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Evaluation of the Legal Institutions of Diversion, Transfer, Storage, and Distribution of Water in Kentucky

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EVALUATION OF THE LEGAL INSTITUTIONS OF DIVERSION, TRANSFER, STORAGE, AND DISTRIBUTION OF WATER IN KENTUCKY

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1968
ABSTRACT

In 1966 Kentucky enacted a water use regulation statute which makes important modifications in the common law doctrine of riparian rights by authorizing the state to grant permits for the use of water. The permit system is primarily designed to allow the state to gather the information necessary to conduct long range planning studies. However, the permit system can also be used to apportion water among competing users. The report examined the common law of riparian rights to determine how KRS Ch. 151 had modified it and analyzed some of the legal problems which could arise in the administration of the statute. The standards for granting or denying a permit were examined in light of the purpose of Chapter 151. Important common law modifications such as the abolition of the watershed limitation were considered. The procedural rights of applicants and third parties effected by the issuance of a permit were criticized because they do not provide an adequate hearing and notice procedure. The constitutional questions raised by the failure of the Chapter expressly to protect prior vested rights were considered. The report concludes with an examination of some emerging problems caused by the increased use of the state's water for recreation.

FCST Category VI-E

Key Words - Legislation*, Legal aspects*, Permits, Water Law*, Riparian rights, Planning
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Chapter I

INTRODUCTION

In 1966 Kentucky joined the growing list of Eastern states to partially abandon the riparian system and enact a comprehensive statute regulating water use. It has been characterized by a political scientist as having "strong regulatory powers diluted by broad exemptions"\(^1\)--thus it is a typical example of Kentucky's legislative style. Nonetheless it is an important first step for it provides some of the legal structure necessary for the future management of the state's water resources. The purpose of this monograph is to describe systematically and evaluate Kentucky laws and judicial decisions relating to the diversion, transfer, and storage of water in light of the state's present and future needs.

Kentucky is a water-rich state. It has a statewide average rainfall of 45 inches which "is reasonably well distributed over the state."\(^2\) Thus, the state has adequate streamflows and ground water supplies to meet its present and future needs if they are managed properly. Shortage problems do, however, exist. In 1930 and again in 1953 many areas of the state experienced severe short-run droughts\(^3\) and many areas today face this possibility because of inadequate carry-over storage facilities.

Kentucky's water needs are diverse and growing. Population patterns


\(^2\)Department of Natural Resources, Kentucky Water Resources: 1965 8 (1965).

and the projected regional role of the state will determine future demands. Prior to the mid-1960's Kentucky's population was virtually static because a high out-migration cancelled most of the natural increases.\(^4\) This out-migration has been substantially reduced because of a successful state industrial recruitment campaign. Substantial intra-state migration is taking place and the population is increasingly being concentrated in the state's urban areas such as Louisville, Paducah, Greater Cincinnati, Lexington, Bowling Green, Owensboro and Ashland. Kentucky is expected to have some three and three quarters million people by 1980, but will still be one of the less populous states in the southeast and midwest. This means that it will increasingly serve as an agricultural and recreation reserve for the more populous urbanized states to the north and west.

These briefly are the kinds of water demands the state will face in the future: (1) Agriculture--Most farmers still rely on natural rainfall and small storage ponds but the use of irrigation is increasing, especially for tobacco. It is estimated that some 103.7 billion gallons per year will be required by 1980.\(^5\) (2) Industry--New industry, especially the chemicals, paper, and metals require large quantities of water. However, most uses are non-consumptive and the major problems are not quantity but the quality of the discharges into streams and ground water basins.\(^6\) (3) Municipal--The state's growing areas will require additional supplies but no long range shortages are forecast.\(^7\) (4) Recreation and Fish and Wild Life--These uses are non-consumptive but large quantities of water are required to support them. Mechanisms must be created to insure minimum flows and lake levels.


\(^5\)Id. at 21-23.

\(^6\)Id. at 24-26.

\(^7\)Id. at 26-27.
With its 531 square miles of mountain streams, rivers, lakes and reservoirs Kentucky's recreation potential is unlimited because of its proximity to the urban midwest and east if adequate supplies are reserved for these uses.\(^8\)

(5) Pollution abatement--The use of streams to purify polluted discharges will continue for the foreseeable future although federal and state regulatory programs are being implemented.

Kentucky may also serve as a source of supply for its more populous neighbors such as Ohio, Indiana, and Illinois. If water becomes scarce in those states, they may turn to Kentucky for additional supplies. Interstate compacts similar to those along the Colorado River in the West may have to be negotiated.\(^9\)

The Department of Natural Resources estimated that by 1980 Kentucky will consume 477,000,000 gallons per day in addition to the large quantities of water which must be reserved for non-consumptive use.\(^10\) This will still not put a severe strain on the total amount of available supply as it is estimated that some 12 trillion gallons of water are available each year as a result of natural rainfall after evaporation.

