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In an attempt to uncover a solution to the problem of the increasing inadequacies of Eastern water law, Professor Farnham has undertaken an exhaustive survey of the law of New York. After first examining the riparian doctrine in connection with previous and proposed statutory clarifications, a comparison is then made with the doctrine of prior appropriation. The author then concludes that the riparian doctrine, if supplemented by suggested modifications, offers more advantages than would a superimposed appropriation doctrine.

THE IMPROVEMENT AND MODERNIZATION OF NEW YORK WATER LAW WITHIN THE FRAMEWORK OF THE RIPARIAN SYSTEM †

*William H. Farnham**

RIPARIAN WATER DOCTRINE

LIKE many other eastern states which have throughout their history adhered to some version of the riparian doctrine with respect to water rights, New York has superimposed on this doctrine, and kept up to date by amendment, much desirable legislation in several subdivisions of the water field.¹ Until 1966, however, New York had no legislation which dealt any further with riparian rights than to recognize their existence expressly and to disclaim any intention to

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1. Such as land drainage, pollution control, public water supply, hydroelectric power, navigation and related matters, stream protection and regulation, fishing, multi-purpose water resources planning, interstate water compacts, and cooperation with the federal government.

impair them.² In other words, until 1966 the owners of New York riparian rights and governmental bodies, agencies and officers charged with the formulation and execution of governmental water-connected projects, had no more knowledge of the extent and duration of such rights than was afforded by the decisions and opinions of the New York courts. Since these decisions and opinions appeared to be in conflict on several important points of riparian law, and were silent on many others, New York riparian law was as of 1965 uncertain to a considerable degree, and still is, since the legislation of 1966³ merely made a beginning on the elimination of the uncertainties existing at the time of its passage.

THE UNDESIRABLE CONSEQUENCES OF UNCERTAINTY

Discouragement of Private Enterprise

One undesirable consequence of these uncertainties is the discouraging effect which they have on some private corporations or individuals contemplating investment in water-based projects. While many riparian owners have gone ahead despite these uncertainties, others have shrunk from an affirmative decision lest after having spent their time and money, they should ultimately be told by a court that their activities were illegal. Just how many have actually been deterred by these uncertainties is not now known, but the number is probably too great to be safely ignored.⁴

Hindrance of Governmental Water Projects

Another undesirable consequence of these uncertainties is the difficulty with which they are likely to confront governmental bodies, agencies or officers charged with the formulation and execution of statewide or regional plans for

2. As does the N.Y. CONSERV. LAW §§ 438, 441 and 502 (1966), and N.Y. PUB. HEALTH LAW §§ 1167 and 1260 (1966).

3. N.Y. CONSERV. LAW § 429-j (1966). As to this statute, see text accompanying notes 17 to 47 *infra*.

4. While others share the view that uncertainties as to water rights discourage private investment in them [Trelease, *Policies for Water*, 5 NATURAL RESOURCES J. 1, 23 (1965)] the validity of this view has been questioned [Maloney, *Eastern Laws Concerning Minimum Stream Flows*, papers presented at SOUTHWESTERN WATER LAW CONFERENCE, 301 (1961); Michelman, *Just Compensation*, 80 HARV. L. REV. 1165, 1241 (1967)], and it has been said that it has not been substantiated by such statistical evidence [O'Connell, *Iowa's New Water Statute*, 47 IOWA L. REV. 549, 577 (1962)]. The writer's opinion is based on conversations with persons familiar with the attitude of New York farmers, and on accounts of statements made by New York industrialists to state water officials and at conferences on New York's water law problems.

the protection and augmentation of available water supplies; the need for which has been demonstrated by the serious water shortages which have occurred from time to time in the northeast.

In December, 1967, Governor Rockefeller announced a plan, reported to him by the New York Water Resources Commission, which might involve the construction of 58 reservoirs adding 153,000 acres to New York's water surfaces.⁵ If Part V of article 5 of the New York Conservation Law, which part is entitled "Water Resources Planning and Development," is applicable to this important plan—as it probably is, despite its statewide nature and despite the fact that part V might conceivably be interpreted as applicable only to planning for regions of the state rather than to statewide planning—a knowledge of the extent and duration of New York riparian rights will be essential to the execution of the plan, since section 438(1)(f) of the Conservation Law provides that no plan shall include any proposal requiring action which would impair any right protected by section 441, and since that section expressly gives protection to riparian rights.

Even in the unlikely event that Part V is construed as inapplicable to a statewide plan as distinguished from a plan for a local region, the New York decisions that riparian rights are property rights protected by the due process clauses,⁶ and the virtual certainty that a plan calling for 58 reservoirs could not be executed without affecting the rights of many riparian owners to a considerable degree, make it clear that without knowledge as to the extent and duration of New York riparian rights, any body, agency or officer responsible for the execution of the statewide plan would find that task more difficult than it should be. Unless the extent of those rights is clearly defined, it will be difficult for draftsmen of legislation implementing the statewide plan to determine what legal obstacles stand in their way; or to decide whether or not the removal of a particular obstacle would require compensation to holders of riparian rights; or, in cases requiring

5. In regard to this plan see NEW YORK WATER RESOURCES COMM'N. *Developing and Managing the Water Resources of New York State* (1967), especially at 23.

6. See, e.g., *Matter of Van Etten v. City of N.Y.*, 226 N.Y. 483, 124 N.E. 201 (1919).

compensation, to estimate its probable amount.⁷ And without such an estimate they could not calculate the cost of the project upon which its feasibility to an important extent depends.

Moreover, uncertainty as to the New York law of riparian rights might in some instances prove embarrassing to New Yorkers should they find it advisable to seek financial assistance under certain federal statutes.⁸ Thus the Watershed Protection and Flood Protection Act makes the acquisition of such water rights existing under state law as may be needed to install and operate the work of improvement prerequisite to the granting of federal funds.⁹ The Small Reclamation Projects Act of 1956 contains a similar requirement;¹⁰ and the Water Supply Act of 1958 is by title 43 U.S.C., section 390b(c) made subject to title 43 U.S.C., section 383, which in substance requires the protection of private water rights jeopardized by reclamation projects. Lack of knowledge as to the extent and duration of New York riparian rights might well impede fulfillment of these requirements.

It should also be borne in mind that the federal water supply statute which may ultimately be enacted to implement the plan to augment the water available in the northeastern region of the United States now being prepared by the Corps of Engineers¹¹ might follow the precedent established by the earlier water supply statutes known as the Reclamation Acts, and expressly provide for the recognition of state water law and for the protection of private water rights existing under

7. "In the building of a road, taking of land or a building obviously involves compensation and the question is, 'How much?' In the water field we are going to have two questions: 'Is this man entitled to compensation?' and 'If so, how much?'" PUBLIC HEALTH SERVICE, SYMPOSIUM ON STREAM FLOW REGULATION FOR WATER QUALITY CONTROL (paper by Stein, *Flow Regulation for Water Quality Control and Water Rights*) 52 (1965). That in determining whether a taking of property of a riparian owner in the constitutional sense has been effected by an interference with his rights in the water or in the bed of the stream, the first step is to determine what his rights are, see 2 NICHOLS, EMINENT DOMAIN 219 (3d ed. 1963).

8. "Whether the threat of federal nonspending is regarded as a carrot or a stick, it can act as a powerful inducement for a state to review its water laws. Aside from such consideration, the states should seriously study the need for revision of their laws. It is easy to be complacent about water law, to adopt a wait-and-see attitude, to say that there is no present emergency crying for action. But if this attitude is taken, the state may never know what it has lost through the lack of development. Trelease, *A Model State Water Code for River Basin Development*, 22 LAW & CONTEMP. PROB. 301, 321 (1957).

9. 16 U.S.C. § 1004(1) (1964).

10. 43 U.S.C. § 422d(b) (1964).

11. 42 U.S.C. § 1962d-4 (1964).

it.¹² This possibility would appear to be strengthened by the requirement in legislation already in force that the plans shall provide for appropriate financial participation by the states, their political subdivisions, and other local interests.¹³ Should this possibility materialize, failure to have resolved existing uncertainties as to the New York law of riparian rights prior to the period during which the terms of the federal implementing legislation are being discussed, could make it difficult for New York to decide what provisions it should ask for as most important to its citizens, and for Congress to decide what requests should be granted.¹⁴

While in view of the foregoing it is apparent that there are two cogent reasons why the number of existing uncertainties in New York riparian law should be reduced,¹⁵ the question remains as to whether such reduction can and should be accomplished within the framework of the riparian system by clarification and revision of New York riparian law; that is, without causing any more substantial uncompensated impairment of property rights than has been caused by other legislation which has proved to be generally acceptable to property owners and the public, and without resort to the principles of the prior appropriation system of water law.

12. As in 43 U.S.C., § 383 (1964).

13. 42 U.S.C. § 1962d-4(3) (1964). As it is conceivable that Congress, when imposing this requirement, realized that a plan complying with it would probably be more acceptable to the states and other local entities if it called for implementing federal legislation which followed the Reclamation Acts pattern rather than that of the federal water project statutes founded on the commerce power under which disadvantaged riparian owners receive no compensation for loss of water use (Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NATURAL RESOURCES J. 1, 20, 75 (1963)), it is likewise conceivable that Congress will be thinking in Reclamation Act rather than in commerce power terms when it enacts the implementing legislation. 43 U.S.C., § 390b (1964) appears to apply Reclamation Act principles to some projects in which the Corps of Engineers plays a part. There would seem to be no conclusive reason why such principles could not be made applicable to projects executed solely by the Corps.

14. "The legal tangle of water law and water rights also presents a very real impediment to overall planning. For planning requires and presupposes a favorable legal structure in the framework of which necessary adjustments can be made to meet the demands of the community. It is apparent that those who desire basin-wide development programs give too little recognition to the enormous problems of adjusting the already established rights in water under state and federal laws and constitutions." MANN, *THE POLITICS OF WATER IN ARIZONA* 16 (1963).

15. The goal should be the reduction rather than the complete elimination of the uncertainties in New York riparian law, because there are some uncertainties which for cogent reasons it would be advisable to preserve to a limited extent. See text accompanying notes 113 to 134 *infra*.

It is submitted that this question can be answered in the affirmative.¹⁶

UNCERTAINTIES CLARIFIED BY HARMLESS USE LAW

Harmless Alterations in Natural Condition of Streams and Lakes

Appreciable support for this conclusion is afforded by what has already been accomplished by the harmless use statute enacted in 1966 as section 429-j of the New York Conservation Law. Prior to this statute it had been charged that the New York riparian system was one of "enforced waste,"¹⁷ because it had been held in nine cases that an alteration in the natural condition of a stream or lake could be enjoined even though the alteration was not causing the plaintiff any harm.¹⁸ In view of these holdings, many riparian owners were compelled to allow streams to flow down to the sea unused, and to forego attempts to develop the potential utility of lakes, even though the alterations of natural conditions which they had in mind could have been made without harm to others. In other words, it was alleged in substance that by these decisions New York had committed itself to the natural flow version of the riparian doctrine, which requires that streams and lakes be allowed to remain in their natural condition,¹⁹ and had rejected the reasonable use version of the riparian doctrine under which changes in the natural condition of bodies of water are lawful so long as they cause no harm.²⁰

16. For inclusion of such an approach among a list of possible alternatives which might be pursued in eastern riparian doctrine states, see Marquis, Freeman & Heath, *The Movement for New Water Rights Laws*, 23 TENN. L. REV. 797, 833 (1955) and Lugar, *Water Rights Law and Management in West Virginia*, PUBLIC AFFAIRS SERIES NO. 4, WEST VIRGINIA CENTER FOR APPALACHIAN STUDIES 50 (1967). For approval of such an approach see CRIBBET, ILLINOIS WATER RIGHTS LAW 50 (1958).

17. *Hearings Before the New York Temporary State Comm'n. on Water Resources Planning*, N.Y. Leg. Doc. No. 15, at 145 (1964).

18. *Smith v. City of Rochester*, 38 Hun 612 (N.Y.S.Ct. 1886), *aff'd* 104 N.Y. 674 (1887); *Neal v. City of Rochester*, 156 N.Y. 213, 50 N.E. 803 (1898); *Townsend v. Bell*, 62 Hun 306 (N.Y. 1891); *New York Rubber Co. v. Rothery*, 132 N.Y. 293, 30 N.E. 841 (1892); *Gilzinger v. Saugerties Water Co.*, 66 Hun 173 (N.Y.S.Ct. 1892); *aff'd on opinion below*, 142 N.Y. 633, 37 N.E. 566 (1894); *Standen v. New Rochelle Water Co.*, 91 Hun 272, 36 N.Y.S. 92 (1895); *Amsterdam Knitting Co. v. Dean*, 162 N.Y. 278, 6 N.E. 757 (1900); *Mann v. Willey*, 51 A.D. 169, 64 N.Y.S. 589 (1900), *aff'd* 168 N.Y. 644, 61 N.E. 1131 (1901); *Storm King Paper Co., Inc. v. Firth Carpet Co.*, 184 A.D. 514, 172 N.Y.S. 33 (1918).

19. 4 RESTATEMENT OF TORTS at 324 (1939).

20. 4 RESTATEMENT OF TORTS at 345-6 (1939); 6A AMERICAN LAW OF PROPERTY 163-6 (Casner ed. 1954); 5 POWELL, REAL PROPERTY § 712 (1962); 50 IOWA L. REV. 141, 143 (1964).

There were, to be sure, New York cases pointing toward an opposite conclusion. Prominent among these was *Knauth v. Erie R.R.*,²¹ which held that a harmless use, even if on non-riparian land, was not actionable and therefore could not begin to serve as a foundation for a prescriptive privilege until it had become harmful. There were also a few decisions to the effect that a harmful use of stream water would be lawful, if reasonable under all the circumstances;²² a doctrine which seems basically inconsistent with the view that a harmless use is illegal if it involves an alteration in the natural condition of a body of water. And then there was *McCann v. Chasm Power Co.*²³ in which the court suspended an injunction against a harmless alteration until it should become harmful. But as none of the opinions in these cases made any attempt to explain the relation between their holdings and the cases in which injunctions against harmless alterations were granted, the New York law as to the legality of such alterations was obviously in an uncertain state as of 1965.

Necessity for Precautionary Suits

Since the injunctions against harmless alterations were founded in part on the erroneous notion that such relief was necessary to the protection of the plaintiff against the acquisition of a prescriptive privilege by the defendant,²⁴ there was uncertainty despite the holding in *Knauth*, as to whether or not a prudent riparian owner should bring a precautionary action against any person effecting an alteration in the body of water to which the prudent owner's land was riparian,

21. 219 A.D. 83, 219 N.Y.S. 206 (1926).

22. *Bullard v. Saratoga Victory Mfg. Co.*, 77 N.Y. 525 (1879); *Pierson v. Speyer*, 178 N.Y. 270, 70 N.E. 799 (1904).

23. 211 N.Y. 301, 105 N.E. 416 (1914).

24. *See the Townsend, New York Rubber and Amsterdam cases, supra* note 18. In view of the basic rule that the claimant of a prescriptive privilege must show that his activity was wrongful and gave the person against whom the privilege is claimed a cause of action during the prescriptive period [*Adams v. Van Alstyne*, 25 N.Y. 232 (1862); *Merriam v. 352 West 42nd St. Corp.*, 14 A.D.2d 383, 221 N.Y.S.2d 82 (1961); 4 TIFFANY, REAL PROPERTY 556, 575, 595 (3d ed. 1939); RESTATEMENT OF PROPERTY comment e § 458 (1944); 3 POWELL, REAL PROPERTY 447 (1952)], it follows that it is not necessary for a court to hold that a party has a cause of action in order to protect him against prescription. "... to say that an action must be given the riparian to prevent prescription running against him, under the American law of prescription is to put the cart before the horse. If the cause of action is not given prescription will not run." Bingham, *California Law of Riparian Rights*, 22 CALIF. L. REV. 251, 259 (1934). *Accord*, 3 TIFFANY, REAL PROPERTY 126 (3d ed. 1939).

even though the alteration was at the time harmless to him. For the prudent riparian to live under the shadow of this uncertainty involved hardship for him and a conflict with the policy against unnecessary litigation. If he were aware of the uncertainty he might feel constrained to bring an action, to the expense of which he as an unharmed riparian ought not to be put, and with which the courts ought not to be burdened. On the other hand, if he were ignorant of the rule creating the hazard, as he well might be, he probably would not sue; but if he did not, he might later find that his riparian interest had been impaired by prescription.²⁵

By providing that a harmless alteration in a body of water, however effected, and whether for the benefit of riparian or nonriparian land, should not be actionable, and could not supply the cause of action essential to the initiation of prescription,²⁶ section 429-j not only resolved the uncertainties above referred to, but disposed of them in a way consistent with the reasonable use version of the riparian doctrine,²⁷ thus encouraging harmless uses of water, and making it unnecessary for unharmed riparian owners to institute precautionary litigation to protect themselves against prescriptive privileges. The section also has the effect of overruling *Smith v. City of Rochester* and *Neal v.*

25. It was so held in *Messinger's Appeal*, 109 Pa. 285, 4 A. 162 (1885).

26. For a recommendation that Illinois adopt a statute of this type, see CRIBBET, ILLINOIS WATER RIGHTS LAW 50 (1958).

27. "The most significant election . . . is between the two distinct theories of the riparian right—that of natural flow and that of reasonable use." Trelease, *Coordination of Riparian and Appropriation Rights*, 33 TEXAS L. REV. 24, 36 (1954). The natural flow version has been sharply criticized. "[T]he legal right of action of a riparian who has suffered no damage is an anachronism." Bingham, *Some Suggestions Concerning the California Law of Riparian Rights*, 22 CALIF. L. REV. 251, 260 (1934). In 1964 this version was characterized as "rigid, illogical and senseless" by Edward L. Ryan, then Legal Consultant to the New York Temporary State Commission on Water Resources Planning. See *Hearings Before the New York Temporary Comm'n. on Water Resources Planning*, N.Y. Leg. Doc. No. 15, at 140-41 (1964). See also 5 POWELL, REAL PROPERTY 357, 392 (1962) criticizing the natural flow version as making it too easy for the first riparian user to acquire a prescriptive privilege, and so to hinder shifts in the water use pattern necessitated by changes in the relative urgency of the various needs for water. The reasonable use version of the riparian doctrine under which harmless alterations are lawful and riparian owners with a dog-in-manger attitude cannot insist on waste of the water [Haar & Gordon, *Riparian Water Rights vs. A Prior Appropriation System*, 38 B.U.L. REV. 202, 246 (1958)], is the one preferred by the American Law Institute [4 RESTATEMENT OF TORTS Ch. 41 (1939)], and is supported by the weight of authority in states in which riparian rights are recognized. [6A AMERICAN LAW OF PROPERTY 162 (Casner ed. 1954); CRIBBET, ILLINOIS WATER RIGHTS LAW 4 (1958); 5 POWELL, REAL PROPERTY § 712 (1962)]. For a recommendation that states whose courts have not already chosen the reasonable use version adopt it by legislation, see CRIBBET, ILLINOIS WATER RIGHTS LAW 50 (1958).

