public trust over navigable waters despite private ownership of the beds, other jurisdictions have held to the older view of making the incidents of water use follow the ownership of the soil. For the states following the more modern view see, Swan Island Club v. Yarbrough, 209 F.2d 698 (4th

fish in lakes and streams that are navigable even if the beds are privately owned,[36] but excludes the public from fishing in all nonnavigable waters. Even in Michigan, however, hunting and trapping are not incidents of the public easement of navigation.[37]

In the final analysis, it is seen that bed ownership can be separated from the control of the overlying waters; that broad state tests of navigability may serve as starting points in gaining more public use and greater state control, but that more liberal tests of navigability, without more, cannot provide an over-all solution to the wide variety of water use problems.

B. Public Ownership

Legislation which predicates public control and use on public ownership could be held to constitute a taking of private property for public use, thereby making it mandatory that the state compensate a large class of people. But this is obviously not feasible and raises many difficulties, especially from the viewpoint of expense. There is the possibility of using eminent domain and then issuing licenses or permits for water use conditioned on payment of a fee sufficient to cover the costs of condemnation, but such a plan would involve many administrative problems.

Under the common law, riparians owning part of the shore of a nonnavigable lake were considered to own a pie-shaped slice out of the bed of the lake itself.[38] More recent decisions have declared that all riparians on a nonnavigable lake have a common right to swim, fish and boat on the entire expanse of the lake, regardless of the slice of the bed that they may own.[39] It is not clear whether such a doctrine would make it possible for the state to acquire a small area of the lake site by condemnation and then allow the public to use the entire expanse of the water. Obviously the public right would be held on

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Cir. 1954) (dicta); Collins v. Gerhardt, 237 Mich. 38, 211 N.W. 115 (1926); Johnson v. Seifert, 257 Minn. 154, 100 N.W.2d 689 (1960); Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17 (1954); Muench v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514 (1952). For a statement of the older view and a list of cases that have followed the older view see, 3 Tiffany, Real Property §§ 936, 937, (3d ed. 1939). There are also problems in this area as to whether a state has the power to grant beds held in trust to private individuals and, if so, whether such grants are still subject to some public rights. See Swan Island Club v. Yarbrough, supra.

36. Morgan v. Kloss, 244 Mich. 192, 221 N.W. 113 (1928) (Lake); Collins v. Gerhardt, 237 Mich. 38, 211 N.W. 115 (1926) (Stream).

37. Sewers v. Hacklander, 219 Mich. 143, 188 N.W. 547 (1922).

38. For a thorough discussion of the common law doctrine see Hardin v. Jordan, 140 U.S. 371 (1891).

39. E.g., Duval v. Thomas, 114 So. 2d 791 (Fla. 1959); Snively v. Jaber, 48 Wash. 2d 815, 296 P.2d 1015 (1956).

the basis of a riparian right and thus would be limited by the reasonable use doctrine.[40] Would it be reasonable to allow widespread public use? There are indications that a private riparian owner of part of a lake could invite the public, perhaps for a fee, to use the entire lake. The Florida court in *Duval v. Thomas*[41] said:

> We take judicial knowledge of the importance of "tourism" to our state. . . . Fishing and swimming are prominent if not principal items of the entertainment the stranger expects to find here. If the enjoyment of non-navigable lakes were to be curtailed or restricted by a holding that the owner of a portion of one of them, and his guests, should enjoy the waters only within the property lines the damage would be immeasurable.[42]

It has also been held that a riparian is making an unreasonable use of the water if he pumps water out of a nonnavigable lake, thereby interfering with another riparian's business of renting equipment to the *public* for fishing and boating.[43] However, in general, the reasonable use doctrine would probably tend to hinder the public use possibilities to such an extent that the "paying guest" approach would not be of major significance in solving problems of greater public use.[44]

Some states through their legislatures have established extensive

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40. For example, in Meyers v. Lafayette Club, 197 Minn. 241, 248, 266 N.W. 861, 865 (1936), the court stated:

> The right of a riparian owner to have the water retained in its original state is qualified by the right of other riparian owners to make a reasonable use of the water, even if such use results in some damage to the complainant.
>
> The riparian owner has the right to make reasonable use of the water for domestic, agricultural, and mechanical purposes, so far as it does not interfere with the reasonable use of the water by other riparian owners.