Kentucky's abundance of natural water supply does not mean that the state will be without problems. The failure of cities to provide adequate storage facilities to augment their historic source of supply may cause short-run shortages. It is often stated that resources should be managed to

\(^8\) Id. at 27-29.


\(^10\) Id. at 18.
encourage their multiple use, but not all uses of water are compatible. The use of a reservoir for flood control storage may conflict with its use as a summer playground if it is drawn down to provide water for downstream cities during the hot months or to provide room for winter and spring run-offs.\textsuperscript{11} Systems analysis using models now being developed by the Division of Water may result in pressures to shift water from one location to another in order to maximize the benefits capable of being derived from a limited supply and the state's legal institutions must be capable of responding to new criteria for allocating water in order to facilitate the most efficient use of the commonwealth's water resources.

The Division of Water is currently developing a number of computer models to study the best use of the Commonwealth's water resources. The project is financed by Title III funds authorized by the Water Resources Planning Act of 1965.\textsuperscript{12} One possible location scheme is suggested by the following excerpt from the Division's 1967 progress report:

Water is an almost universally used resource, and is relatively scarce in many areas. A serious attempt must be made to allocate the available supply in the most efficient way possible. This implies the development of a quantitative method for measuring the value of water used in alternate ways. Other studies have utilized


the concept "value added per unit of water used" to classify industry types in accordance with their contribution relative to their water use, and that seems to offer a fruitful possibility here. It will not, in and of itself, answer all questions with respect to the best utilization of the water resource, but it provides a quantitative measure which may be combined with qualitative aspects of the problem in arriving at allocation and planning decisions. Once these values have been determined, it is possible to combine them with information relative to the geographical dispersion of industry within the state and thus to estimate the regional consequences of shifts in final demand for products produced anywhere within the state. The importance of the concept for planning is obvious. In areas of actual or potential water shortage the push for increased industrialization should be in the direction of those industries where the ratio is high—i.e., where value added per unit of water use is great. In areas where there is an actual or potential water shortage and where there is an established industry showing high value added per unit of water used, then rich rewards await increased availability of water resources.

However, it should be noted that value added per unit of water used is not the same thing as the marginal revenue productivity of water in the industry's technology. Value added per unit of

* Value added is used here in the technical sense. That is, for a given industry, value added is equal to the total market value of its output less the value of intermediate goods it uses as inputs.
water in the industry will be large whenever the numerator of the ratio is large in comparison with the denominator. 13

13 Id. at 41-42.
Chapter II

THE COMMON LAW OF RIPARIAN RIGHTS

HISTORICAL INTRODUCTION

Kentucky does not have a well-developed common law of water rights reflecting the absence of substantial use conflicts during most of its history. The state's early water problems were centered around the elimination of health hazards caused by swamps and the improvement of navigation on the Ohio River and its tributaries rather than conflicts among consumptive users. For example, Louisville was known as the graveyard of the west and a mecca for doctors after it was plagued by a series of epidemics caused by its swamps along the Ohio River.\textsuperscript{14} A public drainage program was started in 1811 and the hazard was eventually eliminated. A canal company was formed in 1835 to dig a canal around the Falls of the Ohio which impeded navigation on the river.\textsuperscript{15} The important conflicts of the recent past have been ones of pollution, principally between coal miners and downstream riparians, and surface drainage. These problems will not be covered in this report except as they relate to the allocation and distribution of water. These examples serve only to illustrate the focus on the state's natural resource problems which predominated during its early history and to serve as a contrast to the kinds of problems the state may face in the future.

The common law of riparian rights is still important, however,

\textsuperscript{14}Wade, The Urban Frontier 87 (1959).

\textsuperscript{15}Ibid. at 137.
because several elements of it have been incorporated into K.R.S. Ch. 151. The common law distinction between water flowing or standing in a natural water course and diffused surface water is the basis of the Division of Water's regulatory jurisdiction. K.R.S. 151.210 preserves the domestic preference for riparians as well as other rights.\(^{16}\) Thus, an understanding of K.R.S. Ch. 151 must start with a brief discussion of the Kentucky common law of riparian rights.

**History of Riparian Doctrine in Kentucky**

Kentucky has followed the doctrine of riparian rights rather than the western doctrine of prior appropriation. Riparian rights attach to those who own land adjacent to a natural stream or watercourse, as one commentator explained it, "simply by virtue of his ownership of land."\(^{17}\) The riparian right was conceptualized as an incident to the adjoining property, thus the rights passed with a grant of riparian land regardless of whether they were specifically conveyed.\(^{18}\) Further, the right was neither lost by nonuse nor were any acts of intention to use or actual use required to perfect a riparian right. The right could be asserted whenever the downstream riparian decided that he was threatened by the use being made of the water by the upstream riparian.

The doctrine of riparian rights has historically been considered a branch of the law of real property. This has led to a rigid view of the right and forms that basis for the frequently asserted claim that any public interference with the right would be a taking of private property

\(^{16}\)K.R.S. 151.120(1) (1966).