*City of Rochester*²⁸ which enjoined diversion of stream water, even though the defendant was preventing harm to the plaintiff by adding enough water from another source to compensate for its diversion. Thus it will be possible henceforth for the New York courts to adopt the western practice of working out "physical solutions" in water cases;²⁹ at least where such solutions involve no harm to the parties on whom they are imposed. That the statute should, therefore, be of benefit to New York riparians as a group, and to the people of the State of New York generally because of the increased utilization of the water resources of the state which it should encourage, seems clear.³⁰

This new statute should, moreover, be of benefit to governmental bodies, agencies or officials charged with the formulation and execution of plans for the protection and augmentation of the New York water supplies; for they can proceed on the assumption that no project can be blocked by a riparian owner unless he can show that he would be harmed by its execution. That this is a practical rather than a merely theoretical benefit is shown by the situation revealed in a preliminary engineering study of a proposed project to stabilize the flow of Flint Creek in central New York: viz., that riparian owners located more than a certain number of miles downstream from the projected dam would not be affected by it to any extent whatever. The practical consequence of section 429-j in such a case would be that the

28. See *supra* note 16.

29. As to the legality, frequency and value of physical solutions, see Trelease, *Coordination of Riparian and Appropriative Rights*, 33 TEXAS L. REV. 24, 38 (1954); Hutchins, *Irrigation Water Rights in California*, CIRCULAR 452 REVISED, CALIF. AGRIC. EXPER. STATION 40 (1967); 1 ROGERS & NICHOLS, *WATER FOR CALIFORNIA* §§ 359, 404, 441 (1967).

30. It should be noted that § 429-j provides that it shall not affect any power which the state or its municipalities may have to enjoin an alteration in the natural condition of a body of water. It follows that if it actually was the law prior to the enactment of § 429-j that the state or a municipality could enjoin a harmless alteration, that law is still in force. Among the considerations tending to justify the inclusion of this exceptive provision are the following. The fact that the stream protection law [N.Y. CONSERV. LAW §§ 429-a to 429-g (1966)] does not in terms make proof of harm essential to the establishment of a violation indicates that the legislature believes that certain acts should be prohibited unless a permit is obtained, even though they might be initially harmless, because of the possibility that they would ultimately prove to be prejudicial to the interests of the people in the waters of the state. Moreover, this exemption served to allay the apprehension of the Conference of Mayors that without it the interests of municipalities in the waters of the state might be insufficiently protected. And finally, the exemption is consistent with the policy long followed in New York of treating public water supply as a special field to be governed by legislation primarily designed to deal with problems in that field rather than by legislation of a more general nature.

planners would not need to take the riparian rights of the far downstream owners into account.³¹

Constitutionality of Harmless Use Law

If it actually was the New York law prior to the enactment of section 429-j that a riparian owner had a right that the natural condition of a stream or lake should not be altered even harmlessly,³² it follows that the provision of the section legalizing harmless use, if enforced, would deprive a riparian owner of part of his riparian interest, and without compensation. But a holding that this provision of the section is nevertheless constitutional, at least when applied to harmless alterations made after the effective date of the statute,³³ can be anticipated with reasonable confidence, despite the fact that the extent of a state's police power has never been accurately defined.³⁴ It is well settled that the uncompensated diminution of a property right is effected with the due process of law required by the due process clauses³⁵ if it is accomplished by a valid exercise of the state's police power.³⁶

31. Section 429-j can also probably be credited with the creation of two riparian rights new to New York: (1) a right that the view from riparian land shall not be unreasonably interfered with (a right recognized in Florida [Maloney & Plager, *Florida's Lakes*, 13 U. FLA. L. REV. 1, 42 (1960)]); but twice denied in New York [Crance v. State, 205 Misc. 590, 128 N.Y.S.2d 479; 284 A.D. 750, 136 N.Y.S.2d 156 (1954)]; *aff'd on appeal* 309 N.Y. 680, 128 N.E.2d 324 (1955) and Keinz v. State, 2 A.D.2d 415, 156 N.Y.S.2d 505 (1956)], *leave to app. to Ct. of App. denied*, 3 A.D.2d 815, case 9, 161 N.Y.S.2d 608 (1957)]; and (2) a right that the beauty of the prospect from riparian land should not be unreasonably impaired [a right denied in West Virginia—International Shoe Co. v. Heatwole, 126 W. Va. 888, 30 S.E.2d 537 (1944)—and apparently denied in New York in *Crance* and *Keinz*]. While § 429-j does not in express terms purport to create these new rights, it appears to do so by implication. A Cornell Water Resources Center study now in course of preparation will contain a discussion of the validity of this conclusion.

32. See text accompanying notes 18-23 *supra*.

33. The question as to whether the provision legalizing harmless alterations could be applied to such an alteration made prior to the effective date of § 429-j will be discussed in a Cornell Water Resources Center study now in course of preparation. If a riparian owner contesting such enforcement had effected a harmless alteration many years ago, and if the law was that it was wrongful when he began it, he could argue that to legalize it now would be to deprive him without compensation of a fully matured prescriptive privilege, the exercise of which he should be entitled to continue, even though such exercise was not causing harm to others.

34. As to the undefined limits of the police power, see *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908); *Village of Euclid v. Ambler*, 272 U.S. 365, 387, 54 A.L.R. 1016 (1926); *Berman v. Parker*, 348 U.S. 26, 32 (1954).

35. U.S. CONST. amend. XIV; N.Y. CONST. art. 1, § 6.

36. *Kratovil & Harrison, Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596, 608 (1954); 11 McQUILLIN, MUNICIPAL CORPORATIONS § 32.26 (3d ed. rev. 1964); *O'Hara v. Los Angeles County Flood Control Dist.*, 19 Cal. App. 2d 61, 119 P.2d 23 (1941); *Twentieth Century Associates, Inc. v. Waldman*, 294 N.Y. 571, 63 N.E.2d 177, *appeal dismissed*, 326 U.S. 696 (1945); *Moore v. Ward*, 377 S.W.2d 881, *case 2* (Ky. 1964); *Knight v. Grimes*, 80 S.D. 517, 127 N.W.2d 708 (1964).

When determining whether a particular statute constitutes a valid exercise of the police power, the courts have treated numerous factors as having significant bearing on the question: viz., whether the statute completely destroys the property interest of the person attacking it; whether the statute confers on such a party benefits which to an appreciable degree offset what he loses by the statute's diminution of his interest; whether the extent and importance of the public interest to be served by the statute outweighs any unfairness, disappointment of reasonable expectation or financial loss to which the statute would subject the owner of the property interest if it were held valid; and whether the statute involves an impairment of a private property interest to enhance the economic value of some governmental enterprise, or to improve the public condition by the resolution of conflicts among private property owners.³⁷

Viewed in the light of these factors, the harmless use provision of section 429-j would clearly constitute a valid exercise of the police power. The power of which it purports to deprive a riparian owner—the power to obtain an injunction when he is not harmed or threatened with immediate harm—constitutes but a small and relatively insignificant fraction of his riparian property interest; a fraction which will not be necessary under the section to protect him from prescriptive impairment of his riparian rights and privileges in the future.³⁸ One offset against this inconsequential loss—if any offset is deemed necessary—is the relief which the section affords the riparian owner when the shoe is on the other foot from the possible necessity of bringing precautionary suits against parties effecting harmless alterations.³⁹ Another offsetting advantage which the harmless alteration

37. *Brown, Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 966 (1927); *Kratovil & Harrison, Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596, 609 (1954); *Dunham, A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 663-69 (1958); *Hochman, The Supreme Court & the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960); *Sax, Takings and the Police Power*, 74 YALE L.J. 36, 67 (1964); *Trelease, Policies for Water Law*, 5 NATURAL RESOURCES J. 1, 35 (1964); *Michelman, Property, Utility and Fairness*, 80 HARV. L. REV. 1165, 1223, 1233 (1967); *Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 761 (1967); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Bacich v. Board of Control*, 23 Cal. 2d 343, 144 P.2d 818 (1943); *Shepard v. Village of Skaneateles*, 300 N.Y. 115, 89 N.E.2d 619 (1949); *Moore v. Ward*, 377 S.W.2d 881, case 2 (Ky. 1964).

38. See text accompanying note 26 *supra*.

39. See text accompanying notes 24-26 *supra*.

provision confers upon riparian owners becomes apparent when it is noted that if they may be hindered by it when they appear in the role of plaintiff, they may be helped by it when, because of water-connected activities, their adversaries cast them in the role of defendant. Moreover, this provision will not subject most riparians to disappointment of legitimate expectations. The power to sue though not harmed or threatened with harm is not one on the existence of which a riparian owner would normally rely when buying his riparian land. If an atypical riparian owner acquired his land primarily for the purpose of extorting a price for a release of his power to obtain an injunction though not harmed, a conclusion that the frustration of this purpose was unfair to him would scarcely seem justified.⁴⁰ The public interest in avoiding waste of water and in encouraging its maximum utilization which the provision serves clearly outweighs any loss to the riparian owner. It also seems evident that the destruction of the power to sue when not harmed involves an improvement of the public condition by resolution of conflict between private persons, rather than an enhancement of the economic value of a governmental enterprise.

And finally, it should be noted when considering the validity of this provision as a police power measure, that there is available guidance more definite and certain than that afforded by any of the criteria above referred to. As of 1928, because of apparently conflicting judicial decisions, there was uncertainty in California as to whether a riparian owner had power to prevent appropriation of water for which he had no reasonable use by a person basing his claim of the privilege of doing so on the prior appropriation laws of that state.⁴¹ The subject matter of this uncertainty was substantially similar to that of the uncertainty existing in New

40. Where defendant's tort is causing plaintiff little or no harm, and plaintiff therefore has nothing substantial to gain from an injunction except the power to extort from the defendant a price for a release of plaintiff's right, the court is likely to refuse injunctive relief. *Edwards v. Allouez Mining Co.*, 38 Mich. 46 (1878); *Haber v. Paramount Ice Corp.*, 239 A.D. 324, 267 N.Y.S. 349 (1933), *aff'd* 264 N.Y. 98, 190 N.E. 163 (1934); *Johnson v. Killian*, 157 Fla. 754, 24 So. 2d 345 (1946). Holdings in accord with this tendency would seem to furnish analogical support for the conclusion that a statute which deprives a riparian owner of nothing except the power to extort a price for the release of a power to sue although not harmed, is not unfair to the riparian owner and does not deprive him of an expectation worthy of legal protection.

41. *Trelease, Coordination of Riparian and Appropriative Rights*, 33 TEXAS L. REV. 24, 37 (1954).

York as of 1965: viz., as to whether a riparian owner had power to prevent an alteration in a stream or lake which was causing him no harm.⁴² To resolve the California uncertainty, a section was added to the California constitution limiting riparian rights "to such water as is reasonably required for the beneficial use to be served" and declaring that "such right does not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water."⁴³ Under this section a riparian owner could not complain of a use of water so long as it caused him no actual damage.⁴⁴ When it was attacked in *Chow v. City of Santa Barbara*⁴⁵ as in contravention of the provision of the 14th amendment to the federal constitution forbidding the taking of property without due process of law, it was upheld "as a measure adopted in the exercise of the police power."⁴⁶ Since the harmless alteration provision of section 429-j would, if upheld, have substantially the same effect as the section added to the California constitution, *Chow* would be an authority squarely in point and in favor of the validity of the provision should its constitutionality ever be called in question.⁴⁷ It seems likely, therefore, that section 429-j will be found to have provided solutions for some of New York's water problems without having caused any substantial uncompensated impairment of property rights.

UNCERTAINTIES DEALT WITH IN PROPOSED HARMFUL USE BILL

Substantially Harmful but Reasonable Uses

There are, of course, as already indicated, numerous uncertainties in New York riparian law which continue to

42. See text accompanying notes 17-23 *supra*.

43. Trelease, *supra* note 41.

44. *Id.*

45. 217 Cal. App. 673, 22 P.2d 5 (1933).

46. *Id.*

47. The fact that the decision in *Chow* was in regard to the validity of a constitutional provision rather than of a statutory provision legalizing harmless uses should not prevent a party asserting the validity of the harmless alteration provision in § 429-j from relying on *Chow* for support. Since a provision in a state constitution is as much subject to the federal constitution as is a state statute [*Fisk v. Jefferson Police Jury*, 116 U.S. 131, 135 (1885); *Opinion of the Justices*, 234 Mass. 597, 607, 127 N.E. 525 (1920)], a state statute should be subjected to no more stringent scrutiny than that to which a state constitutional provision is subjected when attacked as invalid under the 14th amendment to the federal constitution. It should be noted that the court in upholding the California constitutional provision in the *Chow* case did not rely on its being such rather than a statute, but on its constitutionality under the 14th amendment as a valid exercise of the state's police power. 22 P.2d at 17-18.

exist despite the enactment of section 429-j of the Conservation Law,⁴⁸ and which should be resolved for the encouragement of private riparian owners contemplating water-based projects, and to prepare the way for multi-purpose governmental water protection and supply projects.⁴⁹ Among these is the uncertainty as to whether a water-connected activity which involves substantial harm to riparian owners other than the actor is unreasonable as a matter of law because of such harm and therefore illegal, or whether such an activity can, despite its substantially harmful character, be found to be reasonable under all the circumstances, and therefore lawful. Doubt concerning this point has been created by New York judicial utterances difficult to reconcile.⁵⁰

It would seem desirable to have this uncertainty resolved by legislation providing that an alteration in the natural condition of a body of water should be lawful, even though it causes substantial harm, if the alteration is reasonable under all the facts and circumstances. If the contrary position is taken, there will be situations in which the riparian owner who first exercises his riparian rights will acquire a permanent advantage over a riparian who is not in a position to develop his riparian land as quickly. Thus, if *A* begins to irrigate, withdrawing *X* gallons daily for use on his riparian land; if *B*, higher up on the stream, thereafter begins to irrigate, withdrawing *Y* gallons daily for use on his riparian land; if *B*'s withdrawals leave available for *A* only *X* minus *Y* gallons; if *X* minus *Y* equals one-half of *X* gallons; and if *A*'s crop is substantially reduced because *A* can now obtain only half the water originally available to him, *B*'s alteration

48. See text accompanying note 3 *supra*.

49. See text accompanying notes 4-7 *supra*.

50. *With Bullard v. Saratoga Victory Mfg. Co.*, 77 N.Y. 525, 530 (1879) in which the court said: "There is no question upon the facts in this case that the manner of using canals by the defendant is a serious injury to the plaintiff," and yet affirmed a judgment for the defendant, and with *Henderson Estate Co. v. Carroll Elec. Co.*, 113 A.D. 775, 99 N.Y.S. 365 (1906), *aff'd* 189 N.Y. 531, 82 N.E. 1127 (1907) in which the court said "The test is whether the use is reasonable, not whether possible injury may result," compare *City of N.Y. v. Blum*, 208 N.Y. 237, 243, 101 N.E. 869 (1913) in which the court said: "The defendant had the right temporarily to detain or divert the waters of Pine's stream, but the lower riparian owners . . . had the right to have that water returned in its natural state, save for such slight diminution or pollution as might necessarily occur from a reasonable use," and held for the plaintiff. Although the holdings in *Bullard* and *Henderson* are reconcilable with that in *Blum* because the harm inflicted in *Bullard* and *Henderson* was not, the passage quoted from *Blum* could obviously be used as a basis for the contention that activity causing more than slight harm is unreasonable as a matter of law.

of the stream by his withdrawal of *Y* gallons daily will clearly have caused *A* substantial harm, and would therefore appear to be unlawful under a rule that an alteration in the natural condition of a body of water which causes substantial harm to another riparian owner is wrongful.

It is submitted that the result which would apparently follow in this hypothetical case under such a restrictive rule affords evidence of the undesirability of the rule. In the first place, such a result would be in conflict with several basic principles of the riparian doctrine: viz., that priority in time does not necessarily create priority in right;⁵¹ that riparian rights are not lost by non-use;⁵² and that the extent of riparian rights varies from time to time in response to changes in the situation⁵³—in the hypothetical case, the situation changed when *B* began to irrigate. In the second place, the result which would be arrived at in the hypothetical case under the restrictive rule would tend toward an undesirable rigidity in the pattern of water use, which would make it difficult to satisfy important new water needs as they arose from time to time.