41. Duval v. Thomas, 114 So. 2d 791 (Fla. 1959).

42. Id. at 795. A starting point for allowing public access in the future to nonnavigable lakes as *paying* guests of private owners is established by the court's inclusion of the rights of the guests of the riparian owner to the enjoyment of the lake. See also, Snively v. Jaber, 48 Wash. 2d 815, 296 P.2d 1015 (1956).

43. Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129 (1955).

44. For a statement concerning the reasonable use limitations see supra note 40. It is questionable, for example, whether or not the courts would hold that *large* numbers of the public could be invited to use a lake for recreational purposes as paying guests of one riparian owner against the protests of other riparian owners who claim their property values were being diminished, their privacy invaded, their use of the waters unduly curtailed and restricted, etc. It would seem that the courts would be more liberal in construing the reasonable use doctrine if the public were actually the riparian owner as opposed to claiming rights to use as guests of a private owner. See McCord v. Big Brothers Movement, 120 N.J.Eq. 446, 185 Atl. 480 (N.J. Chancery 1936) where it was held that it was not a reasonable use to allow unlimited invitees to use water that was diverted from the stream to a pond for swimming.

systems of water regulation.[45] Applicable to both navigable and nonnavigable waters, most of these water programs set up permit systems which are not based upon the public ownership principle alone. Indiana has a particularly unique statute.[46] It provides that:

> The state of Indiana is hereby vested with full power and control of all the public fresh water lakes . . . in trust for the use of all of its citizens for fishing, boating, swimming, the storage of water to maintain water levels, and for any purposes for which said lakes are ordinarily used and adapted, and no person owning lands bordering any such lakes shall have the exclusive right to the use of waters of any such lake or any part thereof.[47]

It appears as though the Indiana legislature desired to separate the question of land ownership from water ownership. However, it is strange that it should have asserted that "power and control" rather than "property" or "title" is held in trust for the citizens. Perhaps the legislature was really thinking in terms of the police power of the state. But on the other hand, contrary to the police power approach, "power and control" of all fresh water lakes given in trust to the state is based upon the acquiescence of bordering landowners. Public fresh water lakes are defined as "all lakes which have been used by the public with the acquiescence of any riparian owner."[48] Police power is not a function dependent upon acquiescence. However, under the Indiana statute, once a lake is found to be public, it may be used for any purpose for which it is ordinarily used and adapted. Since there is no restriction as to initial use, it seems as though a strict prescriptive property right is *not* being asserted. What the Indiana legislature has actually done is to abandon the concept of navigability in determining public rights. Acquiescence in public use is made the test for ascertaining whether a lake is public. *After* a lake is designated as public, the state asserts its authority through the police power. An unanswered problem under this statute is the amount or kind of use, with the acquiescence of an owner, required before a lake becomes public. It seems that, although contradictory language is used in the Indiana water statute, an attempt is being made to control the waters by virtue of the police power rather than through public ownership.

However, what would be the rights of the public under a statute similar to that in Indiana if the basis were public ownership? Would

45. E.g., Fla. Stat. Ann. § 370.10(1) and §§ 373.071—373.251 (1960); Ind. Ann. Stat. §§ 27-601—27-659 (Burns 1960); Minn. Stat. Ann. §§ 105.01—105.79 (West Supp. 1960); S.D. Code §§ 61.0101—61.1054 (Supp. 1960).

46. Ind. Ann. Stat. § 27-654 (Burns 1960).

47. Ibid.

48. Ind. Ann. Stat. § 27-656 (Burns 1960).

acquiescence be dependent upon the running of the prescriptive period? It has generally been held that the public cannot acquire fishing rights by prescription.[49] Members of the public may acquire such rights by prescription as individuals, but there is no extension to the public at large. If the statute is interpreted as meaning that the state gains control by prescription, it is contrary to the general rule. Then, too, merely because the prescriptive period had run and all the elements of adverse possession were applicable to some riparians, the public might nonetheless be allowed access even though they unreasonably interfered with the rights of riparians against whom the prescriptive period had not run.