\(^{17}\)The Commonwealth of Massachusetts, Legislative Research Council Report: Rights to Surface and Subsurface Waters in Massachusetts 18 (1957).

\(^{18}\)Clark, ed. Waters and Water Rights 53.4 (1967).
for which compensation must be paid. However, the position that the laws
governing the use of land should govern the use of water are untenable
in light of the history of the common law as it developed in England and
the United States.

The English common law developed during an era when water use con-
flicts were not serious and there was little attempt to formulate a
functional theory of water rights. The English courts frequently announced
that rule that "every man has a right to have the advantage of a flow of
water in his own land without diminution or alteration," except as one
might acquire a prescriptive right.\footnote{\textit{Bealey v. Shaw} 6 East 208, 102 Eng. Rep. 1266 (1805). In the case
an upstream mill owner enlarged his sluice which reduced the flow avail-
able to the downstream owner. The court held for the downstream mill
owner on the theory that he had been the first to use the water, although
he had not used it for the prescriptive period, and thus was entitled to
an injunction. The English court in effect applied the doctrine of prior
appropriation rather than the natural flow theory.}

Thus, the first user on the stream
might gain all the water or a downstream riparian might be able to enjoin
all upstream use without showing any injury by the upstream use but this
doctrine was never applied to its logical conclusion but the important
fact for an understanding of American water law is that it was not accepted
by American scholars during the time when the American common law or
riparian rights was being developed.\footnote{The history of the doctrine is admirably discussed in \textit{Lauer, The
Common Law Background of the Riparian Doctrine}, 28 Mo. L. Rev. 60 (1963),
and \textit{Lauer, The Riparian Right as Property, Water Resources and the Law}
133 (1958).}

The two leading American scholars who developed the American common
law are Justice Story and Chancellor Kent. The test adopted by Justice
Story and promulgated by Kent in his Commentaries was derived both from
The civil law, developing, from Roman law had never been burdened with the tension between the absoluteness of private property rights in land and the difficulty of applying these concepts to water. The civil law, as reflected in the Code Napoleon of 1804, gave each riparian on the stream a co-relative right to use the water. Adjustments were to be determined by the facts of the individual case. The English common law had been struggling toward this position but had never clearly conceptualized the development. Story recognized the potential economic absurdity of the English common law and turned instead to the French Law and its Roman origin because of their emphasis on the correlative rights of each user along the stream.

Kentucky's first case adopted Justice Story's reasonable use theory, although latter cases fumbled around conceptually before returning to a clear enunciation of it. The leading Kentucky case on the law of riparian rights is Anderson v. Cincinnati Southern Railway. Plaintiff operated a grist mill over a stream and defendant built a nine foot high dam upstream to store water for its trains which diminished the flow of the stream causing the mill to stop. The court stated the basic premises of riparian law: (1) every proprietor of lands along the banks of streams has an equal and usufructory right to the water while it passes his land, (2) the law distinguishes between domestic and artificial uses. The land owner may use all the water necessary to supply his domestic needs but he is limited to a reasonable and proportionate share of the water necessary for artificial uses. The court found that supplying railroad trains was a

22 86 Ky. 44 (1887).
reasonable but artificial use of the water and stated that the relevant inquiry was "whether its use for the purposes the railroad injured the mill below." The court held that plaintiff would be entitled to an injunction if he proved injury. Anderson is a straightforward and correct application of the reasonable use standard but the opinion caused considerable conceptual confusion for subsequent courts because the court originally dropped the phrase that "every proprietor ... has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it is wont to run without diminution or alteration."23 Although this was immediately contradicted by the next sentence which said "No proprietor has a right to use the water to the prejudice of other proprietor above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment."24 The natural flow theory was further rejected when the court emphasized that recovery could not be had on a simple showing of upstream diversion but that there had to be a showing of diversion plus injury.

In Krawer v. Smith,25 a 1915 decision, a distillery was polluting a stream by discharging slop. A lower riparian sued and was granted an injunction on the somewhat garbled theory that the riparian is "entitled to the natural flow of the water, unimpaired in quality, except as may be occasioned by reasonable use of the stream by other proprietors" but the court did emphasize the need to show substantial injury before an injunction could be granted, so it is clear they were applying the reasonable use theory.

23 Id. at 48.
24 Id. at 48–49.
25 164 Ky. 674, 177 S.W. 286 (1915).
In 1949 the court of appeals was still unsure of which theory it had adopted. In *City of Louisville v. Tway*\(^\text{26}\) defendant dammed a creek which impeded its flow and plaintiff lower-riparian alleged that this aggravated the stream's pollution condition because the velocity was no longer sufficient to flush the stream. The lower riparian naturally urged the natural flow theory and the court surprisingly agreed saying, "it is true that, as suggested by counsel, that our court is committed to the natural flow theory" but then said it made little difference which theory applied as no injunction could issue unless a substantial showing of injury was made. The court's opinion about the consequences of the two theories shows complete confusion but the result indicates that the reasonable use theory was always the law in Kentucky.