51. RESTATEMENT OF TORTS § 853 comment *h* (1939); 3 TIFFANY, REAL PROPERTY 417 (3d ed. 1939); 6A AMERICAN LAW OF PROPERTY 159 (Casner ed. 1954).
52. 6A AMERICAN LAW OF PROPERTY 159 (Casner ed. 1954); CRIBBET, ILLINOIS WATER RIGHTS LAW 42 (1958); Trelease, *Law, Water and People*, 18 WYO. L.J. 3, 4 (1963); Lugar, *Water Rights Law and Management in West Virginia*, PUBLIC AFFAIRS SERIES No. 4, W. VA. CENTER FOR APPALACHIAN STUDIES 21 (1967); Hutchins, *Irrigation Water Rights in California*, CIRCULAR 452 REVISED, CALIF. AGRIC. EXPER. STATION 13 (1967); Petraborg v. Zontelli, 217 Minn. 536, 15 N.W.2d 174, 181 (1944). Among the New York cases recognizing this rule are *Townsend v. Bell*, 62 Hun 306 (N.Y. 1891); *Gilzinger v. Saugerties Water Co.*, 66 Hun 173 (N.Y.S.Ct. 1892); *aff'd on opinion below*, 142 N.Y. 633, 37 N.E. 566 (1894); *Mann v. Willey*, 51 A.D. 169, 64 N.Y.S. 589 (1900), *aff'd* 168 N.Y. 664, 61 N.E. 1131 (1901).
53. Bingham, *Some Suggestions Concerning the California Law of Riparian Rights*, 22 CALIF. L. REV. 251, 258 (1934); WATER RESOURCES AND THE LAW (Ch. by Lauer) 210 (1958); CRIBBET, ILLINOIS WATER RIGHTS LAW 28 (1958); HABER & BERGEN, WATER ALLOCATION IN THE EASTERN UNITED STATES (ch. by Haar & Gordon) 215 (1958); Beuscher, *Appropriation Water Law Elements in Riparian Doctrine States*, 10 BUFFALO L. REV. 448, 449 (1961); Maloney, *Eastern Laws Concerning Minimum Stream Flows*, PAPERS SOUTHEASTERN WATER LAW CONFERENCE 301 (1961); O'Connell, *Iowa's New Water Statute—The Constitutionality of Regulating Existing Uses of Water*, 47 IOWA L. REV. 549, 577 (1962); Trelease & Lee, *Transfer of Water Rights*, 1 LAND & WATER L. REV. 1, 4 (1966); 1966 WIS. L. REV. 942, 943; Lugar, *Water Rights Law and Management in West Virginia*, PUBLIC AFFAIRS SERIES No. 4, WEST VIRGINIA CENTER FOR APPALACHIAN STUDIES 21 (1967); Hutchins, *Irrigation Water Rights in California*, CIRCULAR 452 REVISED, CALIF. AGRIC. EXPER. STATION 18 (1967); *Hoy v. Sterrett*, 2 Watts 327, 332 (Pa. S. Ct., 1834); *Fulton County Gas & Elec. Co. v. Rockwood Mfg. Co.*, 238 N.Y. 109, 115, 144 N.E. 359 (1924); *In re Water Rights in Silves River*, 115 Ore. 27, 237 P. 322, 357 (1925); *Prather v. Hoberg*, 24 Cal. 2d 549, 150 P.2d 405, 411 (1944); *Smith v. Stanolind Oil & Gas Co.*, 197 Okla. 499, 172 P.2d 1002 (1946); *Hoover v. Crane*, 363 Mich. 36, 42, 106 N.W.2d 563 (1960). The question as to whether New York should, despite the importance of reducing the amount of uncertainty in its water law, retain this rule, is discussed hereinafter. See text accompanying notes 113 to 134 *infra*.

Moreover, acceptance of a rule that a use, alteration or activity which causes substantial harm is unlawful for that reason alone would automatically exclude from consideration circumstances which have often been taken into account when passing upon the reasonableness and legality of a particular alteration, use, or activity. In other words, the restrictive rule makes harm to the complaining party a decisive factor by itself, provided only it is substantial. That harm of such degree should be and is an important factor when determining legality cannot be denied;⁵⁴ but that such harm should be treated as but one of several important factors contributing to the final result seems equally clear.⁵⁵ There may well be situations in which a use, alteration or activity should be held lawful, although causing substantial harm, because of its importance to the public and defendant's inability to avoid the harm,⁵⁶ or because the plaintiff's activity is unsuited to the neighborhood,⁵⁷ or because the plaintiff could practically minimize the harm,⁵⁸ or because the stream comes to the defendant's tract before reaching the plaintiff's.⁵⁹ It is to be hoped, therefore, that the New York legislature will pass the bill now pending before it⁶⁰ and providing in substance in accord with the prevailing view that an alteration in the natural condition of a body of water is lawful, even though causing substantial harm, if it is reasonable under all the circumstances.

Harmful but Reasonable Diversion—Impoundment and Addition of Foreign Water

Another question in regard to New York riparian law which remains unanswered despite the enactment of section 429-j of the Conservation Law is the following. If it be assumed that the New York law has been and still is that substantially harmful alterations in bodies of water are in

54. RESTATEMENT OF TORTS § 852 (1939).

55. RESTATEMENT OF TORTS §§ 853, 854 (1939).

56. See *Barnard v. Sherly*, 135 Ind. 547, 24 L.R.A. 568 (1893).

57. See *Michelson v. Leskiewicz*, 55 N.Y.S.2d 831 (S. Ct. 1945); *aff'd* 270 A.D. 1042, 63 N.Y.S.2d 191 (1946).

58. See *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 6 A. 453 (1886) and in *City of New York v. Blum*, 208 N.Y. 237, 101 N.E. 869 (1913).

59. See *Henderson Estate Co. v. Carroll Elec. Co.*, 113 A.D. 775, 99 N.Y.S. 365 (1906), *aff'd* 189 N.Y. 531, 82 N.E. 1127 (1907).

60. N.Y. Senate No. 882-A, Assembly No. 1571-A (1968). Introduced in the 1968 session at the request of the Joint Legislative Committee on the Conservation, Development and Equitable Use of the Water Resources of the State.

general lawful if reasonable, have some exceptions to this rule been created under which certain particular sorts of alterations would be unreasonable as a matter of law and therefore illegal?⁶¹ Thus under the New York cases, there is doubt as to whether a riparian owner, if sued for a substantially harmful diversion,⁶² or seasonal impoundment of a body of water,⁶³ or addition of foreign water⁶⁴ thereto,⁶⁵ could hope to secure a judgment in his favor by demonstrating that his alteration was reasonable despite its particular sort⁶⁶ and despite its substantially harmful character.⁶⁷ It would

61. That the view implemented in this bill is the prevailing one, *see* PROSSER, *TORTS* 621-23 (3d ed. 1964).

62. *Compare* the statement in *Garwood v. New York Cent. & H.R.R.*, 83 N.Y. 400, 406 (1881) that it is the rule that a riparian owner has no right to divert any part of the stream into an accustomed course "for any purpose" to the prejudice of another riparian proprietor, *with* the holdings in *Smith v. City of Rochester*, 38 Hun 612 (N.Y.S. Ct. 1886), *aff'd* 104 N.Y. 674 (1887) and *Neal v. City of Rochester*, 156 N.Y. 213, 50 N.E. 803 (1898) that diversions of stream water could be enjoined, even though the defendant was preventing harm to the plaintiff by adding enough water from another source to compensate for the defendant's diversions, with the following statement in *Strobel v. Kerr Salt Co.*, 164 N.Y. 303, 58 N.E. 142 (1900): "Consumption by watering cattle, temporary detention by dams in order to run machinery, irrigation when not out of proportion to the size of the stream, and some other familiar uses, although in fact a diversion of the water causing some loss, are not regarded as an unlawful diversion . . . the lower owners must submit to such loss as is caused by reasonable use." Evidence of the doubt which exists as to the present legality of harmful but reasonable diversion of stream water in New York is afforded by an objection lodged against the harmful use bill when it was before the 1967 session of the legislature on the ground that it would change the New York common law under which a substantially harmful diversion could not be justified by a plea of reasonableness.

63. The holdings and dicta in *Clinton v. Myers*, 46 N.Y. 511, 7 Am. Rep. 373 (1871), *Strobel v. Kerr Salt Co.*, 164 N.Y. 303, 58 N.E. 142 (1900), and *Fulton County Gas & Elec. Co. v. Rockwood Mfg. Co.*, 238 N.Y. 109, 144 N.E. 359 (1924) leave the state of the New York law as to the legality of seasonal impoundment of stream water in an uncertain condition. In this connection, the interpretation put upon *Clinton* in *Seneca Consol. Gold Mines Co. v. Great Western Power Co.*, 209 Cal. App. 206, 287 P. 93 (1930) is of special interest. Seasonal impoundments have been legalized by statute in several states to varying degrees and subject to various conditions. *See, e.g.*, ARK. STAT. ANN. §§ 21-1301 to -1315 (1947); KY. REV. STAT. § 262.690 (1962); and VA. CODE ANN. §§ 62-94.1 to -94.12 (1950). For a recommendation that Illinois legalize seasonal impoundment by legislation, *see* CRIBBET, *ILLINOIS WATER RIGHTS LAW* 51 (1958).

64. That is, water from a source not naturally tributary to the body of water to which it is added.

65. *See* the dicta in *Waffle v. New York Cent. R.R.*, 53 N.Y. 11 (1873); *McCormick v. Horan*, 81 N.Y. 86 (1880); and *Kennedy v. Hoog, Inc.*, 48 Misc. 2d 107, 264 N.Y.S.2d 606 (S. Ct., 1964); *aff'd in part and rev. in part sub nom.*, *Kennedy v. Moog Servocontrols, Inc.*, 26 A.D.2d 768, 271 N.Y.S.2d 928 (1966). The wording of the Appellate Division opinion in *Kennedy* leaves it uncertain as to whether it approved or disapproved the dictum in *McCormick* in regard to the addition of foreign water which had been quoted by the trial court in *Kennedy*. As there appear to be no New York judicial holdings or utterances in conflict with these dicta, a risk that they might be followed in actual holdings clearly exists.

66. A court adhering to the natural flow version of the riparian doctrine would, of course, be likely to hold that any of these three sorts of alteration would be illegal, even if harmless.

67. Under N.Y. CONSERV. LAW § 429-j (1966), all of the alterations referred to would be lawful, if harmless.

seem clear that the resolution of this uncertainty would be desirable for the guidance of private riparian owners and governmental units or agencies contemplating embarkation upon water-connected projects. And since the optimum development and use of water resources, whether by private persons or by government, often requires harmful diversion, impoundment or addition of foreign water, it would seem equally clear that the resolving legislation should provide in substance, as does the harmful use bill now before the New York legislature, that no harmful alteration in a body of water shall be held unreasonable and unlawful merely because it would involve diversion, seasonal impoundment, or addition of foreign water, or any other particular sort of alteration.

Relevancy of the Public Interest when Determining Reasonableness

Because of the scarcity and conflicting nature of the available judicial authority, another uncertainty exists in New York riparian law despite the enactment of section 429-j of the Conservation Law: viz., as to whether a trier of fact, when passing on the reasonableness of competing water-connected activities, can take into account their relative importance to the public.⁶⁸ There appears to be but one New York Court opinion containing language which might be construed as relevant to this question. In *Strobel v. Kerr Salt Co.*, the court said: "the courts will not overlook the needs of important manufacturing interests,"⁶⁹ but as the court added almost immediately that the courts "will not permit substantial injury . . . for the purpose of enabling a new and great industry to flourish," it is difficult to draw a definite conclusion as to what the New York rule is on the point in question. Although the relevance of a comparison of the importance to the public of the activities of the contesting parties to the reasonableness issue in water cases has

68. While the New York courts have taken the public interest into account when deciding whether or not a defendant clearly liable at law for damages shall be enjoined from continuing his wrongful conduct [*Squaw Island Freight Terminal Co. v. City of Buffalo*, 273 N.Y. 119, 7 N.E.2d 10 (1937); *Ferguson v. Village of Hamburg*, 272 N.Y. 234, 5 N.E.2d 801 (1936)], such cases cannot, of course, be cited as authority for the proposition that the importance to the public of a party's activity can be considered when deciding whether or not he is liable at law for damages.

69. 164 N.Y. 303; 58 N.E. 142 (1900).

been widely recognized,⁷⁰ and although the New York courts have taken that factor into account when passing on the issue of reasonableness in the general field of nuisance,⁷¹ and so in view of the absence of New York authority clearly to the contrary,⁷² might be expected to concur in the position taken in the water field elsewhere, it would seem advisable to resolve this uncertainty by legislation providing in sub-

70. RESTATEMENT OF TORTS §§ 853, 854 (1939); HABER & BERGEN, WATER ALLOCATION IN THE EASTERN U.S. (ch. by Haar & Gordon) 7 (1958); Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 A. 453 (1886); Mizell v. McGowan, 129 N.C. 93, 39 S.E. 729 (1901); Mason v. Whitney, 193 Mass. 152, 78 N.E. 881, 7 L.N.S. 289 (1906); Board of Drainage Comm'rs. of Dist. No. 10 v. Board of Drainage Comm'rs. of Washington County, 130 Miss. 764, 95 So. 75, 28 A.L.R. 1250 (1923); Motl v. Boyd, 116 Tex. 82, 286 S.W. 458 (1926); Petraborg v. Zontelli, 217 Minn. 536, 15 N.W.2d 174 (1944); Montgomery Limestone Co. v. Bearden, 256 Ala. 269, 54 So. 2d 571 (1951); Joslin v. Marin Munic. Water Dist., 60 Cal. Rptr. 377, 429 P.2d 889 (1967).
71. See Booth v. Rome, W. & O. Term. R.R., 140 N.Y. 267; 35 N.E. 592, 24 L.R.A. 105 (1893).
72. Even though the court's refusal in *Strobel v. Kerr Salt Co.*, 164 N.E. 303, 58 N.E. 142 (1900) and in *Whalen v. Union Bag & Paper Co.*, 208 N.Y. 1, 101 N.E. 805 (1913) to hold the defendants' pollution of streams lawful, despite the size of their payrolls, and the court's rejection in *Strobel* of the doctrine of *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 6 A. 453 (1886) that the relative importance to the public of a particular industry could be taken into account when passing on the legality of its polluting activities, undoubtedly affords some basis for the contention that the relative importance to the public of the defendant's activity and of the activities of the riparians complaining of his activity cannot be taken into account in New York when passing upon the reasonableness of defendant's activity, it should be borne in mind that the question as to the relevance of this comparison apparently was never actually before the court in either *Strobel* or *Whalen*, because in neither case did the court refer to any evidence offered to show that the defendant's activities (salt manufacture in *Strobel* and paper making in *Whalen*) were of greater public importance in New York than the plaintiff's activities (general manufacturing in *Strobel* and agriculture in *Whalen*). It could be argued, therefore, that these cases stand for no more than the obviously sound proposition that a defendant cannot establish the reasonableness of his activity as against a plaintiff merely by showing that his operation and investment are of greater magnitude than the plaintiff's. Nor did the defendant's liability for damages for interference with the plaintiff's percolating water supply in *Forbell v. City of New York*, 164 N.Y. 522, 58 N.E. 644, 51 L.R.A. 695 (1900) appear to have been based on the view that the public interest can never have relevance when determining reasonableness, but rather on the court's conclusion that it was more just to require a city having the power of eminent domain to spread the cost of its water supply over its citizens by taxation than to deprive individual water rights owners of their water supply without compensation [see *Kratovil & Harrison, Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954)]; a conclusion amply supported by New York authority [*Gardner v. Village of Newburgh*, 2 Johns. Ch. 162 (1816); *Gray v. Village of Ft. Plain*, 105 A.D. 215, 94 N.Y.S. 698 (1905); *Ferguson v. Village of Hamburg*, 272 N.Y. 234, 5 N.E.2d 801 (1936); *Squaw Island Freight Terminal Co. v. City of Buffalo*, 273 N.Y. 119, 7 N.E.2d 10 (1937)] and consistent with the widely entertained view that when private rights are impaired in furtherance of a public enterprise, compensation must be given. *Dunham, A Legal & Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 663-69 (1958); *Sax, Takings and the Police Power*, 74 YALE L.J. 36, 67 (1964); *Trelease, Policies for Water*, 5 NATURAL RESOURCES J. 1, 35 (1965). The salutary rule established by these cases would not be changed by the pending harmful use bill; for it provides that none of its sections shall be construed as increasing or decreasing the rights, privileges and powers with respect to bodies of water of the State of New York or of any county, city, town or village therein.

stance that this factor may be taken into account when deciding the issue of reasonableness. The harmful use bill, now before the New York legislature, includes such a provision; and also declares in accord with the Restatement of Torts⁷³ and the New York common law, that consideration may also be given to the relative suitability to the region and to the body of water involved of the parties' respective activities;⁷⁴ to the amount of harm which each would suffer from a decision adverse to him;⁷⁵ to the relative availability to the parties of practicable means of minimizing or avoiding harm;⁷⁶ to the location on the body of water of the parties' points of access thereto;⁷⁷ and to the fact as to which party first began his activity.⁷⁸ Knowledge that these factors are considered relevant to the reasonableness issue should be of material assistance to private riparian owners when deciding upon a course of action, and to governmental units or agencies when formulating and executing public water projects.

Constitutionality of Proposed Harmful Use Bill

If it is presently the law in New York that an alteration in the natural condition of a body of water or an activity in connection therewith which causes substantial harm to another riparian owner can be lawful, if reasonable; that harmful alteration of a body of water by diversion, seasonal impoundment, or the addition of foreign water may be found to be unreasonable but is not unreasonable as a matter of law; and that the relative importance to the public of the activities of the contesting parties may be taken into account when passing on the unreasonableness issue in a water case,⁷⁹ there can be no doubt as to the constitutionality of the provisions to that effect in the harmful use bill, for the codification of common law rules involves no impairment of common law rights.