Finally, it is possible that the legislature meant to presume *dedication*[50] by the acquiescence of the riparians; but, even here, there are still many problems. Although there are contrary views on whether the public can acquire fishing rights in a private lake by dedication,[51] it appears safe to assume that the public can acquire some water rights by dedication.[52] Again, however, there is the possibility that not all of the riparians on a given lake will make a dedication. Thus, the issue of conflicts between the public and other riparians in regard to reasonable use will be present. Allowing the public to use the waters while recognizing the riparians' rights to damages if the public use becomes unreasonable has been tried with poor results.[53] It would seem that an individual riparian would have difficulty in proving damages, thereby allowing the public free rights. Such an approach leads to many conflicts and cannot seriously be considered as a legitimate solution to water use problems.

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49. Annot., 57 A.L.R.2d 595 (1958). See also, Baker v. Normanoch Ass'n, 25 N.J. 407, 136 A.2d 645 (1957).

50. For a general discussion of dedication see Tiffany, Real Property §§ 724-28 (abr. ed. 1940). Dedication is distinguished from prescription in that the former, whether expressed or implied, is established by proof of an act of dedication, consent of the owner and an intent to dedicate without reference to the period of public use; whereas prescription is based on an adverse holding under color of right for a specified period of time Davis v. Town of Bonaparte, 137 Iowa 196, 114 N.W. 896 (1908).

51. Compare Cobb v. Davenport, 33 N.J.L. (4 Vroom) 223 (1868) with Bass Lake Co. v. Hollenbeck, 11 Ohio C.C.R. 508 (Cir. Ct. 1896).

52. Baker v. Normanoch Ass'n, 25 N.J. 407, 416, 136 A.2d 645, 650 (1957); Village of Pewaukee v. Savory, 103 Wis. 271, 79 N.W. 436 (1899). The possibility of use of the doctrine of dedication to the public is also suggested in State v. Bollenbach, 241 Minn. 103, 123, 63, N.W.2d 278, 291 (1954).

53. A statute allowing the public fishing rights in all state streams stocked at public expense, subject to actions in trespass for any damage done to private property along the banks was declared unconstitutional in Hartman v. Tresise, 36 Colo. 146, 84 Pac. 685 (1906). The court said that the statute violated private property rights without just compensation in that it allowed the public use of waters over private beds and access by trespass over the adjacent private soil.

Indiana has also declared its natural resources and scenic beauty to be a public right.[54] By statute the public has been given a vested right in the preservation, protection and enjoyment of all public fresh water lakes in their present state, and the use of such waters for recreational purposes.[55] Similarly, Florida has stated: "The ownership, control of development and use of waters for all beneficial purposes is within the jurisdiction of the state, which in the exercise of its powers may establish measures to effectuate the proper and comprehensive utilization and protection of the waters."[56] This statute was made applicable only to certain lakes for which it was appropriate to extend a broader concept of public rights. Lakes, the land around which was owned by only one person, were excluded from the statute.[57] To protect these water laws from attacks upon constitutional grounds, it is provided that "the present property rights of persons owning land and exercising existing water rights appertaining thereto shall be respected and such rights shall not be restricted without due process of law nor divested without payment of just compensation. . . ."[58] In North Dakota a constitutional provision declares that all flowing streams and natural water courses should forever remain the property of the state for mining, irrigating and manufacturing purposes.[59] It has been held that the constitutional provision was not intended to divest riparians of any of their rights,[60] since such a provision would be void as a violaion of the fourteenth amendment to the federal constitution.[61] A South Dakota statute establishing a water permit system and charging a state agency with the administration of the act provides that all waters within the state are the property of the people, subject to *appropriation* for beneficial use.[62] Again, however, vested rights are preserved.[63] Although some of these statutes remain as yet untested, it is safe to assume that they will be upheld so long as prior vested rights are protected. In Indiana, where the state's authority to control is based upon the acquiescense of the private riparian,[64] there is no taking without the due process, for the real basis of control seems to be