The confusion in the Kentucky cases was eliminated in 1954 when the legislature enacted a statute codifying the reasonable use rule.\(^\text{27}\) K.R.S. 262.690(1) limited the riparian to the amount of water reasonably necessary to meet his needs. The domestic preference was retained but language intended to limit its application was included.\(^\text{28}\)

There have been few cases which have defined the concept of reasonable use in Kentucky.\(^\text{29}\) Most of these have dealt with the right of the upper

\(^{26}\) 297 Ky. 565, 108 S.W. 2d 278 (1949).

\(^{27}\) Kentucky's 1954 water law statutes were modeled after similar enactments in Virginia. See Note, A Comparative Analysis of Kentucky Water Law 43 Ky. L. J. 504 (1954).

\(^{28}\) K.R.S. 262.690 (1) limited water for domestic use to "household purposes, drinking water for livestock, poultry, and domestic animals."

\(^{29}\) For a discussion of the reasonable use doctrine see Murphy, A Short Course on Water Law for the Eastern United States, 1981 U.L.Q. 93, 96-102, 109-10.
the courts have devised no consistent set of criteria to determine if a given use is reasonable. They have relied both on categories of uses which are uniformly unreasonable, such as pollution, and on the proposition that no use can be classified as unreasonable except in the context of the use with which it conflicts. There have been few Kentucky

30 See, e.g., Crabtree Coal Mining Co. v. Hamby's Adm'r, 28 Ky. 90 S.W. 226 (1906).

31 See, e.g., Inland Steel v. Isaacs, 283 Ky. 770, 143 S.W. 2d 503 (1940).

31a Compare Crabtree Coal Mining Co. v. Hamby's Adm'r, 28 Ky. 687, 90 S.W. 226 (1906) with North-East Coal Co. v. Hayes, 224 Ky. 639, 51 S.W. 2d 960 (1932). Both cases involved conflicts between the holder of the surface estate and the holder of mineral rights who was alleged to have damaged the surface estate by pollution. In Crabtree the court held for the surface owner on the theory that the company had a right to use the stream "in a reasonable degree but it may not materially alter its quality." The court's reasoning mixes both the reasonable use and per se unreasonable theories of pollution but its tone indicates that it considered substantial pollution unreasonable per se. In North-East Coal Co., the court applied a reasonable use analysis to the right of the mineral owner to pollute the surface owner's water supply as part of his mining operations, saying that the holder of the minerals would be liable for pollution only if the damage could have been avoided by "ordinary care" or "reasonable expense" on his part.

31b See Lauer, The Riparian Right as Property, supra note at 196.

cases where the reasonable use rule has been applied to allocate water between two or more riparians who desire to use more water than the stream can supply by decreeing mutual curtailment of their present manner of use. The Court has only rejected the two most inefficient consequences of the natural flow theory. The strict common law view was that both diversions and impoundments were unreasonable per se. These views have been explicitly rejected by the Court of Appeals in favor of the more rational position that these uses can only be held unreasonable in the context of other competing uses. The court of appeals has in dictum, however, adopted a general formulation of the reasonable use rule. In *Daughtery v. City of Lexington*[^32] plaintiff desired to construct a motel and restaurant on riparian land above the city of Lexington's reservoir. The city of Lexington denied the necessary building permit and the court of appeals sustained the denial because plaintiff failed to allege his sewage disposal system would not endanger the purity of the public water supply. Defendant argued that he was entitled to make reasonable use of his property as a riparian and argued that his proposed use would be reasonable. In the course of its opinion the court quoted from a Michigan case which defined reasonable use in the following terms. In the course of the opinion the court quoted with approval from a Michigan case[^33] which said "But in determining whether a use is reasonable we must consider what the use is for, its extent, duration, necessity, and its application; the nature and size of the stream, and the several uses to which it is put; the extent of the injury to the one proprietor and of the benefit to the other; and

[^32]: 249 S.W.2d 775 (Ky. 1952).
[^33]: People v. Hubert, 131 Mich. 156, 170, 91 N.W. 211, 217 (1902).
all other facts which may bear upon the reasonableness of the use."
Vague as this formulation is, it does give some indication of the factors
a court would use in making an allocation of a stream between competing
riparians.

**DEFINITION OF A WATER COURSE**

The common law attached different consequences to different categories
of water. The two major classifications were: (1) diffused surface water,
and (2) water flowing in a natural stream or standing in a watercourse such
as a lake. The former was considered the property of the owner of the land
on which they were found.\(^{34}\) The latter were the common property of all
land owners adjacent to the stream and allocated by the doctrine of riparian
rights.