73. Sections 852-54 (1939).

74. *Strobel v. Kerr Salt Co.*, 164 N.Y. 303, 58 N.E. 142 (1900).

75. *Michelson v. Leskiewicz*, 55 N.Y.S.2d 831 (S.Ct. 1945), *aff'd* 270 A.D. 1042, 63 N.Y.S.2d 191 (1946).

76. *City of N.Y. v. Blum*, 208 N.Y. 237, 101 N.E. 869 (1913).

77. *Henderson Estate Co. v. Carroll Elec. Co.*, 113 A.D. 775; 99 N.Y.S. 365 (1906), *aff'd* 189 N.Y. 531, 82 N.E. 1127 (1907).

78. *Strobel v. Kerr Salt Co.*, 164 N.Y. 303, 58 N.E. 142 (1900). For the statement that the weight given to this factor in riparian doctrine states is greater than is generally supposed, see Beuscher, *Appropriation Water Law Elements in Riparian Doctrine States*, 10 BUFFALO L. REV. 448, 451, 453 (1961).

79. See text accompanying notes 48-78 *supra*.

On the other hand, if the current New York riparian law is to the contrary on any of these points,⁸⁰ the harmful use bill, if enacted and enforced, would deprive riparian owners of one or more constituent elements of their present riparian interests. Since the bill makes no provision for compensation to riparian owners whose riparian interests would be diminished by it under this assumption, it could be argued that a statute embodying the provisions of the bill would deprive riparian owners of their property without due process of law.⁸¹

It is submitted, however, that each of the provisions in the bill which might be found to impair existing common law rights should be upheld as a valid exercise of the police power in view of the factors which the courts take into account when deciding whether a statute constitutes such an exercise,⁸² at least if such provisions are applied only to alterations or activities begun after the effective date of the legislation embodying them.⁸³ The diminution in the size of the riparian interest which the bill would effect—a reduction in the scope of the right to freedom from substantial harm, and loss of immunity from the risks incident to having the public interest taken into account when passing on the reasonableness issue—is relatively small, and is largely offset by the fact this diminution and this loss would often be transformed into an increase and a gain whenever a riparian owner found himself a defendant rather than a plaintiff.

Moreover, such hardship as enforcement of the provisions of the bill might inflict on any particular riparian owner would seem to be outweighed by the public interest in the optimum utilization of the state's water resources which would be served by those provisions, and in the proper adjustment of the rights and privileges of riparian owners as among themselves which these provisions would make. Since such impairment as they might cause is for these purposes rather than for increasing the economic value of some public enter-

80. *Id.*

81. See text accompanying notes 32-33 *supra*.

82. See text accompanying note 26 *supra*.

83. The question as to whether the retrospective application provided for by the bill would be constitutional will be discussed in a Cornell Water Resources Center study now in course of preparation.

prise, compensation should not be required for it.⁸⁴ Analogical support for this conclusion would seem to be afforded by the decisions upholding the constitutionality of zoning legislation,⁸⁵ which involves adjustment of the rights and privileges of adjoining landowners as among themselves, despite the losses which such adjustment causes, unless they are so great as to amount to confiscation.⁸⁶ The public interest in an adjustment of private rights and privileges tending to benefit the majority in the long run is held to outweigh the losses inflicted on the few.⁸⁷ It would seem, therefore, that if the harmful use bill becomes law, it will, like section 429-j, provide solutions for some of New York's water problems without causing any more substantial uncompensated impairment of property rights than has been caused by other legislation which has proved to be generally acceptable to property owners and the public in New York.⁸⁸

OTHER UNDESIRABLE UNCERTAINTIES

Since like section 429-j of the Conservation Law, the harmful use bill deals with only a few of the uncertainties in New York riparian law which existed as of 1965, several of these uncertainties will continue to discourage private development of the water resources of the state and to complicate the planning and execution of public water projects, even if the harmful use bill becomes law, unless additional clarifying legislation is enacted.

84. Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 663-69 (1958); Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 67 (1964); Trelease, *Policies for Water*, 5 NATURAL RESOURCES J. 1, 35 (1965).

85. This analogy is suggested in Beuscher, *Appropriation Water Law Elements in Riparian Doctrine States*, 10 BUFFALO L. REV. 448, 458 (1961).

86. *Johnson v. Apton*, 18 N.Y.2d 668, 219 N.E.2d 868 (1966).

87. The question as to the extent to which the often cited cases of *Connecticut v. Massachusetts*, 282 U.S. 660 (1931) and *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 73 F.2d 555 (1934), *aff'd* 295 U.S. 142 (1935) tend to establish the constitutionality of the provisions of the harmful use bill, and the question as to whether *People v. New York Carbonic Acid Gas Co.*, 196 N.Y. 421, 90 N.E. 441 (1909) and *Flynn v. New York W. & B. Ry.*, 218 N.Y. 140, 112 N.E. 913 (1916) would militate against its constitutionality will be discussed in a Cornell Water Resources Center study now in course of preparation.

88. In *Bove v. Donner-Hanna Coke Corp.*, 236 A.D. 37, 43, 258 N.Y.S. 229 (1932) the court said: "Property owners, as well as the public, have come to recognize the absolute necessity of reasonable regulations of this character in the interest of public health, safety, and general welfare, as well as for the conservation of property values. Such is the purpose of our zoning laws." It could be argued then that the property owners and the public do not view the impairment of property rights effected by zoning laws as substantial, and that they therefore would not look upon an analogous impairment of riparian rights as substantial.

Identification of Riparian Land

Prominent among these still existing uncertainties are those as to what land can be classified as riparian. While it has been decided in New York that for land to be so classified, it must border on a natural body of water;⁸⁹ that if it so borders, its owner may lawfully withdraw water from such body for the generation of power regardless of its navigability and of the ownership of its bed;⁹⁰ and that the owner of such land has the privilege of access to such part of the water as is navigable, even if the bed is privately owned,⁹¹ numerous questions remain unanswered. For example, under what circumstances will a conveyance by a riparian of a strip of land running along his shore cause the remaining part of the tract to become non-riparian.⁹² If a person owns land bordering on a natural body of water, will all of it be riparian if it extends inland from the water for several miles, or if part of it lies outside the watershed of the body of water? Can a riparian owner increase the amount of his riparian land by acquiring a contiguous tract not bordering on the water? Under what conditions, if any, will the rear part of a riparian tract retain its riparian character if severed and conveyed by the riparian owner to another person?⁹³

89. *United Paper Board Co. v. Iroquois Pulp & Paper Co.*, 228 N.Y. 38, 123 N.E. 200 (1919).

90. *Id.*

91. *Marine Air Ways, Inc. v. State of New York*, 201 Misc. 349, 104 N.Y.S.2d 964 (1951), *aff'd* 280 A.D. 1021, case 1, 116 N.Y.S.2d 778 (1952); *Riveria Ass'n., Inc. v. Town of North Hempstead*, 52 Misc. 2d 575, 276 N.Y.S.2d 249, 252 (S. Ct. 1967).

92. *See Rumsey v. New York & N.E. R.R.*, 114 N.Y. 423, 21 N.E. 1066 (1889); *New York Cent. & H.R. R.R. v. Aldridge*, 135 N.Y. 82, 32 N.E. 50, 17 L.R.A. 516 (1892); *Saunders v. New York Cent. & H.R. R.R.*, 144 N.Y. 75, 38 N.E. 992, 27 L.R.A. (1894); *Crance v. State of New York*, 284 A.D. 750, 136 N.Y.S.2d 156 (1954).

93. Apparently several of the questions as to what land is riparian which are unanswered in New York are also open in various other eastern states. As to Illinois, *see MANN, ELLIS & KRAUSZ, WATER—USE LAW IN ILLINOIS* 18 (1964). It has been recommended that Illinois enact a statute defining riparian land. *CRIBBET, ILLINOIS WATER RIGHTS LAW* 50 (1958). VA. CODE ANN. § 62-94.1 et seq. appears to permit a riparian owner to buy adjoining non-riparian land, and by so doing to make the added land riparian, provided it lies within the watershed. *See Ellis, Water Rights & Legislation in the Eastern States* 16 (paper presented at the ATLANTA WATER RESOURCES CONFERENCE OF 1965). As to Kentucky, *see Clay, Kentucky Law on Water, RESEARCH REPORT NO. 25, KY. LEGISLATIVE RESEARCH COMM'N* 2 (1965). As to Maryland, *see Galbreath, Maryland Water Law, UNIV. OF MD. WATER RESOURCES STUDY COMMITTEE* 6 (1965). As to Massachusetts, *see HABER & BERGEN, WATER ALLOCATION IN THE EASTERN U.S. (ch. by Haar & Gordon)* 19 (1958). As to Michigan, *see HABER & BERGEN, WATER ALLOCATION IN THE EASTERN U.S. (ch. by Arens)* 380 (1958). The question as to whether a part of a riparian tract can retain its riparian character after being

Classification of Domestic Uses

Another uncertainty in New York riparian law now existing because of scarcity of authority which was not clarified by section 429-j of the Conservation Law, and which would not be resolved by enactment of the harmful use bill, is as to what uses of water can be classified as domestic. While despite this scarcity of authority it probably would be safe to assume that in New York as elsewhere use of stream or lake water by a riparian owner and his family for drinking, cooking, sanitation and for watering the number of domestic animals needed to supply the family table with meat, milk and eggs would be classified as domestic,⁹⁴ although use for the irrigation of commercial crops would not be,⁹⁵ there appears to be no New York authority as to whether any of the following uses could qualify as domestic: irrigation of enough land to supply the needs of the riparian family for fruit, grain and vegetables; the supply of water to animals being raised for market or kept for the production of eggs or milk for sale; maintenance of ponds fed by stream or lake water for family food supply and recreation; operation of air-conditioning units in the riparian home; and use for drinking, cooking and sanitation in hospitals, military installations, motels, children's camps, and similar institutions located on riparian land. The degree of uncertainty as to how New York would classify these uses is increased by the scarcity of authority in other states, and by conflicts on some points among the few authorities available.⁹⁶ Statutory definitions of domestic use have been enacted in other states.⁹⁷

deprived of contact with the water by severance was answered in the affirmative in *Thompson v. Enz*, 2 Mich. Ct. App. 404, 140 N.W.2d 563 (1966). As to Missouri, see MANN, McLARNEY, ANGLE & MILLER, *WATER-USE LAW IN MISSOURI* 30 (1965). As to North Carolina, see HABER & BERGEN, *WATER ALLOCATION IN THE EASTERN U.S.* (ch. by Ellis) 207 (1958). As to West Virginia, see Lugar, *Water Rights Law and Management in West Virginia*, PUBLIC AFFAIRS SERIES No. 4, WEST VIRGINIA CENTER FOR APPALACHIAN STUDIES 19 (1967).

94. 5 POWELL, *REAL PROPERTY* 357 (1962).

95. *Meng v. Coffey*, 67 Neb. 500, 93 N.W. 713 (1903).

96. In regard to the question as to what uses are domestic, see, in addition to the authorities cited in notes 94 and 95, 6A *AMERICAN LAW OF PROPERTY* 165 (Casner ed. 1952); Trelease, *Concept of Reasonable Beneficial Use*, 12 WYO. L.J. 1, 2-5 (1957); Beuscher, *Appropriation Water Law Elements in Riparian Doctrine States*, 10 BUFFALO L. REV. 448, 452 (1961); *Salem Flour Mills Co. v. Lord*, 42 Ore. 82, 69 P. 1033 (1902); *Filbert v. Dechert*, 22 Pa. Super. 362 (1903); *Hough v. Porter*, 51 Ore. 318, 98 P. 1083 (1909); *Cowell v. Armstrong*, 210 Cal. 218, 290 P. 1036 (1930); *McCord v. Big Brothers Movement, Inc.*, 120 N.J. Eq. 446, 185 A. 480 (1936); *Prather v. Hoberg*, 24 Cal.2d 549, 150 P.2d 405 (1944).

97. For a recent example, see DEL. CODE ANN. tit. 7 § 6102(a) (1966).

Transferability of Riparian Rights

Another uncertainty existing in New York riparian law because of scarcity of authority, and with which neither section 429-j nor the harmful use bill purports to deal, is as to which riparian rights and privileges are transferable, and with what effect. While it has been held in New York that the privilege to use water for power⁹⁸ and the privilege of access to navigable water⁹⁹ are transferable either with or without the riparian land to which they were originally incident, and that in such cases the extent of the interest which the transferee receives is determined by the extent of the interest possessed by his transferor,¹⁰⁰ there appears to be no New York authority on the question as to whether other kinds of riparian rights and privileges, such as the consumptive privilege of use for irrigation, are transferable. It is possible that the New York courts, if faced with the question, would hold that consumptive riparian privileges are transferable; particularly since the rationale of *United Paper Board Co. v. Iroquois Pulp & Paper Co.*,¹⁰¹ in which it was held that the privilege of use for power is transferable, so closely resembles that of *Smith v. Stanolind Oil & Gas Co.*¹⁰² holding that the privilege of withdrawing stream water for use in oil drilling operations, which under the facts of the case amounted to a consumptive use, was transferable to a non-riparian. However, in view of suggestions by writers and courts that consumptive riparian privileges are not

98. *United Paper Board Co. v. Iroquois Pulp & Paper Co.*, 226 N.Y. 38, 123 N.E. 200 (1913); *FPC v. Niagara Mowawk Power Corp.*, 347 U.S. 239 (1953).

99. *City of New York v. Third Ave. Ry.*, 294 N.Y. 238, 62 N.E.2d 52 (1945).

100. "The right to the use of the water of a flowing stream . . . is a valuable property right which can be severed from the riparian land by grant . . . Thomson and Dix . . . had a mere usufructuary right in it, subjected to the right of the state and rights equal with theirs in the owners of the opposite . . . bank. Their usufructuary and proprietary right was . . . to draw . . . water, for the purpose of power, in such quantity at any time as would not conflict with the right of the state or other riparian owners, to be returned to the river before it left their land, in a manner reasonable and safe to the lower proprietors. Such right as an entirety or any part of it they could grant." *United Paper Board Co. v. Iroquois Pulp & Paper Co.*, 226 N.Y. 38, 123 N.E. 200 (1913).

101. *Id.*

102. 179 Okla. 499, 172 P.2d 1002 (1946). In this case the court said: "[T]he defendant company was not without right, but it was a derivative right. Hence the standard for measuring the legality of the company's act is the extent of the right of the riparian owner who granted it." *Accord*, *State v. Appelbacher*, 167 Wis. 233, 167 N.W. 244 (1918).

transferable,¹⁰³ there is a real possibility that the New York courts, while standing by decisions already made, would deny the transferability of consumptive privileges. Since economists and lawyers are generally agreed that no system of water law can be deemed acceptable unless it makes satisfactory provision for the transfer of water rights and privileges because such provision affords one of the best means of effecting revisions in the pattern of water use in response to changes in the relative importance of the various demands for water,¹⁰⁴ it would seem clear that New York should enact legislation declarative of the transferability and severability of riparian rights and privileges, and indicative of the effect of such transfers.¹⁰⁵

The task of drafting appropriate legislation should not be impracticably difficult, provided the New York law as to the use of water for the benefit of non-riparian land were revised to the extent hereinafter recommended.¹⁰⁶ A basic rationale for a statute providing for the transfer of riparian rights is afforded by the *United Paper Board* and *Smith* cases. The scant attention which has been paid to these cases by most texts and commentators may account at least in part for the pessimistic assumption that the non-transferability

103. 3 FARNHAM, *WATERS* 2190 (1904); *WATER RESOURCES AND THE LAW* (ch. by Lauer) 431 (1958); *Hanford v. St. Paul & D. R.R.*, 43 Minn. 104, 42 N.W. 596 (1890) holding that the privilege of access to navigable water is transferable, but suggesting that some other riparian rights might not be; *Hite v. Town of Luray*, 175 Va. 218, 8 S.E.2d 369 (1940) holding that the privilege to use a stream for power is severable and transferable, but quoting the passage from *Farnham on Waters* in which he suggested that consumptive rights might not be: "Riparian law is not very well suited to the transfer of water rights separate from the land." Trelease, *Legal Contributions to Water Resources Development*, U. CONN. INST. OF WATER RESOURCES, REPORT NO. 2, at 9 (1967). But the statements which follow indicate that this comment was predicated on the assumption that harmful non-riparian use cannot be legalized under the riparian system. A transfer of any sort of riparian privilege or right for exercise for the benefit of non-riparian land could, of course, be effective as against riparians other than the grantor only to the extent that the grantor himself could have lawfully used the water on non-riparian land, for he cannot convey a right or privilege which he himself lacked. Hutchins, *Irrigation Water Rights in California*, CIRCULAR 452 REVISED, CALIF. AGRIC. EXPER. STATION 22 (1967). See also, as to the transfer of riparian rights and privileges, BEUSCHER, *WATER RIGHTS* 186-88 (1967).

104. Tolley, *Western Water Resources*, 5 NATURAL RESOURCES J. 259, 279 (1965); Trelease & Lee, *Transfer of Water Rights*, 1 LAND & WATER L. REV. 1, 5 (1966); King, *Handling Riparian Rights in an Adjudication Act*, PROCEEDINGS TEX. U. WATER LAW CONFERENCE 41 (1966).