54. Ind. Ann. Stat. § 27-620 (Burns 1960).
55. Ibid.
56. Fla. Laws 1955, c. 29748, § 1(b). See Maloney & Plager, Florida's Lakes: Problems in a Water Pardise, 13 U. Fla. L. Rev. 1, 18 (1960).
57. Fla. Stat. § 373.081(3) (1960).
58. Fla. Stat. Ann. § 373.101 (1960).
59. N.D. Const. art. XVII, § 210 (1889).
60. State v. Brace, 76 N.D. 314, 36 N.W.2d 330 (1949).
61. U.S. Const. amend. XIV, § 1.
62. S.D. Code § 61.0101(2) (Supp. 1960).
63. S.D. Code § 61.0106 (Supp. 1960).
64. Ind. Ann. Stat. § 27-656 (Burns 1960).

police power rather than public ownership, and the courts are therefore less likely to find a taking of private property requiring compensation. It remains to be seen how much control can be gained from the statute since there is always the limitation of the protection provided to private rights which are being exercised.

Florida has also statutorily declared the state to be the owner for the benefit of the people of all fish within the jurisdiction of the state except those fish contained in privately owned ponds not exceeding 150 acres.[65] However, assuming that a lake exceeding 150 acres is nonnavigable and has no outlet to navigable waters, it is still not certain whether the state could regulate fishing by virtue of the statute without violating constitutional guarantees. A claim of right by a member of the public to fish in such a lake based solely on a state license plus the statutory declaration of state ownership of fish would probably be unsuccessful.[66]

Analogous to the dedication theory of public ownership, it has been suggested that some nonnavigable lakes might be made available to the public through recognition of an easement.[67] The water would be made available to the public for hunting and fishing when, over a period of years, a lake had been so used by the public or stocked with fish at state expense. Thus, in Oregon a liberal test of navigability has been coupled with a presumption of a public easement over navigable waters, even though the beds remain in private hands.[68] The easement approach has received support in recent years,[69] because it allows public use for a variety of activities. Since the public is not claiming under a riparian right, there are no strict limitations of reasonable use, the public right being superior to that of the riparians.[70] In above mentioned situations it would seem that the public could substantially impair, although not completely deprive, a private riparian's rights without compensation. A suggested solution for Florida's water problems provides for a differentiation between lakes which meet the federal test of navigability and those that are

65. Fla. Stat. Ann. § 370.10(1) (1960).

66. See Hamilton v. Williams, 145 Fla. 697, 200 So. 80 (1941) (hunter with license not allowed to trespass). See also, Winans v. Willetts, 197 Mich. 512, 163 N.W. 993 (1917) (No fishing allowed in private pond without permission from owner even though fish were not private property and the state had the right to control fishing therein).

67. Maloney & Plager, Florida's Lakes: Problems in a Water Paradise, 13 U. Fla. L. Rev. 1, 14, 75 (1960).

68. Luscher v. Reynolds, 153 Ore. 625, 56 P.2d 1158 (1936).

69. Maloney & Plager, op. cit. supra note 67, at 13; State v. Bollenbach, 241 Minn. 103, 123, 63 N.W.2d 278, 291 (1954) (dicta).

70. See Luscher v. Reynolds, 153 Ore. 625, 635, 56 P.2d 1158, 1162 (1936).

navigable under a state definition.[71] The trust doctrine, allowing state control, would be applied to lakes navigable under the federal test, while the state test of navigability would be the basis for recognition of an easement for certain public uses (supposedly including such incidents as boating, fishing and swimming) on lakes navigable under the state test. There would be no need to invalidate earlier conveyances of beds to private individuals. Individual riparian rights would still be protected but subordinated to the superior public rights. Thus, the problem of violation of due process could be avoided. Once the easement doctrine is established, the public can gain access through riparian land by eminent domain procedure, if necessary.[72] The easement approach would be of special value for states desiring more public use for recreational aspects, although for an easement determined by the state test of navigability to include recreational uses it might, in many jurisdictions, be necessary for the legislature to clearly list such uses. However, the state test of navigability would not be helpful in gaining control of water for irrigation, domestic purposes, industrial uses, or prevention of pollution since such problems are not as closely related to navigation as are swimming and fishing.