The difference between the two basic classifications is buried in
history and a full historic examination of the development of these doctrines
is beyond the scope of this paper. Their primary modern importance is
that they serve to define the Division of Water's jurisdiction. K.R.S.
151.120 limits the Division's jurisdiction to public water which is defined
as "Water occurring in any stream, lake, ground water, subterranean water,
or other body of water in the Commonwealth which may be applied to any
useful and beneficial purpose . . ." Diffused surface water is not public
water "and the owner of land on which such water falls shall have a right
to its use."

K.R.S. 151.100(5) defines diffused surface water as "that water
which comes from falling rain or melting snow or ice, and which is diffused

\(^{34}\) Clark, ed., Waters and Water Rights, section 521(A) (1967).
over the surface of the ground, or which temporarily flows vagrantly upon
or over the surface of the ground as the natural elevations and depressions
of the surface of the earth may guide it, until the water reaches a stream or
watercourse." K.R.S. 151.100(4) defines a stream or watercourse as "any
river, creek or channel having well defined banks, in which water flows
for substantial periods of the year to drain a given area, or any lake or
any other body of water in the Commonwealth." It is not clear whether
K.R.S. 151.100(4)-(5) merely incorporates common law or attempts to sub-
stitute a more narrow definition of watercourse. The common conception
of a natural watercourse is a stream flowing in a definite channel with
a bed and banks or a lake in well defined bed. The common law definition,
however, is much broader. K.R.S. 151.100(4) could be read to limit the
Division's jurisdiction by not incorporating the many cases which have
held various types of flood waters which had left their normal channel to
be still flowing in a watercourse and thus subject to the doctrine of ripar-
ian rights.

The leading Kentucky decision on the definition of a watercourse is
Morgan v. Morgan. Defendant sought to build a roadway across Twin Creek
which separated his land from plaintiff's. Plaintiff sued for damages
alleged to have resulted from the deposit of rocks and metal beneath the
roadway. The main issue was whether defendant was entitled to an easement
of necessity. The Court of Appeals held he was but desired to limit its

35 Clark, ed., Waters and Water Rights section 52.1(B) (1967).
36 Id. at section 52.1(B).
37 205 Ky. 545, 266 S.W. 35 (1924).
scope to protect plaintiff from any flooding which might result from obstructing a natural stream as his road would be built over the highwater mark. Thus, it became necessary if the fill was placed in a natural stream in order to determine if it was entitled to protection as a riparian. The court held that plaintiff could compel the removal of the obstructions if she could prove probable injury because they were placed within the boundaries of a natural stream. It defined a stream as follows:

"A 'watercourse' in the legal sense of the term does not necessarily consist merely of the stream as it flows within the banks which form channel in ordinary states of water. When, in time of ordinary high water, the stream, extending beyond its banks, is accustomed to flow down over the adjacent lowlands in a broader, but still definable stream, it still has the characteristic of a watercourse, and the law relating to water courses is applicable, rather than that relating to mere surface water." 38

Morgan illustrates that the hydrologic problems which will give the court the most trouble in defining the Division's jurisdiction will result from flooding and overflow situations. It is difficult to define at what point waters which rise above the normal level of the stream cease to be water flowing in a natural stream or watercourse and become diffused surface waters. There are two criteria the courts use (1) the area covered by the flow, and (2) the continuity and frequency of the flow. It is clear that at common law water does not automatically become diffused surface water when it leaves the normal channel. If the court finds that there is

38 266 S.W. at 36.
an area which is regularly subject to flooding or overflows, it has often been held that this constitutes a natural stream or watercourse. The question is obviously one of degree and the court is less likely to make this finding as the water spreads farther away from its normal channel. If the overflow is limited to a section of the stream, the court is less likely to classify the water as diffused than if the water never returns to the normal channel or forms a channel with definable banks. For example, in a recent California case defendant impounded what he alleged to be diffused surface waters. Plaintiff, a downstream riparian, sued alleging interference with his rights claiming that the waters were part of a stream system. The court held that the defendant was entitled to the waters because they did not enter the reservoir by a well defined channel or watercourse and thus were diffused surface waters.

The definition of a watercourse adopted by the court of appeals in Morgan could be held to be precluded by K.R.S. 151.100(4). Morgan holds that a stream can be a watercourse when it leaves its banks if the flow maintains a definite course, while 100(4) could be read to confine the commission's jurisdiction to water within the banks of the stream. Flood water could thus be captured without the necessity of obtaining a permit from the Division.

If K.R.S. 151.100(4) is narrowly read the Division will be deprived of jurisdiction over a potentially large source of water. There is evidence that the legislature did not intend to substitute a new definition for

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the common law definition of watercourse. K.R.S. 151.120(1) and (2) appears to create two classes of water, public and private. Diffused surface water is private and is defined as "water which flows vagrantly over the surface of the ground . . ." This appears to be a codification of the common law definition, while public water is water flowing or standing in a watercourse as defined by K.R.S. 151.100(4). If 151.100(4) is not read to incorporate the broadest common law definition of watercourse, Ch. 151 creates three classes of water, public, private, and flood waters subject to the doctrine of riparian rights. There is no evidence that the legislature intended to this result. Rather it is more logical to assume it intended to substitute allocation by permit for the riparian system except where the common law was specifically retained in K.R.S. 151.120. Either K.R.S. 151.100(4) should be construed by the courts to incorporate the common law definition of a watercourse or it should be amended to do so.