105. As recommending legislation of this sort, see CRIBBET, *ILLINOIS WATER RIGHTS LAW* 50 (1958).

106. See text accompanying notes 135 to 147 *infra*.

of riparian rights is an incurable defect of the riparian system.¹⁰⁷

Free-loading by Riparians

Again, despite the enactment of section 429-j, and even assuming that the harmful use bill becomes law, another uncertainty will continue to exist in New York water law for lack of authority unless it is resolved either by legislation or by a court decision which might not be rendered for many years. This uncertainty is as to whether a lower riparian owner would be privileged to use part of the increase in stream flow resulting from an impoundment erected by an upper riparian owner despite the lower owner's unwillingness to contribute to the construction costs of the impoundment or to bear a share of its operating and maintenance charges. In three other states this question has been answered in the affirmative by the recognition of what might be called a riparian free-loading privilege.¹⁰⁸ The possibility that the New York courts might follow these clearly inequitable decisions should be precluded by legislation for the encouragement and protection of private riparians contemplating investment in impoundments. Several states have enacted statutes designed to eliminate or at least to confine within reasonable limits whatever common law free-loading privilege there may be.¹⁰⁹ Appropriate legislation in this area would, moreover, facilitate the planning and execution of governmental water projects. Granted that the legislation implementing the project might expressly provide that no riparian owner below a dam could use more than his common-law share of the stream without making financial contribution, a lower riparian owner could argue that he was exempt from this burden because his common law rights in the stream attached not only to the natural part of the flow

107. The legal scholars who have recommended that riparian rights be made transferable by statute apparently have not envisaged any insuperable obstacles to such a step. See Marquis, Freeman & Heath, *The Movement for New Water Rights Laws*, 23 TENN. L. REV. 797, 833 (1955); CRIBBET, ILLINOIS WATER RIGHTS LAW 50 (1958).

108. *Tourtellot v. Phelps*, 4 Gray 370, 375-76 (Mass. 1855); *Druley v. Adam*, 102 Ill. 177 (1882); *Dyer v. Cranston Print Works*, 22 R.I. 506, 48 A. 791 (1901); *Lansdale v. City of Woonsocket*, 25 R.I. 428, 56 A. 448 (1903); *Mason v. Whitney*, 193 Mass. 152, 78 N.E. 881 (1906).

109. ARK. STAT. ANN. § 21-1307 (1947); IND. ANN. STAT. § 27-1403 (1960); MICH. STAT. ANN. § 3.533(30) (1961); MINN. STAT. ANN. § 111.22 (1963). See also 19 OKLA. L. REV. 462 (1966) discussing recent Oklahoma legislation.

but also to the additional flow made available by the execution of the governmental project.

One governmental official expressed his concern over the problems with which the existence of a common law free-loading privilege might confront the operators of a government water project in the following language:

The problem of releases from impoundments for water quality control is the most difficult problem we have in the water quality field Let us assume . . . that we have secured adequate treatment of wastes at their source . . . that the hydrological problems are solved, that the mathematical problems are solved, and that all other technical problems of releasing water at the right time are solved . . . that the water has been impounded, and that it is now being released from the reservoir. After the water is released and flows down the stream, it presumably becomes a part of the waters of the State, just like any other waters. Let us take an outrageous case first. A farmer wants to irrigate downstream, so he pumps water from the river, puts it on his land, and the water does not get back into the stream. Here, all the work, all the theory, all the operating plans, all the Congressional objectives, all the interstate and interagency agreements . . . go right down the drain because the water is withdrawn. I think this is the prototype of the problem that we have to deal with and that we can have many, many variations of the same thing.¹¹⁰

While thorough study of the merits of the various possible answers to the questions as to what land is riparian, as to what uses are domestic, as to the transferability of riparian rights, and as to the existence of a free-loading privilege should precede the enactment of legislation in regard to them, it would seem inadvisable to leave them unanswered much longer.¹¹¹

110. PUBLIC HEALTH SERVICE, SYMPOSIUM ON STREAM FLOW REGULATION FOR WATER QUALITY CONTROL 43-44 (paper by Stein) (1965).

111. "The riparian doctrine, fluid in nature, may have been adequate to meet changing needs in the past when water was plentiful relative to need, and its use was mainly for non-consumptive purposes; but as the demands on water resources grow, the necessity for legislation to define more explicitly the relations between riparian owners will become more evident." Aycock, *North Carolina's Water Use Law*, 46 N.C. L. REV. 1, 20 (1967). As to another uncertainty in New York riparian law which might be added to the list of those that it would be desirable to clarify by legislation, see the text accompanying note 152 *infra*.

Constitutionality of Necessary Legislation

Problems as to the constitutionality of whatever legislation is found to be desirable in these areas should be of less than average difficulty. If there is no common law on a particular point, there can be no common law rights in regard to it to be impaired by the legislation supplying a rule. Section 14 of article 1 of the New York Constitution should not prove to be an obstacle to gap-filling legislation because what it purports to preserve is "such parts of the common law . . . as . . . did form the law" of the colony of New York in 1775, and because such law apparently did not contain any rules in regard to the questions listed in the preceding paragraph. Scattering decisions rendered in other states in regard to some of them need not be held to have created riparian rights in New York waters, if the New York courts conclude that such decisions were unsound in general, or inappropriate to conditions existing in New York. Should a case arise involving a question to which the New York courts believed the New York common law had given an answer resulting in the creation of New York riparian rights and privileges, and if the new legislation impaired them, such impairment could probably be justified under the police power as in furtherance of the public interest in readjusting the rights and privileges of riparian owners as among themselves in a manner beneficial to the majority of such owners.¹¹² It would seem, therefore, that many of these questions could be dealt with satisfactorily without any uncompensated impairment of riparian rights whatever, and that any uncompensated impairment which might actually occur would not be more substantial than property owners could fairly be asked to accept, and probably would be willing to accept.

BENEFICIAL UNCERTAINTY: FLEXIBILITY

The uncertainties in New York riparian law which have been discussed herein up to this point are those which should

112. See text accompanying notes 80 and 88 *supra*. If the New York courts should find that a free-loading privilege exists in New York at common law, a constitutional basis for a statute destroying such privilege, which might be considered more appropriate than that afforded by the police power, might be found in the cases upholding statutes requiring persons who had opposed the construction of certain works by conservancy, flood control or drainage districts to pay part of the cost of such works because otherwise they would be unjustly enriched by the benefits which they derived from such works. See Dunham, *Flood Control via the Police Power*, 107 U. PA. L. REV. 1098, 1122 (1959).

and can be eliminated without causing too substantial uncompensated impairment of existing riparian rights, and while keeping within the framework of the riparian doctrine. Are there others against which complaint has been made, but which could not be eliminated without considerable departure from the riparian system, and which should not be eliminated, at least totally, in view of the desirable ends they serve? If a New York riparian owner asks his attorney how much water he could lawfully withdraw from a stream for irrigation, industrial use, or for some other worthy purpose, his attorney will probably feel constrained to tell him that he can use an amount which is reasonable under all the circumstances.¹¹³ Should the riparian owner inquire whether, after having invested in equipment or structures necessary for his water-based activity, he might have to reduce the amount of his withdrawals if the number of riparians using the stream subsequently increases, his attorney will doubtless give him an affirmative answer.¹¹⁴ If the riparian owner should ask whether the amount he could lawfully take initially might be reduced in the future, despite a substantial investment by him, should it appear that due to changes in economic and social conditions, the public interest would be better served if he took less water and the other riparians took more, his attorney would probably again feel obliged to give a discouraging reply.¹¹⁵ Since these answers would be correct under the riparian law prevailing in New York and many other riparian doctrine states,¹¹⁶ the riparian system has been attacked because of the uncertainty which adherence to it involves. Thus it has recently been said:

[A] vested water right is a property right and therefore must be qualitatively defined. One can no more have a vested right to divert a reasonable amount of water than he can have a right to possess a reasonable amount of land or withdraw a reasonable amount of money from the bank. Numbers—acre feet—mathematical formulae must be substituted for adjectives if this elusive right is to have substance. Otherwise every riparian owner on the stream (whether he has ever diverted before or not) is a potential destroyer

113. *Timm v. Bear*, 29 Wis. 254 (1871); *Prentice v. Geiger*, 74 N.Y. 341 (1878).

114. See authorities cited in note 52 *supra*.

115. See authorities cited in note 53 *supra*.

116. See authorities cited in notes 113, 52, and 53 *supra*.

of the substance of the right of every other. Nothing could be more self-defeating.¹¹⁷

It is submitted nevertheless that the uncertainty which is the consequence of adherence to the riparian doctrines of reasonableness, survival of unused rights, and variability is not an unmitigated evil which must be completely done away with at all costs. Because the facts involved in any particular water case more often than not fail substantially to duplicate those appearing in any other, it would seem to be impossible to formulate a set of rules by resort to which a riparian owner could, without obtaining an adjudication, ascertain the exact scope of his riparian rights and privileges in all cases. The almost infinite number of conceivable situations would call for an almost infinite number of rules. Experience in the water field has shown that when the courts laid down rules which purported to be definite, it became necessary to recognize exceptions to them relatively soon after their promulgation, unless injustice was to be inflicted and the public interest sacrificed for the sake of predictability.¹¹⁸ It is doubtful that detailed legislation would fare much better. The riparian right should, therefore, be determined by the application of the reasonableness standard, at least initially.

And it would seem to be advisable to continue to apply that standard at later stages. While it has been argued in substance that it is unfair to require *A*, the first riparian to use a stream, to cut down the extent of his use when riparian *B* is ready to exercise his riparian privileges,¹¹⁹ it is doubtful that such curtailment would disappoint any ex-

117. PROCEEDINGS TEX. U. WATER LAW CONFERENCE (paper by King) 39 (1966).

118. The difficulties attendant upon attempts to formulate definite rules as to privileges and rights in regard to water are pointed out in *City of Franklin v. Durgee*, 71 N.H. 186, 51 A. 911, 58 L.R.A. 112 (1901) and *Armstrong v. Francis Corp.*, 20 N.J. 320, 120 A.2d 4, 59 A.L.R.2d (1956). Although one of these cases involved surface water rather than stream or lake water, and the other involved drainage of surface water into a stream, the points made appear to be as valid for purely riparian law as for the law of surface water. See also, as to the merits of a reasonableness standard, Wiel, *Fifty Years of Water Law*, 50 HARV. L. REV. 252, 279-81 (1936). If the difficulty of determining what is reasonable in water cases makes it seem inadvisable to rely on the reasonableness standard as a basis of decision, the truth of the following judicial utterance should be borne in mind. "There would seem to be no more difficulty in ascertaining what is a reasonable use of water than there is in determining probable cause, reasonable doubt, reasonable diligence, preponderance of evidence, a rate that is just and reasonable, public convenience and necessity, and numerous other problems which in their nature are not subject to precise definition but which tribunals exercising judicial functions must determine." *Chow v. City of Santa Barbara*, 217 Cal. 673, 22 P.2d 5 (1933).

119. *Trelease, Policies for Water*, 5 NATURAL RESOURCES J. 1, 32 (1965).

pectation of *A*'s which could be characterized as reasonable; for however uncertain New York riparian law presently may be in certain respects, most New York riparians know that the rule that riparian rights are not lost by non-use prevails in their state. It could be suggested, moreover, that *A*, instead of complaining when compelled to relinquish *B*'s share, should count himself fortunate because he had been allowed to use it without liability during the period of *B*'s non-use.¹²⁰

It has also been asserted in substance that the uncertainty as to the extent and duration of a riparian right attributable to the riparian doctrines of reasonableness, survival of unused rights, and variability discourages the private development of water resources because private riparians are reluctant to invest in a project based on water rights when they have no assurance as to their extent and duration.¹²¹ Although the degree to which this assertion is true is not accurately known,¹²² the amount of truth in it is probably too great to be cavalierly overlooked. Thus in 1967 both farmers and industrialists were still complaining to New York water officials about the risks inherent in investing in water-based activities under New York's present riparian system.¹²³ On the other hand, it is doubtful that the private development of water resources is currently being so much deterred by the existing uncertainty as to the extent and duration of riparian rights as to require the complete abandonment of the reasonableness, survival of unused rights, and variability doctrines by retention of which flexibility in the water use pattern in response to changed conditions may be facilitated. The fact that the variability principle has thus far seldom been actually applied in furtherance of this end¹²⁴ does not preclude the possibility that there will be future use for it

120. A would be free from liability under § 429-j of the N.Y. Conservation Law, and under the reasonable use version of the riparian doctrine, if it were true that because of *B*'s failure to make use of the water, he would be unable to show that *A*'s use was causing him harm. RESTATEMENT OF TORTS ch. 41, at 346 (1939); 6A AMERICAN LAW OF PROPERTY 163-64 (Casner ed. 1952); 5 POWELL REAL PROPERTY § 712 (1962); 50 IOWA L. REV. 141, 143 n.14 (1964)).

121. Trelease, *Policies for Water*, 5 NATURAL RESOURCES J. 1, 23 (1965).

122. See text accompanying note 4 *supra*.

123. In this connection it should be noted that the N.Y. Commission on the Preservation of Agricultural Land at 27 of its report to the Governor dated Jan. 1, 1968, recommended that the Water Resources Commission provide irrigation permits that would be attached to land so long as it remains in agricultural use.

124. Trelease & Lee, *Transfer of Water Rights*, 1 LAND & WATER L. REV. 1, 4 (1965).

when mounting demands for water generate pressure for changes in the water use pattern. That belief in the desirability of these doctrines as a preserver of flexibility still exists to a significant extent in the eastern states is indicated by the number of provisions in eastern permit statutes which either place time limits on the duration of permits or even go so far as to make permits revocable at any time.¹²⁵ As the enactment of these statutes was no doubt preceded by careful consideration of pros and cons, their passage affords appreciable justification for the view that it would be inadvisable for New York to abandon the reasonableness and variability principles completely.¹²⁶

And the doctrine that riparian rights survive non-use cannot be abandoned without injustice¹²⁷ to the many New

125. As in Iowa a water use permit may not endure for more than ten years without renewal [IOWA CODE § 455A.20 (1966)], and may be cancelled to protect the public interest or to prevent injury to person or property, the status of the permittee is "little more than a mere tenant at will of the use." Hines, *A Decade of Experience under the Iowa Water Permit System*, 7 NATURAL RESOURCES J. 499, 547 (1967). MINN. STAT. ANN. § 105.44(g) (1963) still provides that permits are subject to cancellation at any time if necessary to protect the public interest despite the statement of the Minn. Water Resources Brd. in its 1963 report on water law study at 48-49 that Minnesota water use permits are insecure. The second sentence of the ambiguous provision in MISS. CODE ANN. § 5956-05 (1966 Cum. Supp.) that "No water appropriation acquired pursuant to law shall be declared forfeited and surrendered except by a court of competent jurisdiction as other property rights are determined. Provided, however, upon good cause shown, the board may modify or terminate any appropriation at any time," points toward uncertainty in the duration of permits; the degree of uncertainty depending upon the construction which the courts put upon the phrase, "upon good cause shown." See also ARK. STAT. ANN. § 21-1306 (1947); MICH. STAT. ANN. §§ 3.533 (22) and 13.145 (1) (1967); 58 N.J. STAT. ANN. § 1-44 (1937); TEX. WATER COMM. rule 205.4; WIS. STAT. ANN. § 30.18 (1964).

126. As favoring limitation of the duration of water rights, stressing the importance of flexibility, and supporting the variability principle, see Maquis, Freeman & Heath, *Movement for New Water Rights Laws*, 23 TENN. L. REV. 797, 832, 835 (1955); HABER & BERGEN, *WATER ALLOCATION IN THE EASTERN U.S.* (ch. by Haar & Gordon) 38 (1958); CRIBBET, *ILLINOIS WATER RIGHTS*, 48 (1958); ALLEE, *GOVERNMENTAL FACILITATION OF IRRIGATION IN NEW YORK* 375 (doctoral thesis) (1961); Maloney, *Eastern Laws Concerning Minimum Stream Flows*, paper delivered at SOUTHEASTERN WATER LAW CONFERENCE 301 (1961); O'Connell, *Iowa's New Water Statute*, 47 IOWA L. REV. 549, 578 (1962); Lugar, *Water Rights Law and Management in West Virginia*, PUBLIC AFFAIRS SERIES No. 4, W. VA. CENTER FOR APPALACHIAN STUDIES 37-38 (1967). For discussion of appropriate durations for permits for various water uses, see Trelease, *Policies for Water Law*, 5 NATURAL RESOURCES J. 1, 23-6 (1965).

127. "In the interest both of equity and of avoiding constitutional difficulties it may be desirable to protect the presently unused rights of riparian owners." Marquis, Freeman & Heath, *The Movement for New Water Law Rights*, 23 TENN. L. REV. 797, 835 (1955). "And it is admitted that these rights may have real value, as representing claims to a future water supply; they may even represent actual investment, if riparian land has been purchased at a price which includes the potential value of the undeveloped rights. To destroy such values would run counter to one of the major principles outlined above—security of investment in water rights." Trelease, *A Model Water Code*, 22 LAW & CONTEMP. PROB. 301, 319 (1957). See also CRIBBET, *ILLINOIS WATER RIGHTS LAW*, 46 (1958).

Yorkers who have invested in riparian land in reliance upon the prevalence of this doctrine in New York, and without warning of the possibility that if they did not make prompt use of their riparian rights and privileges, any person could, without obligation to make compensation, destroy the value of those rights and privileges by beginning a use of the stream or lake before they were ready to do so. The infliction of such injustice would seem to be too high a price to pay for the elimination of an uncertainty to stimulate private development of the state's water resources, particularly in view of the fact that under section 429-j of the Conservation Law enacted in 1966, it is now clear that abolition of unused riparian rights is not prerequisite to the prevention of water waste in New York, because under that section any person, whether riparian owner or not, may use all of the water in a stream or lake so long as such use does not cause present harm to other riparians. Granted that such complete use would have to be reduced when and if previously inactive riparians were ready to use the water, there would be no period of time during which water would have to flow down to the sea unused because of the existence of unexercised riparian rights.¹²⁸

Reconciliation of Need for Certainty and Flexibility

It appearing then that the doctrine of survival of unused riparian rights has been made considerably less objectionable by the enactment of section 429-j, and recognizing that it is impossible to devise a system of water law which would provide both complete certainty and complete flexibility,¹²⁹ what could be done in New York within the framework of the riparian system to achieve a proper balance between these conflicting desiderata? It is submitted that reasonable degrees of both certainty and flexibility could be provided by a statute which provided that a court, when adjudicating a water right, could specify in its decree the duration of that right. Or legislation might be adopted providing for the establishment of a permit system to be run by an administrative agency with power to issue permits to applicants

128. See text accompanying note 27 *supra*. For further discussion of the injustice involved in the uncompensated abolition of unused riparian rights, see text accompanying notes 168 to 178 *infra*.