Some of the state statutes declaring what seemingly amounts to public ownership in reality often do little more than assert the states' rights to use the police power for the welfare of the citizens of the state. If more than an assertion of police power is meant, this could amount to a taking of property without due process of law if vested rights were terminated. Thus, claims of state ownership of rights in overlying waters can aid the states in gaining control of waters that are not navigable by the federal test. State ownership can mean more control by the state since there are no limitations similar to those imposed upon an assertion of the police power.[73] Then, too, police power results in regulation and control but cannot always gain more access for the public in general. Public ownership theories *combined* with the police power of the state can result in effective state regulation and more public access.

C. Monetary Considerations

Another possible way by which the public may be able to gain access to "private" lakes is the granting of special tax benefits to

71. Maloney & Plager, op. cit. supra note 67, at 74.

72. As to the problem of getting the public to the lake without trespassing see, Osceola County v. Triple E Dev. Co., 90 So. 2d 600, 603 (Fla. 1956) (concurring opinion). See also, Flynn v. Beisel, 102 N.W.2d 284 (Minn. 1960).

73. For a discussion of the limitations upon the police power see State ex. rel. Carter v. Harper, 182 Wis. 148, 196 N.W. 451 (1923).

encourage riparians to permit public entrance. Here again, however, the public right would be substantially limited, since it would be based upon a riparian right that was not superior to the rights of other riparians who did not grant access to the public at large. Special tax advantages have been offered to industries that use equipment effective in preventing stream pollution.[74] Minnesota has by statute prohibited the stocking of fish at state expense in any lake where the public is denied free access.[75] Such monetary considerations are helpful on a minor scale, but do not furnish an over-all solution to the many water problems.

D. Police Power

The police power of a state can be used to regulate a variety of water uses.[76] It is said that the police power can only be used for the furtherance of the health, safety and welfare of the citizens, that there must be a reasonable classification and that the assertion must bear a real and substantial relation to a legitimate public end.[77] The limitations are not broad, especially when it is considered that the concept of public welfare deals not only with physical and monetary matters but also with spiritual and aesthetic qualities.[78] It has been recognized that "the State as *quasi*-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the waters and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned."[79] Generally, it has been asserted that every state is free to change its law governing riparian ownership and to permit appropriation of flowing waters for such purposes as it may deem wise.[80] Statutory prohibition against wasting natural gas and oil by proscribing flow for wells has been upheld against claims of deprivation of property without due process of law.[81] It was said that there

74. N.C. Gen. Stat. § 105-122(d) (1958).

75. Minn. Stat. Ann. § 97.485 (Supp. 1960).

76. State v. McCullagh, 96 Kan. 786, 153 Pac. 557 (1915) (hunting); Commonwealth v. Hyde, 230 Mass. 6, 118 N.E. 643 (1918) (restrained fishing to prevent pollution of drinking water); Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 Pac. 1 (1929) (irrigation and flood control); Newton v. City of Groesbeck, 299 S.W. 518 (Tex. Civ. App. 1927) (restrained swimming to prevent pollution of drinking water); State v. Quattropani, 99 Vt. 360, 133 Atl. 352 (1926) (restrained boating to prevent pollution of drinking water).

77. See State ex rel. Carter v. Harper, 182 Wis. 148, 196 N.W. 451 (1923).

78. Berman v. Parker, 348 U.S. 26, 33 (1954).

79. Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908).

80. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 702 (1899).

81. Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900).

was no infringement of vested property and that the state had a right to exercise its police power. In an Arizona case[82] the court stated that where the public interest was significantly involved, the state had a right to prohibit future drilling of wells for irrigation. It now seems clearly settled that the police power can be used even if it means the complete destruction of the property interest of the individual.[83]

In most jurisdictions it would be essential to provide for a preservation of vested rights in any proposed legislation granting sweeping state control on the basis of the police power.