Two other frequently litigated issues are (1) the point at which a watercourse begins, and (2) the frequency of the flow required to constitute a watercourse. In Kentucky the issues will often arise to determine if the flow of a series of springs has become a natural stream. For example, in Winters v. Berea College the college erected a dam across its land at the location of five underground springs. A riparian on a stream below the dam site sued alleging interference with her rights and it became necessary to classify the water. The court held that riparian had the burden of proof and that the evidence failed to prove the existence of a watercourse.

\[41\] 349 S.W.2d 357 (Ky. 1961).
It showed only that there was a hollow below the dam which had a few pot holes which contained water after a rain. The absence of any showing of periodic flow down the hollow seems to be the basis for the court's holding. In the course of its opinion it defined the commencement of a watercourse as follows:

"It has been stated that surface water becomes a natural watercourse at the point where it begins to form a reasonably well-defined channel, with a bed and banks, or sides and current, although the stream itself may be very small and the water may not flow continuously. So, while the term 'water course' does not ordinarily include water descending from hills, down hollows and ravines, only in times of rain and melting snow, yet where water, owing to the hilly and mountainous configuration of the country, accumulates in large quantities from such courses, and at regular seasons descends through long, deep gullies or ravines on the land below, and in its onward flow carves out a distinct and well-defined channel, which bears the unmistakable impress of the frequent action of running water, and through which it has flowed from time immemorial, such stream constitutes a water course and is governed by the rules applicable thereto "56 Am. Jur. 498 (Water 8).

The issues in these cases will be more factual than legal. The doctrines enunciated by the courts can only provide future courts and administrators with rough guidelines. Precise definitions can only come through case by case adjudications of concrete problems.

\[42\] Id. at 358.
There is a need to re-examine the utility of incorporating common law classifications into Ch. 151. The classification of waters should be based on the nature of the claim asserted against them rather than on historic distinctions which have become artificial. Historically diffused surface water was considered a liability and not an asset. It was something to be gotten rid of before it did extensive damage to the surface of one's property. Thus, the rules governing its use (discussed infra) are designed to adjudicate property damage claims by fixing liability between landowners rather than to allocate a scarce resource. It has been frequently stated by the courts in dictum that the upper riparian can impound all the diffused surface water flowing across his land regardless of the detriment suffered by a lower riparian although no Kentucky case so holds. This rule will be unsound as diffused surface water increasingly becomes an important source of water supply and must be allocated among competing users. It should, however, be noted that considerable coordination can presently be achieved through judicial or administrative use of the elastic definitions of natural stream or watercourse. Large quantities of flood water are potentially subject to public regulation if the Division of Water follows the lead of the Court of Appeals and broadly interprets the meaning of natural stream or watercourse.

Chapter 151 should be amended to achieve the coordination of all potential sources of water supply. The Model Water Use Act includes the following provision designed to achieve hydrologic coordination:

43 The common law doctrines are extensively discussed in Dolson, Diffused Surface Water and Riparian Rights: Legal Doctrines in Conflict, 1966 Wis. L. Rev. 58.

44 For a discussion of the common law rule see Maloney and Plager, Diffused Surface Water: Scrouge or Bounty? 8 Natural Resources J. 72, 108-111 (1968).
After the effective date of this Act, no reservoir, dam, embankment, pond, or other device or structure for impounding or collection of diffused surface waters where the amount of water so impounded or collected exceeds [ acre-feet may be constructed or established unless a permit has been obtained from the Commission. The Commission is authorized to issue general and specific permits.

The comments following the section give the following reason for the coordination.

In order to secure intelligent management of the uses of the waters of the state and to avoid interference with these uses when made in accordance with the Act, it is necessary for the Commission to have power over all water resources which reasonably could cause interference with uses sanctioned by the Act. This section recognizes the scientifically established fact that all waters whether above, upon, or beneath the earth are part of one hydrological cycle and that an interference with one phase of the cycle affects other phases. Specifically, an interference with the flow of diffused surface water affects the flow of streams and lakes since great amounts of water found in these collected bodies reach them in the form of diffused surface water. By giving the Commission control over any substantial interference with the flow of diffused surface water, the plans of the Commission for development of the waters of the state under the permit system will be

secure. Further, conflicts which may arise between users of stream and lake supplies and users of diffused surface supplies can be avoided by allowing the Commission power to plan and regulate all the waters of the state.\textsuperscript{46}

The reasons are sound and KRS 151.120(2) should be amended to provide that a person wishing to impound or divert diffused surface waters must secure a permit.\textsuperscript{47}

DEFINITION OF RIPARIAN LAND

It is axiomatic that riparian rights attach only to riparian lands. The generally accepted definition of a riparian owner is that "A riparian owner is an owner of land bounded by a watercourse or through which a stream flows, and generally only such an owner may claim or exercise riparian rights which are those rights which actually touch on the watercourse or through which the watercourse flows."\textsuperscript{48} This definition is incorporated into K.R.S. 151.210, discussed infra, which gives certain preferences and rights to owners of land contiguous to a public stream.