129. Marquis, Freeman & Heath, *The Movement for New Water Rights Laws*, 23 TENN. L. REV. 797, 832 (1955).

whose proposed activities the agency could find would be reasonable and lawful when evaluated in the light of the factors by consideration of which the reasonableness of water-connected activity has customarily been determined by courts adhering to the reasonable use version of the riparian doctrine.¹³⁰ Either type of statute could specify a number of years beyond which the right or permit could not endure unless renewed after hearing the interested parties.¹³¹ While determination of water rights by administrative bodies and the establishment and operation of permit systems are practices more prevalent in prior appropriation system states than in riparian system jurisdictions, their introduction in the latter has not required them to abandon the riparian doctrine.¹³²

Constitutionality of Necessary Legislation

Inasmuch as legislation authorizing a court or administrative body, when adjudicating the water interest of riparian owner A, to specify a duration for any particular privilege recognized as existing in him might lead to a delay in the

130. As apparently indicating approval of resort to devices of substantially this sort to resolve the conflict between the need for certainty and the need for flexibility, see Marquis, Freeman & Heath, *The Movement for New Water Rights Laws*, 23 TENN. L. REV. 797, 832 (1955); CRIBBET, *ILLINOIS WATER RIGHTS LAW*, 48 (1958); Maloney, *Eastern Laws Concerning Minimum Stream Flows*, PAPERS SOUTHEASTERN WATER LAW CONFERENCE, 301 (1961); O'Connell, *Iowa's New Water Statute—The Constitutionality of Regulating Existing Uses of Water*, 47 IOWA L. REV. 549, 580 (1962).

131. Such legislation could instruct the court or agency, when fixing within the statutory limit the duration of a water right established by a decree or permit, to take into account all relevant circumstances, including the period of time in which the owner of the right could be reasonably expected to amortize his investment [comment to § 406 of the Model Water Use Act; Marquis, Freeman & Heath, *The Movement for New Water Rights Laws*, 23 TENN. L. REV. 797, 835 (1955); Trelease, *Policies for Water*, 5 NATURAL RESOURCES J. 1, 25 (1965)]; how soon the water right in question would be likely to become more harmful [Hauver, *Water for Recreation*, 44 DENVER L.J. 288, 298 (1967)]; the relative economic and social importance of the right; and the probable duration of such importance.

132. That the riparian doctrine can be administratively rather than judicially applied and enforced, see HABER & BERGEN, *WATER ALLOCATION IN THE EASTERN U.S.* (ch. by Haar & Gordon) 36 (1958). Obviously assuming the truth of this statement are suggestions that a riparian doctrine state could have an administrative reasonable use law. See HABER & BERGEN, *WATER ALLOCATION IN THE EASTERN U.S.* (ch. by Fisher) 484 (1958) and CRIBBET, *ILLINOIS WATER RIGHTS LAW* 48 (1958). Indeed, it has been said that the Iowa permit system "may be viewed as very similar to that which prevailed at common law in Iowa under the doctrine of reasonable use. Under the statute the determination as to reasonableness is made by the Water Commissioner and the Council but subject to judicial review." O'Connell, *Iowa's New Water Statute—The Constitutionality of Regulating Existing Uses of Water*, 47 IOWA L. REV. 549, 634 (1962). In a similar vein it has been said that "Aside from the changes relating to irrigation, Iowa water users have approximately the same rights under the statute as they did under common law." Hines, *A Decade of Experience under the Iowa Water Permit System*, MONO. NO. 9, IOWA UNIV. AGRIC. LAW CENTER 97 (1966).

beginning of the exercise by riparian *B* of one of his unused riparian privileges beyond the time when he became ready to use it, or might delay a decrease pursuant to the doctrine of variability in the extent of the privilege awarded to *A* and an increase in the privilege which *B* was exercising, it could be argued that if the delay in the change was longer than it would have been at common law, the legislation was unconstitutional because involving an impairment of *B*'s common law riparian interest with no provision for compensation to him.

One answer to this argument might be that in actions either for damages or for an injunction, the extent and conditions of *B*'s privileges would have to be determined at common law by what would be reasonable under all the circumstances; and that a court, or a jury under court instruction, might well find that *A*'s use remained reasonable until he had a reasonable time to curtail it, and that *B*'s use would not become reasonable until the expiration of that time. The legislation in question might therefore be viewed as basically a codification of the common law, made for the purpose of reminding the courts if the jurisdiction were left with them, of a factor which should be taken into account when passing on the reasonableness issue. If the legislation transferred the jurisdiction over water cases at the trial level to an administrative body,¹³³ it could be said that the purpose of the codification was to give that body the power to fix the duration of a riparian privilege which the courts had at common law.

Another answer which might be made to the charge that the legislation under consideration would be unconstitutional because involving uncompensated impairment of a riparian interest would be a repetition of the argument which has been made several times previously herein in support of other proposed legislation which might alter New York riparian rights:¹³⁴ viz., that this legislation would constitute a valid exercise of the police power, because in furtherance of the public interest in making appropriate adjustments in the

133. As to the constitutionality of state legislation purporting to confer judicial power upon an administrative agency, see 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 2.10 (1958). Discussion of this question is beyond the scope of this article.

134. See text accompanying notes 32 to 40, 84 to 88, and 112 *supra*.

rights and privileges of riparian owners as among themselves. It is submitted, moreover, that such uncompensated impairment of riparian rights as the legislation under consideration might cause would clearly seem to be too small to be characterized as substantial.

RELAXATION OF RESTRICTIONS ON NON-RIPARIAN USE

In one area of New York water law—that of non-riparian use—there exists a need for legislation which cannot be satisfied by a statute that merely clarifies existing uncertainties, but can be met only by one that would effect a change in New York common law now in force. A common criticism of the riparian system is that in most of the states in which it prevails, it restricts the use of stream or lake water for the benefit of non-riparian land to too great an extent.¹³⁵ In some jurisdictions such use is prohibited, even though harmless. Under what is probably the plurality view such use is prohibited if it causes harm, even though the harm would have been held reasonable and lawful if inflicted in the course of a use for the benefit of riparian land.¹³⁶ This appears to be the present New York position.¹³⁷ In only a few states is a harmful non-riparian use permitted at common law, if reasonable under all the circumstances.¹³⁸ Justification of the criticism of this discrimination against non-riparian uses is afforded by the fact that under some circumstances, non-riparian uses would better serve the public interest than riparian uses;¹³⁹ and by the further fact that some riparian

135. Marquis, Freeman & Heath, *Movement for New Water Rights Laws*, 23 TENN. L. REV. 797, 832 (1955); CRIBBET, ILLINOIS WATER RIGHTS LAW 28 (1958); "Perhaps no feature of riparian law has received more adverse and critical comment than the concept that the waters are reserved for the benefit of the lands along the stream, and that rights to the use of water are special privileges of the owners of such lands." Trelease, *Legal Contributions to Water Resource Development*, U. CONN. INST. OF WATER RESOURCES, REPORT No. 2, at 9 (1967).

136. That in the western states which still recognize riparian rights, a riparian owner can complain only of non-riparian appropriations that cause him an actual loss or injury, see Trelease, *Concept of Reasonable Beneficial Use*, 12 WYO. L.J. 1, 2 (1957).

137. *Garwood v. New York Cent. & H.R. R.R.*, 83 N.Y. 400 (1881); *Knauth v. Erie R.R.*, 219 A.D. 83, 219 N.Y.S. 266 (1926). Doubt as to the legality in New York of harmless non-riparian uses was dispelled in 1966 by the enactment of N.Y. CONSERV. LAW § 429-j (1966) which declared them lawful.

138. For collections of authorities supporting the several views see 3 TIFFANY, REAL PROPERTY 123 (3d ed. 1939); 6A AMERICAN LAW OF PROPERTY 162, 164 (Casner ed. 1954); 34 N.C. L. REV. 247 (1956).

139. "The court appears to consider that the natural allocation of water between various watersheds ought not to be disturbed by the abstraction of water from one and its diversion to another. If this is the theory of the limitation-to-the-watershed rule, the rule is not properly applicable to all types of

owners, who are not in a position to engage in a water-connected activity, would be better off if they could sell their riparian privileges to non-riparians for use in connection with non-riparian land.

The undesirably restrictive effect of the New York rule prohibiting harmful non-riparian use, even though except for its non-riparian character, it would be reasonable under all circumstances, could be considerably minimized by accompanying the already suggested clarification of the New York law as to which riparian rights and privilege can survive severance from the riparian land to which they are incident,¹⁴⁰ with a revision of the New York law which would permit uses in connection with non-riparian land if reasonable,¹⁴¹ even though they cause harm, provided the person making the non-riparian use has lawful access to the stream or lake; provided the quantity of water used by the non-riparian party is no greater than could have lawfully been used by the riparian whose transferee he is; and provided the harm caused by such use is no greater than could have lawfully been caused by the transferor of the riparian privilege if he had elected to exercise it instead of transferring it.¹⁴²

As a modest precursor to such legislation, the harmful use bill now before the New York legislature contains a provision which would permit a *riparian* owner to use his share of the water on such non-riparian land as he might own, if he found it to his advantage to do so; this privilege of shifting his place of use to be subject to the conditions specified in the preceding paragraph as to quantity with-

water uses. Uses of reasonable quantities of water for consumption would appear to be proper, whether made within the watershed or outside it. Permitting use outside the watershed may encourage uses which would not otherwise occur, but this result does not seem blameworthy if the use is reasonable." Haar & Gordon, *Riparian Water Rights*, 38 B.U.L. REV. 207, 240 (1958). "The obtaining of the maximum benefits of the use of water is a goal that is obviously not always reached by using it nearest its source." Trelease, *Legal Contributions to Water Resources Development*, U. CONN. INST. OF WATER RESOURCES, REPORT NO. 2 at 9 (1967).

140. See text accompanying notes 98 to 105 *supra*.

141. The New York rule forbidding harmful use on non-riparian land constitutes a formidable practical obstacle to the transfer of riparian rights to non-riparians. If a riparian owner has only the privilege of making a harmless use on non-riparian land, he obviously cannot transfer to a grantee a privilege to make a harmful use even though reasonable.

142. MODEL WATER USE ACT § 407 provides for non-riparian use. Relaxation of the rule against such use has occurred in several states. As to Florida, see Maloney, *Eastern Laws Concerning Minimum Stream Flows*, paper delivered at SOUTHWESTERN WATER LAW CONFERENCE 303 (1961); as to Wisconsin, see Beuscher, *Appropriation Water Law Elements in Riparian Doctrine States*, 10 BUFFALO L. REV. 448, 9 (1961).

drawable and resulting harm.¹⁴³ But would this provision and the more extensive revision in the New York law as to the legality of harmful non-riparian uses recommended above, be compatible with the view previously expressed herein that New York should solve its water problems within the framework of the riparian doctrine?¹⁴⁴ Would New York still be a riparian doctrine state if, under the conditions specified, it should permit harmful uses for the benefit of non-riparian land, provided they were reasonable under all the circumstances? It is submitted that these questions can be answered in the affirmative.

Since under such legislation a non-riparian use could be made only by a person having lawful access to the water; since such lawful access could be obtained only from or through a riparian owner by grant, prescription or eminent domain; and since the privilege of use exercised by the non-riparian party could be obtained by him only from the same source and in the same manner, the revision of New York law under consideration would not conflict with the basic premise of the riparian doctrine: viz., that the source of all private water rights is the ownership of riparian land. The privileges exercised by a person making a non-riparian use under the proposed legislation would be riparian privileges not only because they, and the prerequisite privilege of access to the water, must have been derived from a riparian owner, but also because the extent of such privileges in the hands of a non-riparian would be measured by their extent in the hands of their original riparian owner. Furthermore, the fact that under the plurality rule in riparian doctrine states, use for the benefit of non-riparian land is permitted, provided it harms no riparian owner,¹⁴⁵ shows that it has for a considerable time been widely recognized that the riparian doctrine does not make ownership of riparian land a condition to possession of the privilege of using stream or lake water.

Concerning the constitutionality of the provision in regard to harmful non-riparian use included in the harmful

143. Even this small step might be viewed as effecting a change in the common law. See *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N.W. 781 (1903) stating that a riparian owner cannot divert to non-riparian land water which he has a right to use on riparian land. Precedent for the provision to the contrary in the harmful use bill is afforded by WIS. STAT. ANN. § 30.18(5) (1964).

144. See text accompanying notes 15 & 16 *supra*.

145. See text accompanying notes 135 to 138 *supra*.

use bill and of legislation implementing the broader proposal in this area outlined above, there should be little doubt. It is true that a riparian owner attacking either could argue that it purported to permit use on non-riparian land which was harmful to him, and thus curtailed his commonlaw riparian right that no use of the water can be made on non-riparian land if it causes him harm.¹⁴⁶ But the violation of this right which either the harmful use bill or the broader legislation would permit is technical rather than substantial, because each would allow a harmful use on non-riparian land only if such use would be no more harmful to the complaining riparian than it would have been if it had been lawfully made in connection with riparian land; and because neither purports to legalize any other harmful non-riparian uses. A harmful use on non-riparian land would seem to be the substantial equivalent of a harmless use on non-riparian land, when the harmful non-riparian uses involves no more harm to the objecting riparian than he would have sustained from the riparian use to which he could not object because of its reasonableness. As the legislation under consideration would not increase the already existing risk of harm to other riparians from reasonable uses, the considerations which demonstrate the constitutionality of section 429-j enacted in 1966 and legalizing all harmless uses¹⁴⁷ would appear to establish the constitutional validity of the provision of the harmful use bill in regard to non-riparian use and of the broader proposal as well.

DESIRABLE STREAM FLOW REGULATION

When considering whether or not satisfactory solutions to New York's water problems can be achieved within the framework of the riparian system, it should be borne in mind that there is no incompatibility between that system and police power legislation so necessary under present conditions to protect the streams and lakes of the state against pollution and other destructive abuse. Thus there is already in force in New York legislation to control pollution¹⁴⁸ and to prevent undesirable alterations in the physical condition of streams.¹⁴⁹

146. See text accompanying note 137 *supra*.

147. See text accompanying notes 32 to 40 *supra*.

148. N.Y. PUBLIC HEALTH LAW arts. 11 & 12.

149. N.Y. CONSERV. LAW § 429-a to 429-g.

Expansion of the scope of the stream protection law in the interests of navigation, water quality control, fish and wildlife, recreation and scenic beauty by adding a provision that no one should reduce the level of a stream or lake below a specified minimum without having obtained a permit from a designated administrative agency would appear to be desirable and would be no more inconsistent with the riparian system than the present statute.¹⁵⁰

The distinction between such legislation and that which provides for the issue of permits to appropriate water in excess of the average minimum flow of a stream or of the average minimum level of a lake, should be kept in mind. The former, which would restrict the riparian privileges of all riparian owners in order to protect various aspects of the public interest in the water resources of the state would clearly appear to be constitutional.¹⁵¹ On the other hand, if at New York common law a riparian owner's privilege of use extends to flood water or to water in excess of the average minimum flow of a stream or of a normal lake level, and if a riparian owner has a right that this privilege shall not be unreasonably interfered with,¹⁵² the constitutionality

150. For statutes of this type in other states see ARK. STAT. ANN. § 21-1306(c) (1947); MICH. STAT. ANN. §§ 33(22), 11.300(1) and 11.431 (1960). MINN. STAT. ANN. § 110.13 (1963), N.J. STAT. ANN. § 58:1-40 (1935) and statutes collected in Heath, *Water Management Legislation in the Eastern States*, 2 LAND & WATER L. REV. 99, 105, 112 (1967). Under a bill now before the N.Y. legislature (N.Y. Senate No. 878; Assembly No. 1570) the establishment of lake improvement districts with the power to control the level of lakes within their boundaries would be authorized. An apparently similar proposal has recently been adopted in Florida. 2 WATER CONTROL NEWS, No. 11, at 8, July 31, 1967.

151. As tending to establish the constitutionality of such a regulatory stream flow or lake level statute enacted in the interests of navigation, see *People v. System Properties, Inc.*, 2 N.Y.2d 330, 343 et seq., 141 N.E.2d 429, 160 N.Y.S.2d 859 (1953); enacted to maintain water quality, see *Utica v. Water Pollution Control Board*, 5 N.Y.2d 164, 156 N.E.2d 301 (1959); enacted to protect wildlife, see *Barrett v. State of New York*, 220 N.Y. 423, 116 N.E. 99, 1918C 400 (1917); enacted to further recreation, see *People v. System Properties, Inc.*, *supra*; enacted to protect aesthetic values, see *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed for want of substantial federal question*, 375 U.S. 42 (1963); *Matter of Cromwell v. Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22, *motion for reargument denied*, 19 N.Y.2d 862 (1967); *Barrett v. State of New York*, *supra* and *People v. System Properties, Inc.*, *supra*.