In *Nelson v. Delong*[84] the state was recognized as having regulatory powers, even to the point of hampering private rights. However, that case involved a navigable lake the bed of which was held by the state in trust for the people. The right to regulate was based not on property rights, but upon governmental power to which all riparian rights were subordinated. Nothing was intimated concerning what powers the state might have over waters overlying privately owned beds. In Wisconsin, on the other hand, it has been held that a municipality cannot, as an exercise of the police power, deprive a riparian owner on a lake of using the water for swimming, bathing and boating without compensation.[85] Regulating and controlling waters overlying privately owned beds does not seem to be too much of a problem. It is another matter, however, to assert that the police power alone gives the public the right to use such waters. Dicta in the case of *State v. Adams*[86] poses the question, without giving an answer, whether in Minnesota the police power extends to public recreational uses of private beds. Similarly, a Wisconsin case[87] implies that the public could gain use of waters through the police power.

Where the public welfare of the state justifies greater public access, the police power allows the public to utilize the waters for a variety of recreational purposes. A legitimate public end is being served. Nevertheless, if the waters actually were said to be owned by the private individual, or the riparian rights were considered to be vested, future deprivation of existing property rights might be considered a taking of property without due process of law. The Supreme Court of the United States in the case of *Hudson Water Co. v. Mc-*

82. Southwest Eng'r Co. v. Ernst, 79 Ariz. 403, 291 P.2d 764 (1955).

83. See, e.g., State ex rel. Green v. One 5¢ Inning Baseball Machine, 241 Ala. 455, 3 So. 2d 27 (1941) (destruction of gambling devices).

84. 213 Minn. 425, 7 N.W.2d 342 (1942). It seems as though the federal test of navigability was used since it was admitted that if Congress had asserted its jurisdiction the state's power to control would be subordinated thereto.

85. Bino v. City of Hurley, 273 Wis. 10, 76 N.W.2d 571 (1956).

86. 251 Minn. 521, 89 N.W.2d 661, 687 (1958), cert. denied, 358 U.S. 826 (1958).

87. Muench v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514 (1952).

Carter[88] upheld a statute that impaired private property rights on the ground that the statute was a proper exercise of the police power. The Court indicated that the police power is all-encompassing. However, other jurisdictions have not regarded the police power so liberally.[89] As a general proposition, even though private property rights are destroyed, there is not compensable taking of property if the exercise of police power was valid. But in this context, generalizing about the scope of the police power is not enough; instead, the crucial problem is the relation of the public interest involved to the right which is being limited or destroyed. The problem for the drafters of water legislation is to find proper objectives for the application of the power of the state to control waters. The problem is lessened where the jurisdiction holds that the title to the beds of streams and lakes can be separated from the ownership of the overlying waters. Under these circumstances a legislative declaration of public ownership of all waters can give the public a right of use of the waters without destroying existing rights. Where no vested riparian rights are involved, no substantial problems would develop. But in most situations a state would have to include provisions protecting such private rights unless it could be shown that continued exercise of the private right threatened the achievement of the public goal. Control and regulation of waters regardless of private bed ownership and existing riparian rights can thus be asserted on the basis of the police power.

CONCLUSION

There seems to be no doubt that greater public access and state control is needed in many states. The guiding principle should be to benefit the welfare of the state without unjustly hampering or destroying private rights; and any water development program probably should include the use of several theories in combination. The easement approach protects private rights while allowing a superior right of the public. Public ownership statutes can contain provisions for the preservation of existing non-conflicting private rights. More liberal state tests of navigability or an exercise of the police power could regulate and control many water activities without the necessity for any concept of public ownership. In combination these concepts of navigability, state ownership and the police power provide an effective foundation for an adequate water program. Establishing proper control now on a realistic theory may prevent the necessity of drastic reform of water programs in the future.

88. 209 U.S. 349, 355, 56 (1908).

89. For example, see Herminghaus v. Southern California Edison Co., 200 Cal. 81, 117-20, 252 Pac. 607, 622-23 (1926).