The definition of a watercourse has been previously discussed and often it will be necessary to find the existence of a watercourse before it can be determined if the land is riparian.

It is generally accepted that riparian land must be within the watershed of the stream if the diversion threatens the reasonable uses

\textsuperscript{46} Model Water Use Act 402 comment (1958).

\textsuperscript{47} Iowa and Mississippi have enacted coordination statutes. The right to use diffused surface waters is conditioned on the maintenance of an average minimum flow for downstream users. Iowa Code 455A.27 (Supp. 1964) and Miss. Code Ann. 5956-02(i) (1958).

\textsuperscript{48} Armstrong v. Westroads Development Co., 380 S.W.2d 529 (Mo. 1964).
being made by riparians within the watershed.\textsuperscript{49}

The division of a tract of land into tracts which are no longer contiguous to the stream destroys the riparian right under the California rule\textsuperscript{50} but not under the Oregon rule.\textsuperscript{51} The California rule is that "The riparian right extends only to the smallest tract held under one title in the chain of title leading to the present owner." The person purchasing a non-riparian segment of a riparian tract can, of course, protect himself by purchasing water rights from the riparian at the time of the transfer.\textsuperscript{52}

It is probable that the Court of Appeals will adopt the California rule if called on to decide the question although neither K.R.S. 151 nor the cases require that result. K.R.S. 151.210 speaks of an owner or owners of land contiguous to public water but does not clearly specify if the section applies only those presently owning contiguous land. It would be reasonable to assume that "presently" is implied for the non-contiguous owner may obtain a permit to divert water to non-contiguous lands if he has not obtained rights by a prior transfer.

\textbf{RIGHTS TO GROUND WATER}

Ground water is a source of water supply in all parts of Kentucky but its two principal areas of use are the Ohio River Valley strip and the Jackson Purchase. Its use is still small compared to surface water but it is expected to increase as municipalities and industries increasingly

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\textsuperscript{49}\textit{Anaheim Union Water Co. v. Fuller}, 150 Cal. 327, 88 Pac. 978 (1907).
\textsuperscript{50}\textit{Boehmer v. Big Rock Irr. Dist.}, 117 Cal. 19, 48 Pac. 908 (1897).
\textsuperscript{51}\textit{Jones v. Conn}, 39 Ore. 30, 64 Pac. 855 (1901).
\textsuperscript{52}Modern cases hold that riparian rights may be served from the land and sold, \textit{Mianus Realty Co. v. Greenway}, 151 Conn. 128, 133 A.2d 713 (1963), but the non-riparian transferee is subject to the rule of reasonable use. \textit{State v. Apfelbacher}, 167 Wis. 233, 167 N.W. 244 (1918).
\end{flushright}
rly on wells for their supply. It is unlikely that Kentucky will ever experience the severe over-draft problems which have plagued central Arizona and portions of California. However, as the use of ground water increases, pumping in excess of the safe annual recharge may occur in portions of the state and it will be necessary to adjudicate conflicts among competing users.

Kentucky has never enacted legislation dealing specifically with ground water. Those conflicts which have arisen have been resolved by the common law. Chapter 151 includes "ground water" within the definition of public water but has no special provisions to regulate the drilling and management of wells. The most serious problems are pollution of ground water supplies and certain aspects of this problem are covered by other legislation. For example, any person desiring to drill or deepen, reopen a plugged well for purposes of fluid injection for the production of oil and gas must obtain a permit from the Director of Oil and Gas Conservation in the Department of Mines and Minerals. Pollution of the ground water supply is a factor to be considered by the Director in the issuance of the permit and the condition attached to it.

The term "ground water" has no precise meaning for the hydrologist as it had for the common law. The common law classified "ground water" into two categories: (1) percolating waters and (2) water flowing in underground streams. The consequences of the classification were that percolating water was held to be the private property of the overlying owner and thus subject to his exclusive use. Water flowing in an underground stream was governed by the law of riparian rights.