152. While there appears to be no New York case establishing the privilege and right referred to, it seems likely that the New York courts would recognize them as existing in any stream or lake water which had not become surface water by separation from the stream or lake by natural forces. One basis for this assumption is afforded by cases decided in other states which the New York courts might follow. See *Miller & Lux v. Madera Canal & Irrig. Co.*, 155 Cal. 59, 99 P. 502, 22 L.N.S. 391 (1907); *Longmire v. Yakima Highlands Co.*, 95 Wash. 302, 163 P. 782 (1910); *Tilden v. Smith*, 94 Fla. 502, 113 So. 708 (1927). The contrary case of *Motl v. Boyd*, 117 Tex. 82, 286 S.W. 458 (1926) might possibly be treated as distinguishable as refer-

of the latter sort of statute would be more doubtful because providing in substance for the destruction of this riparian privilege and right without compensation. But even if such a statute could be upheld as a valid police power measure, as is entirely conceivable,¹⁵³ it is submitted that New York should not adopt that sort of legislation unless it provided in effect that in determining what water was surplus, the riparian privilege and right with respect to flood water or water above the average minimum level must be taken into account.¹⁵⁴ The enactment of such a statute lacking such a provision would be undesirable, not only because inconsistent with the riparian system, but also because it would be unjust to riparian owners who have not as yet begun to exercise their privilege with respect to flood or surplus water.¹⁵⁵

PRIOR APPROPRIATION DOCTRINE

Having attempted to show that New York water law can be substantially improved by measures no more radical than clarification and revision of its riparian doctrine, consideration will now be given to the desirability of the super-

able in part to legislation. The assumption might also find support in the analogy afforded by the New York rule that a riparian who causes harm by interfering with the flow of high water while it is still a part of a natural watercourse is liable therefor. *Howard v. City of Buffalo*, 211 N.Y. 241, 105 N.E. 426 (1914). Edward L. Ryan, thoroughly conversant with New York water law for many years, said, when legal consultant to the New York Temporary State Commission on Water Resources Planning: "Riparian rights apply to the natural flow of a stream or lake including high and low water stages." *Hearings, Before New York Temporary State Comm'n on Water Resources Planning*, N.Y. Leg. Doc. No. 15, at 141 (1964). For more extended discussion see CORNELL UNIVERSITY WATER RESOURCES CENTER, *PROFILE OF A WATERSHED: FLINT CREEK* 128 (1965). The uncertainty in New York riparian law caused by lack of New York authority as to whether riparian privileges and rights attach to flood water or to water above average minimum levels could well be added to the list of uncertainties previously set forth herein which should be clarified by legislation. See text accompanying notes 48 to 110 *supra*.

153. See text accompanying notes 80 to 88 *supra*.

154. For legislation containing such a provision see MICH. STAT. ANN., §§ 3.533 (22) (1960) *et. seq.* which permit impoundment and use of surplus water, but protect the privileges and rights of all riparians to share in the entire stream flow by defining surplus water as that which may be impounded without decreasing stream flow below its optimum flow, and by providing that optimum flow shall be determined by taking account of the range of stream flow variation, the stream's waste assimilation capacity, its practical utility for domestic use, fish and wildlife habitat, recreation, municipal and industrial water supply, commercial and recreational, navigation, public and private utilities; and by taking account of the present riparian uses of the stream, of those which may be made in the foreseeable future, and of such other factors as are necessary to preserve the rights of riparians. This legislation, which became effective in 1964, appears to be a logical development of the ideas regarding the use of water in excess of minimum flows and levels expressed in Maloney, *Eastern Laws Concerning Minimum Stream Flows*, paper delivered at SOUTHEASTERN WATER LAW CONFERENCE 295, 297 (1961).

155. As to such injustice see the text immediately following that to note 126 *supra*.

imposition of some version of the prior appropriation system on existing New York riparian law. General descriptions of the prior appropriation system present it in a very favorable light. Its advocates say in substance that it encourages the maximum development of water resources by private enterprise by assuring to a prospective investor in a water-connected project a right to a definite quantity of water in perpetuity, and that it facilitates the future alterations in the pattern of water use which should occur in response to changes in the relative economic and social importance of the various demands for water by permitting the appropriator to sell and transfer his right whenever it becomes more valuable to someone else than it is to him.¹⁵⁶

UNCERTAINTIES EXISTING UNDER THE APPROPRIATION SYSTEM

It would seem, however, that the statement that the prior appropriation system assures the prospective appropriator of a definite quantity of water in perpetuity should be qualified.¹⁵⁷ Even an appropriator with the highest priority will get less water than his appropriation calls for if a drought occurs which is so severe as to reduce the stream flow below that necessary to satisfy his appropriative right.¹⁵⁸ Since junior appropriators can take no water except what remains after the senior appropriator has withdrawn the amount he

156. See, e.g., Trelease & Lee, *Transfer of Water Rights*, 1 LAND & WATER L. REV. 1, 4 (1966).

157. "It is argued that . . . the appropriation system removes the insecurity involved in the riparian system and tends to protect and encourage investments in the development and use of water resources. But evidence indicates that this illusion of certainty is not borne out in the operation of the appropriation system in the West and that often the individual water user is no more certain of his water rights than a similar user under the riparian system." Maloney, *Florida's New Water Resources Law*, 10 U. FLA. L. REV. 119, 126-7 (1957) quoting in support of this conclusion the following statement made by Thomas Maddoch, Jr., Chief, Irrigation Operation Branch, U.S. Bureau of Reclamation in 1956: "The appropriation doctrine is presumed to set up water rights with finality and mathematical precision, but any man in the West where water use is fully developed has no idea as to his water rights." From informal oral statements made by insurance company officers, the author has gained the impression that in the West, title insurance is obtainable on water rights only for a premium higher than that charged for insurance on other interests in land, and that the title companies make little effort to sell title policies covering water rights. Assuming their accuracy, such statements point toward the conclusion that the prior appropriation system, even in its native habitat, is not credited with the ability always to assure to an appropriator a right to a definite quantity of water in perpetuity.

158. "The amount that each appropriator is entitled to receive remains fixed, if there is sufficient flow in the stream to supply it . . ." (emphasis added) Trelease, *Legal Contributions to Water Resources Development*, U. CONN. INST. OF WATER RESOURCES, REPORT No. 2, at 6 (1967).

is entitled to¹⁵⁹ and since moderate droughts, which occur not infrequently, may render the stream flow inadequate to supply all appropriators, junior appropriators may quite often find that they are unable to get all the water called for by their appropriations.¹⁶⁰ It follows then that the statement of quantity in the description of an appropriative right merely marks the upper limit of the right, and guarantees to its holder a definite quantity of water only if it is available.

Again, since holders of a contract right to water supplied by a ditch company from a single appropriation pro-rate in time of shortage,¹⁶¹ the actual extent of their water rights is indefinite except as to the maximum withdrawal permissible. Moreover, the quantity of water which an appropriator may be able to get may depend in part as a practical matter on whether or not he will be allowed to persist in an inexpensive but wasteful means of diversion. If he is not allowed to continue it, the amount of water which he can afford to withdraw may be much less than it would be if adherence to his original diversion means were permitted.¹⁶² The rule that an appropriative right is measured by the actual need of the appropriator¹⁶³ also can make it difficult to fix the quantitative extent of the appropriative right exactly. As in dry years an irrigator will need more water from the stream than in wet years, it would seem to follow that the quantity which he would be entitled to take would vary from year to year.

159. Trelease, *Legal Contributions to Water Resources Development*, U. CONN. INST. OF WATER RESOURCES, REPORT NO. 2, at 6 (1967); Hutchins, *Irrigation Water Rights in California*, CIRCULAR 452 REVISED, CALIF. AGRIC. EXPERIMENT STATION 27, 33 (1967).

160. "[T]he certainty claimed for uses under appropriation rights may be somewhat exaggerated. The certainty attaching to an appropriation rights, particularly one of junior priority, can be no greater than the dependability of the water supply." HABER & BERGEN, *WATER ALLOCATION IN THE EASTERN UNITED STATES* (ch. by Fisher) 86 (1958).

161. SAX, *WATER LAW: CASES AND COMMENTARY* 280 (1965).

162. This would apparently be true even under the new Alaska Water Use Act of 1966, which has been described as "regulated prior appropriation in its most modern form, with much old baggage removed and many undesirable features eliminated." Trelease, *Alaska's New Water Use Act*, 2 LAND & WATER L. REV. 1, 14, 34-35 (1967).

163. Trelease, *Legal Contributions to Water Resources Development*, U. CONN. INST. OF WATER RESOURCES, REPORT NO. 2, at 6 (1967); Hutchins, *IRRIGATION WATER RIGHTS IN CALIFORNIA*, CIRCULAR 452 REVISED, CALIF. AGRIC. EXPER. STATION 28 (1967).

Since appropriative water rights can be lost by abandonment or forfeiture for non-use,¹⁶⁴ they obviously are not perpetual in any absolute sense; and the abandonment and forfeiture issues are often hotly disputed. It follows that in certain instances an appropriator will not know whether he has lost part or all of his right, and so will be ignorant of its exact extent, until the abandonment or forfeiture issue has been adjudicated.

The relation of the factors referred to above to the transferability of an appropriative water right is obvious. Since they create uncertainty as to its quantitative extent and as to its very existence, and since such uncertainty will discourage some prospective buyers, they will decrease its marketability. An industrial concern considering the purchase of an irrigator's appropriative right in order to secure a water supply would have to reckon with the possibility that its quantum would vary from year to year, since the amount to which the irrigator would be entitled was measured by his need, which would vary from year to year. Under such conditions, the general rule that an appropriative right is transferable loses an appreciable amount of its practical significance.¹⁶⁵ Moreover, since transfer of appropriative water rights is permitted only if it can be effected without prejudice to the other holders of water rights on the stream,¹⁶⁶ a prospective buyer of an appropriative right may be faced with a difficult question of fact the answer to which can be obtained only at considerable expense.

The foregoing is not, of course, intended to suggest that the uncertainties as to the extent of appropriative water rights are so great as to lead to the conclusion that the prior appropriation system should be abandoned in the West as well as rejected in the East. The economic and social gains

164. Trelease, *Legal Contributions to Water Resources Development*, U. CONN. INST. OF WATER RESOURCES, REPORT NO. 2, at 7 (1967); Hutchins, *Irrigation Water Rights in California*, CIRCULAR 452 REVISED, CALIF. AGRIC. EXPER. STATION 34 (1967).

165. For comments on difficulties involved in attempts to transfer appropriative water rights, see Seastone & Hartman, *Alternative Institutions for Water Transfers*, 39 LAND ECON. 31 (1963); Trelease, *Policies for Water*, 5 NATURAL RESOURCES J. 1, 33 (1965); Yeutter, *Legal-Economic Critique of Nebraska Water Course Law*, 44 NEB. L. REV. 11, 41 (1965); Comment, 42 DENVER L. J. 116 (1965).

166. WATER RESOURCES AND THE LAW (ch. by McCormick) 34 (1958); 5 POWELL, REAL PROPERTY 456 (1962). And this would seem to be true under the new Alaska Water Use Act. Trelease, *Alaska's New Water Use Act*, 2 LAND & WATER L. REV. 1, 38 (1967).

achieved under it have been too great to permit the adoption of a position so extreme. Attention has been called to these uncertainties merely to show that the prior appropriation system, like the riparian system, has disadvantages as well as advantages, and that some of the disadvantages of the prior appropriation system appear in an area in which superiority over the riparian system is claimed for it. It must be conceded, however, that the New York riparian law, even if clarified and revised to the extent suggested herein, would, if the reasonableness, survival of unused rights, and variability doctrines were retained as recommended,¹⁶⁷ involve on the whole more uncertainty than is incident to the prior appropriation system. The question, therefore, is whether in view of this, of other advantages and disadvantages respectively incident to the two systems, and of the conditions presently existing in New York, it should superimpose the prior appropriation system on its present riparian system or even borrow extensively from the appropriation system.

PROTECTION OF UNUSED RIPARIAN RIGHTS

Relevant to the first branch of this general question is the specific question as to whether superimposition of the prior appropriation system on New York's present riparian system would necessarily involve the abolition of unused riparian rights. This would depend on which version of the prior appropriation system was superimposed. In some of the states in which both appropriative and riparian rights have been recognized from an early date, unused riparian rights are protected.¹⁶⁸ However, the tendency in states which have recently superimposed the prior appropriation system on a riparian system seems to have been to shape the superimposing legislation so as to limit the protection of riparian rights to those in use at the effective date of the statute.¹⁶⁹ This is a logical position to take if encouragement of the development of unused water resources is deemed to be of overriding importance.

167. See text accompanying notes 113 to 132 *supra*.

168. Trelease, *Coordination of Riparian and Appropriative Rights*, 33 TEXAS L. REV. 24, 67 (1954).

169. See, e.g., MISS. CODE ANN. §§ 5956-01 to -30 (1966 Cum. Supp.). See also MODEL WATER USE ACT § 303.

It is submitted, however, that the interests of the owners of unused riparian rights deserve protection. The injustice which would be inflicted on them by the uncompensated destruction of such rights in the form of disappointment of legitimate expectations and of financial loss has already been adverted to. It has also been previously pointed out that the infliction of such injustice would be too high a price to pay for stimulation of private investment in water-connected activity in view of the fact that the enactment of section 429-j of the New York Conservation Law has made it unnecessary to abolish unused riparian rights in order to prevent the waste of water in New York.¹⁷⁰

Constitutionality of the Abolition of Unused Riparian Rights

It should be noted, however, that while statutes purporting to abolish unused riparian rights without compensation have been stricken down by some courts as unconstitutional, other courts have upheld such statutes;¹⁷¹ and undoubtedly would not have done so had they believed that they would subject the owners of unused riparian rights to serious injustice.¹⁷² And it must be conceded, moreover, that the decisions upholding the constitutionality of zoning legislation furnish analogical support for the validity not only of the legislation previously recommended herein to effect appropriate adjustments in the rights and privileges of riparian owners as among themselves,¹⁷³ but also for the validity of a statute purporting to abolish unused riparian rights without compensation.¹⁷⁴ If a landowner can constitutionally be deprived without compensation of his privilege to devote his land to industrial use, if he has not exercised that privilege before the enactment of the restrictive ordinance, it would seem that an owner of riparian land could constitutionally be deprived without

170. See text accompanying notes 127 and 128 *supra*.

171. For discussion of the constitutionality of such statutes and for citations to the divided authorities, see Trelease, *COORDINATION OF RIPARIAN AND APPROPRIATIVE RIGHTS*, 33 TEXAS L. REV. 24, 62-7 (1954); Marquis, Freeman & Heath, *The Movement for New Water Law Rights*, 23 TENN. L. REV. 797, 828 (1955); CRIBBET, *ILLINOIS WATER RIGHTS LAW*, 41, 6 (1958).

172. As to the consideration given by the courts to possible disappointment of reasonable expectations and possible unfairness when deciding whether a statute constitutes a valid exercise of the police power, see text accompanying note 26 *supra*.

173. See text accompanying notes 85 & 86 *supra*.

174. Trelease, *Coordination of Riparian and Appropriative Rights*, 33 TEXAS L. REV. 24, 67 (1954); Trelease, *Policies for Water Law*, 5 NATURAL RESOURCES J. 1, 37 (1965).

compensation of his privilege to use the body of water to which his land is riparian, if he had not exercised that privilege prior to the passage of the destructive legislation. Of course, just as a zoning ordinance is invalid as confiscatory if it forbids all the uses to which the land is reasonably adapted,¹⁷⁵ a statute abolishing unused riparian rights might be held invalid if the land, because shorn of them, could not reasonably be used for any purpose. As most riparian lands, however, would be reasonably capable of some use, even when minus their normal riparian rights, it is entirely conceivable that an uncompensated abolition of riparian rights could be held valid as against the great majority of riparian owners.¹⁷⁶

Reasons for Protecting Unused Riparian Rights

It is submitted, nevertheless, that unused riparian rights should not be abolished in New York without compensation. The mere existence of a power does not establish the wisdom of exercising it at every opportunity.¹⁷⁷ There would appear to be a significant difference between the expectations and plans of a purchaser of ordinary land and those of a purchaser of riparian land. Whereas the buyer of ordinary land often has no specific use in mind and is entirely willing to have the future fate of his land determined by the course of unpredictable events, the buyer of riparian land normally invests in it primarily because he intends at some time to exercise the riparian rights incident to it.¹⁷⁸ Consequently an abolition

175. *Arverne Bay Construction Co. v. Thatcher*, 278 N.Y. 222, 226, 15 N.E.2d 587, 117 A.L.R. 1110 (1938); *Stevens v. Town of Huntington*, 20 N.Y.2d 353, 229 N.E.2d 591, 283 N.Y.S.2d 16 (1967).

176. Analogical support for this suggestion seems to be afforded by *Dennis v. Village of Tonka Bay*, 156 F.2d 672 (1946) upholding a zoning ordinance restricting riparian land to residential use, although enforcement of the ordinance prevented the riparian owner from exercising his riparian privilege of constructing a commercial boat dock. *Accord*, *Poneleit v. Dudas*, 141 Conn. 431, 106 A.2d 479 (1954). But an ordinance of this sort has been held confiscatory where the burden on the riparian owner by the restriction was heavy and the public benefit from the ordinance was small. *Johnson v. Apton*, 18 N.Y.2d 668, 219 N.E.2d 868 (1966).

177. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 739; 20 A.L.R.2d 633 (1949); *CRIBBET, ILLINOIS WATER RIGHTS LAW*, 46 (1958).

178. "The fronting of a lot on a navigable stream or bay often constitutes its chief value and desirability whether for residence or business purpose. The right of access to the property over the water, the unobstructed view of the bay and the enjoyment of the privileges of the waters incident to ownership of the bordering land would not in many cases be exchanged for the price of an inland lot in the same vicinity. In many cases doubtless the riparian rights incident to the ownership of the land were the principal if not the sole inducement leading to its purchase by one and the reason for the price charged by the seller."—*Thiesen v. Gulf, Fla. & Ala. Ry.*, 75 Fla. 28, 79 So. 491 (1918). See also *Petraborg v. Zontelli*, 217 Minn. 586, 15 N.W.2d 174, 181 (1944).

of those rights, even if it does not render the land useless, involves a loss to him which he will feel is confiscatory, even though it may not be legally so classifiable.

A specially undesirable consequence of the superimposition on the New York riparian system of a version of the appropriation system which abolished unused riparian rights would be the reduction which would occur under such version in the amount of riparian land which could be counted upon to serve as a physical base from which to make recreational use of streams and lakes. For example, suppose that when the superimposing legislation was enacted, *A* owned land riparian to a lake; that although the lake was suitable for boating, fishing and swimming, *A* had never used the lake for these purposes; that after the effective date of the act, *A* sold his riparian tract to *B*, who began to boat on the lake and to fish and swim in it; and that *C* thereafter applied for an appropriative right to withdraw so much water from the lake for purposes concededly beneficial that its utility for recreational purposes would be destroyed if his application were granted, would *B*'s recreational uses be protected?

If the provision for the elimination of unused riparian rights were held constitutional, as is entirely conceivable though not entirely certain,¹⁷⁹ *B*'s recreational enjoyment of the lake would get no protection unless the superimposing legislation contained a provision that an appropriation of water for recreational purposes could be effected without a diversion—a provision which apparently has not as yet been embodied in the legislation of any appropriation doctrine state; or unless the legislation provided for the withdrawal from appropriation of waters specially adaptable to recreational use,¹⁸⁰ and *B* had persuaded the agency or official having jurisdiction to exercise this power with respect to the lake to which his land was riparian; or unless *B* could persuade such agency to deny *C*'s application on the ground that it would be against the public interest to grant it.¹⁸¹ Otherwise *B*'s recreational use would have no protection. *B*

179. See text accompanying notes 171 to 175 *supra*.

180. See the statutes cited in Hudak, *Modern Western Legislation as a Pattern for Changes in the Law of Mont. Water Rights*, 28 MONT. L. REV. 95, 99-100 (1966).

181. See Trelease, *Alaska's New Water Use Act*, 2 LAND & WATER L. REV. 1, 48 (1967).

did not acquire *A*'s unused riparian recreational privileges and rights because the new legislation would have destroyed them before *B* bought *A*'s riparian tract. *B*'s exercise of such privileges gave him no appropriative recreational right, because diversion of water is essential to the acquisition of any appropriative water right,¹⁸² and because merely boating upon, or fishing or swimming in a lake obviously does not constitute a diversion of it.¹⁸³

Granted that if one of the conditions above referred to were fulfilled, *B* would have protection for his recreational uses despite superimposition of a prior appropriation system which did not preserve unused riparian rights, he could be more certain of such protection, at least to a reasonable degree,¹⁸⁴ under New York's present riparian law, because *A*'s recreational privileges and rights, even though never used by *A*, would have passed to him by the conveyance of *A*'s riparian tract. In Mississippi with its irretrievably silted water, or in West Virginia with its scarcity of lakes and its urgent need for industrial development, the creation of a hazard to unused riparian recreational rights by resort to the prior appropriation system might be a matter of relatively small consequence; but in New York with its multitude of beautiful streams and lakes eminently suitable for recreational uses, the creation of any hazard to such uses should be avoided unless offset by advantages in other areas greater than the prior appropriation system appears likely to offer. In view of these considerations it is submitted that if New York decides to superimpose a prior appropriation system on its present riparian system, it should choose a version of the prior appropriation system which protects unused riparian rights.

182. HUTCHINS, *SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST* 303 (1942); *Empire Water & Power Co. v. Cascade Town Co.*, 205 F. 123 (1913); SAX, *WATER LAW: CASES AND COMMENTARY* 54 (1965) quoting decision D 1030 of the Calif. Water Rights Board in 1961; *Colorado River Water Conservation Dist. v. Rocky Mt. Power Co.*, 406 P.2d 798 (Colo. 1965).

183. Trelease, *Alaska's New Water Use Act*, 2 LAND & WATER L. REV. 1, 43 (1967). Since use of a riparian right can be established without showing a diversion, *A*'s recreational use would have been protectible as part of his riparian interest, if he had begun it prior to the enactment of the superimposing legislation, and so would have passed to *B* by a conveyance of *A*'s riparian tract.

184. That the rule that no riparian privileges are absolute and unconditional but are exercisable only to a reasonable degree applies to recreational privileges see *George v. Village of Chester*, 202 N.Y. 398, 95 N.E. 767 (1911).

PERPETUAL WATER RIGHTS

Also relevant to the general question as to whether New York should superimpose a prior appropriation system on its existing riparian system is the specific question as to whether such superimposition would necessarily involve creation of water rights which would be more nearly perpetual than a water right ought to be; *i.e.*, rights destructible only by abandonment, forfeiture, prescription or eminent domain. Since rights of such durability are apparently characteristic of all western prior appropriation systems, including the newest,¹⁸⁵ and since a system which did provide for rights less durable could, therefore, scarcely be classified as a prior appropriation system,¹⁸⁶ an affirmative answer to this question would seem proper; and such an answer would furnish a cogent reason why New York should not take the prior appropriation road. The importance of retaining the riparian doctrine principle of variability to a limited degree in order to facilitate shifts in the pattern of water use in response to changes in the relative importance of the several water-connected activities has already been pointed out.¹⁸⁷ To abandon that principle altogether in order to encourage development of water resources by private capital would be going unnecessarily far, since, as already indicated, it would seem possible to achieve a proper balance between the need for certainty and the need for flexibility within the framework of the riparian system.¹⁸⁸

185. Even under the Alaska Water Use Act, which may well be the most nearly perfect prior appropriation legislation now in force (*supra* note 151), appropriative water rights, once acquired, exist in perpetuity, unless abandoned, forfeited for cause or taken by eminent domain. Trelease, *Alaska's New Water Use Act*, 2 LAND & WATER L. REV. 1, 36-37 (1967). While appropriative rights can be destroyed by prescription in some western states [Hutchins, *Irrigation Water Rights in California*, CIRCULAR 452 REVISED, CALIF. AGRICUL. EXPERIMENT STATION 35 (1967)], the Alaska Act expressly provides that they cannot be acquired by prescription (ALASKA STAT. § 46.15.140 (1962)); and it would seem to follow that they could not be destroyed by prescription.

186. If the correct interpretation of the Mississippi statute is that water rights created under it can be terminated for good cause shown, and that a desire to make water available to a prospective user whose activity would be of more public importance than that of a holder of a previously issued permit would constitute good cause [*supra* note 117], it is doubtful that the customary classification of the Mississippi legislation as a prior appropriation act is justified.

187. See text accompanying notes 121 to 126 *supra*.

188. See text accompanying notes 129 to 132 *supra*.

EFFECT ON GOVERNMENTAL WATER PROJECTS

As increasing demands for water in New York and all too frequent droughts have made time of the essence with respect to the completion of public projects designed to protect and augment the supply of water available to the people of the state, any action which would tend to delay the completion of such projects would clearly be contrary to the public interest. As pointed out above, lack of knowledge as to the extent of the private water rights which would be affected by such projects imposes a severe handicap on those who must plan, execute and operate them.¹⁸⁹ It follows that if an attempt to superimpose some version of the prior appropriation system on existing New York riparian law would substantially retard the clarification of the New York law as to private water rights, that fact would constitute another serious objection to such an attempt. It seems all too likely that this would prove to be the case.

If a bill were introduced to superimpose some version of the prior appropriation system on New York's riparian system, it is unlikely that a decision as to whether to enact it or defeat it would be soon arrived at. The speed with which New York's recent anti-pollution legislation was enacted was in large part referable to a great surge of public desire for clean streams and lakes which had been sedulously built up during a long period of time. It seems unlikely that a proposal to adopt some version of the prior appropriation system would be swept on to quick adoption by a similar swollen tide of public opinion. While proposals have indeed been made by a few New York citizens and at least one organization that New York permit the appropriation of so-called surplus waters, which would probably involve a partial substitution of appropriation law for riparian law,¹⁹⁰ there has been no demand for such a step which could properly be characterized as public. Substantially the same statement can be made with respect to the more general request of agriculture and industry for water rights more certain as to extent and duration. While this request has been renewed from time to time, it has never been widely publicized, and seems not to have been accompanied by the suggestion that authorization of

189. See text accompanying notes 7 to 14 and 108 to 110 *supra*.

190. See text accompanying notes 151 to 155 *supra*.

the acquisition of appropriative water rights would be the best way to achieve the desired certainty.

The people of New York have lived for almost 200 years under the riparian system; and apparently not many of them have ever given thought to the possibility that their failure to achieve greater prosperity than they now enjoy may be attributable to their acquiescence in that system, or that adherence to it has seriously retarded the development of the state's water resources or has involved injustices which cry for remedy. A proposal to superimpose some version of the prior appropriation system on New York's riparian system would in all probability be met with strong opposition¹⁹¹ which would be encouraged by the deceleration of the trend toward the prior appropriation system which began in the eastern states ten years ago,¹⁹² by the go-slow attitude toward that system recommended by qualified commentators,¹⁹³ and by the continued presence on the statute books of

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191. It is worthy of note in this connection that when the New York Joint Legislative Committee on Natural Resources was sponsoring the bill which when enacted added part V on Water Resources Planning & Development to N.Y. CONSERV. LAW Art. 5 (1966), it deemed it advisable to state that it would create no new water rights, that all present rights and privileges to the use and control of waters would be preserved, and that the rights of all water users would be guaranteed; apparently to avoid opposition from those who desired continued adherence to the riparian system, at least in general. N.Y. Leg. Doc. (1959) No. 22, 158-165. "A case has not been made for significant change in our riparian rights system, and I would hate to think that a system which has its roots and took shape over a period of 600 years would be changed without the most careful consideration." Statement by Joseph R. Shaw on behalf of the Associated Industries of New York, *Hearings, Before New York Temporary State Comm'n on Water Resources Planning*, N.Y. Leg. Doc. No. 15, at 152 (1964). "Our department certainly is not ready for major changes in the water resources laws, or even in the water rights and riparian laws." Statement by Horace S. Evans on behalf of the New York Dept. of Public Works, *Id.* at 154. "Early in the presentation, the riparian principles was defined as an attitude of luxury and enforced waste. From our standpoint the riparian principle might better be defined as an attitude of responsibility and enforced conservation . . . Even a casual glance at a map of the Empire State indicates how much of our development, both economic and social, has been affected by water . . . This development has been achieved through and is dependent on the *firm* basis of riparian rights. Our present and future economic growth will require the maintenance of such rights." Statement by Ronald B. Peterson on behalf of the New York Dept. of Commerce, *Id.* at 155.
 192. As to the original direction of the trend, see Maloney, *Florida's New Water Resources Law*, 10 U. FLA. L. REV. 119, 126 (1957); HABER & BERGEN, *WATER ALLOCATION IN THE EASTERN U.S.* (ch. by Haar & Gordon) 36 (1958); Hines, *A Decade of Experience Under the Iowa Permit System*, 7 NATURAL RESOURCES J. 499, 518 (1967). But a recent count shows only two eastern states as having substantially adopted the western law of prior appropriation. Trelease, *Legal Contributions to Water Resources Development*, U. CONN. INST. OF WATER RESOURCES, REPORT No. 2, at 10 (1967).
 193. CRIBBET, *ILLINOIS WATER RIGHTS LAW* 44 (1958); HABER & BERGEN, *WATER ALLOCATION IN THE EASTERN UNITED STATES* (ch. by Haar & Gordon) 47 (1958); Maloney, *Eastern Laws Concerning Minimum Stream Flows*, paper delivered at SOUTHEASTERN WATER LAW CONFERENCE 301 (1961); Agnor,

other eastern states of provisions for the protection of riparian rights which are not in express terms, at least, limited to rights already exercised.¹⁹⁴ Though such opposition might in some cases be founded on misconceptions, it would nevertheless be difficult to deal with. Persons and corporations now exercising riparian privileges and enforcing riparian rights to their advantage and profit would be apt to fear that at least part of what they now enjoy would be taken from them by the introduction of a dual system of water law. To persuade them that this was not so; that the situation of others could be improved by such a measure without prejudicing their own, would require a persistent educational campaign of long duration, even if the truth lay on the side of the proponents of change which, for reasons pointed out hereinbefore, is somewhat less than certain.

Since the introduction of legislation superimposing some version of the prior appropriation system on the New York riparian system would immediately render the status of New York riparian rights even less certain that it now is until such legislation was either enacted or defeated; since that status would remain as uncertain as it now is, if such legislation were defeated, except in the unlikely case that legislation of the sort recommended herein were considered contemporaneously and passed; and since the outcome of the educational campaign without which legislation superimposing appropriative rights could have no hope of passage might take many years to resolve, it is submitted that the introduction of such legislation would delay for too long a period the clarification of New York private water rights which should be effected to facilitate the planning and execution of public water projects, and would, therefore, be contrary to the public interest.

paper delivered at SOUTHEASTERN WATER LAW CONFERENCE 65 (1961); OHIO WATER COMMISSION, RECOMMENDATIONS ON WATER POLICY AND LEGISLATION 13 (1965); Kendall, *Basic Concepts of Private Water Rights*, PROCEEDINGS NEW ENGLAND WATER RIGHTS LAW CONFERENCE 15 (1966).

194. See, e.g., DEL. CODE ANN. § 6461 (1953); MICH. STAT. ANN. §§ 3.583, 11.437, 11.451, 11.455, 11.459, 11.463, 11.464(2) and 11.466 (1961); Ch. 781, § 9, [1959] N.C. Sess. Laws; CODE OF LAWS OF S. CAR. § 70.47 (1962). And the Minn. Water Resources Board recommended at 50 of its 1963 report on water law that protection of vested common law private water rights be provided by amendment of MINN. STAT. ANN. § 105.45 prescribing criteria for the granting of permits. See also as to the relation of the N. Car. Water Use Act of 1967 to riparian rights, Aycock, *North Carolina's Water Use Law*, 46 N.C. L. REV. 1 (1967), especially at 3-4.

Moreover, even if legislation superimposing some version of a prior appropriation system on the existing New York riparian system were to be enacted shortly after introduction, it seems unlikely that the outlines of private water rights in New York would have been made particularly clear by such action. Judging from the western experience under systems of water law which recognize both appropriative and riparian rights, it is likely that the superimposition of any version of the prior appropriation system on New York riparian law would give rise to numerous uncertainties, and that these would constitute new impediments to public projects until discovered, analyzed and eliminated. The coordination of appropriative and riparian water rights in such a way as to accord fair protection to both has often proved to be a difficult task.¹⁹⁵ Because of the tolerance by the federal government of the enterprising activities on the public lands of trespassing miners who evolved a prior appropriation system of their own without benefit of legislation or judicial decision, some of the western states were forced to develop a dual system of water rights to avoid the perpetration of grave injustice.¹⁹⁶ New York, however, is not so coerced by a fait accompli. If a dual system of water rights appears to be disadvantageous in the light of present conditions, New York is free to reject it. It is submitted that for the reasons already given a dual system would be disadvantageous, and should be rejected.

CONCLUSION

It must be admitted, of course, that even the conservative proposals for the clarification and revision of New York riparian law which have been made herein might not be promptly implemented by legislation and that the discouraging uncertainties as to the law on many important points

195. Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water*, 33 TEXAS L. REV. 24 (1954). That the superimposition of a prior appropriation system on Mississippi's riparian system has left and created a number of uncertainties as to private water rights in that state, see Champion, *Prior Appropriation in Mississippi: A Statutory Analysis*, 39 MISS. L.J. 1 (1967). It is conceivable, of course, that the legislation superimposing an appropriation system could be so skillfully drafted in the first instance as to leave or create no uncertainties; but the experience in Mississippi and elsewhere suggests that such perfection is not likely to be achieved at so early a stage.

196. TRELEASE, BLOOMENTHAL & GERAUD, *CASES AND MATERIALS ON NATURAL RESOURCES* 2-3 (1965).

and the overly strict limitations on non-riparian use might continue for a considerable time, even though the task of clarification and revision were not complicated by an attempt to superimpose prior appropriation principles. It seems probable, nevertheless, that the legislation recommended herein could achieve passage more readily than any providing for the creation of appropriative rights, for it would not only include the following desirable features:

- (1) Protection for the investor in riparian land by preserving unused riparian rights as well as those already in use;
- (2) Encouragement of construction of dams and reservoirs by preventing riparian owners below them from sharing in the resulting increased water supply except on equitable terms;
- (3) Definitions of domestic use and of riparian land;
- (4) Clear legalization of harmful uses of any sort, when reasonable under all the circumstances; and express authorization of consideration of the public interest when passing on reasonableness;
- (5) Facilitation of alteration in the pattern of water use in response to changing conditions by making it clear that riparian rights are transferable, and by retaining the riparian principle of variability;
- (6) Achievement of a proper balance between the conflicting desiderata of certainty and flexibility by permitting a court or administrative agency to guarantee in an appropriate case that the use declared reasonable may be continued for a specified time; and
- (7) Relaxation to a reasonable degree of the restrictions on non-riparian uses;

but would provide them within the framework of the riparian system to which state officials concerned with water matters, the legislature, the courts, and the people at large are accustomed. In short, it is submitted that the important task of eliminating uncertainties in New York water law in order to encourage the development of the water resources of the state by private enterprise, and the even more important

task of preparing the way for governmental projects for the protection and augmentation of New York's water resources by clarifying the extent of private water rights in New York, could be more effectively expedited if an attempt were made to perform those tasks by legislation which would fit easily and naturally into the existing riparian doctrine framework than by legislation which provided for the superimposition of some version of the prior appropriation system on New York's present riparian law.