These categories have long been criticized by hydrologists and legal scholars as artificial because they are unrelated to scientific fact. The basic criticism is that they ignore the interrelationship between surface and subsurface systems and thus frustrate management programs designed to coordinate the development of a watershed. Thomas and Luna summarize the defects in the common law classificatory system as follows:

"Yet it is clear that this isolation can only be maintained only when and where water is being mined from underground storage. Any water pumped from wells under equilibrium conditions is necessarily diverted into the aquifer from somewhere else, perhaps from other aquifers, perhaps from streams and lakes, perhaps from wetlands, ideally, but not necessarily, from places where it was of no use to anyone. There are enough examples of streamflow depletion by ground-water development and of ground water pollution from wastes released by surface waters, to attest to the close though variable relation between surface water and ground water."\(^{54}\)

Ground water basins are generally managed to balance the rate of withdrawal against the rate of recharge so that an optimum time distribution can be achieved and present needs balanced against future needs. The period used to determine equilibrium conditions varies.\(^{55}\) A yearly

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\(^{55}\) Id. at 11-13.
period is generally used and ground water is considered being "mined" -- the depletion of a stock resource--if the annual rate of withdrawal exceeds the annual rate of recharge. However, longer time periods may be used, if withdrawals are coordinated with the use of other sources of water. For example, it has been proposed that the State of California manage the ground water basins in Southern California so that they would be drawn down during dry cycles and replenished during years of excess run off. Proposed management programs such as this illustrate the need to coordinate the laws governing allocation of ground water with those governing the allocation of surface water in order to maximize the efficiency of the program.

The Kentucky common law was what is known as the "American rule" of ground water. The first case Nourse v. Andrews, adopted the strict common law rule rather than the American rule. Plaintiff lower riparian sought to enjoin defendant city from using two springs for its water supply alleging that they were part of the source of a river which flowed through plaintiff's land and thus his water supply was being depleted by defendant's withdrawals. The plaintiff, in effect, argued that the springs and river were part of one water supply system and each user's right was correlative to the others. Unfortunately plaintiff was unable to show that the springs affected the supply of the river. The court adopted the common law rule that all ground water is presumed to be percolating and the party


57 200 Ky. 467, 255 S.W. 84 (1923).
alleging the existence of an underground stream has the burden of proof. The court concluded that the evidence showed only that the springs were separated from the river by a low ridge and that they continued to flow during dry cycles while the river became only a series of stagnant pools. The case is a correct application of the common law. It is unfortunate that the facts did not establish an interrelationship between the springs and the river as it would have given the court an opportunity to develop some guidelines to coordinate the use of ground and surface supplies.

The court announced the common law rule as follows:

"The law seems well settled that water percolating through the soil is not, and cannot be, distinguished from the soil itself. The owner of the soil is entitled to the waters percolating through it, and such water is not subject to appropriation." However, "once a stream is known to exist the presumption is that it has a fixed and definite channel through which it flows and which varies only with the erosion which the water produces."\(^{58}\)

The absolute ownership rule has similar consequences to the rules governing capture of oil and gas although the justifications vary and logically should lead to different results. The overlying owner has the right to capture all the oil and gas beneath his land. He may create a pressure differential and cause oil or gas to drain to his property from adjoining tracts as long as his wells are confined within vertical planes corresponding to the surface boundaries of his property. The reason given by the courts was that oil and gas are analogous to wild animals and birds

\(^{58}\)Id. at 86.
which constantly migrate from one place to another and thus ownership of the tract on which they--or the oil and gas alight--is the only basis for ownership. The reason given by the Norse court for ownership of percolating water is much closer to scientific fact. Subsurface liquids tend to be relatively stationary and migrate only when a pressure differential is created beneath an adjoining tract. The logical consequence of the Norse court's assertion that percolating water can not be distinguished from the soil itself is that the overlying owner could enjoin an adjacent owner from pumping if he proved that pumping caused drainage from his land. It could be conceptualized as analogus to his right of trespass against anyone removing soil without his consent but the Court of Appeals has applied the rules of capture of oil and gas to ground water.\(^{59}\) Each overlying owner has a correlative right to pump and if one creates a pressure differential and causes drainage, the remedy of the other is to go and do likewise. This rule functions to the benefit of society as long as there is an abundance of the resource or society desires to encourage rapid exploitation, but it results in an inefficient use of the resource if there is a need to conserve it for future use.

Another consequence of the absolute ownership theory is the encouragement of short-run waste. Thus, Kentucky, as did most other American jurisdictions, soon modified the strict common law rule and adopted the "American" or "reasonable use" rule in Sycamore Coal Co. v. Stanley.\(^{60}\) Plaintiff overlying landowner alleged that defendant coal company drilled a sixty (60) foot core hole which caused the water of plaintiff's well to disappear.

\(^{59}\)"The right of the owner of land to drill wells and take percolating water is analogus to the right of the proprietor to take oil and gas." 
Sycamore Coal Co. v. Stanley, 292 Ky. 168, 169, 166 S.W.2d 293, 294 (1942).

\(^{60}\)292 Ky. 168, 166 S.W.2d 293 (1942).
The defendant subsequently plugged the hole and the water in plaintiff's well rose to fourteen inches contrasted with its former level of four and one half feet. Plaintiff alleged that defendant interfered with the flow of an underground stream and thus injured plaintiff's riparian rights. The court found no evidence of the existence of an underground channel and treated the problem as one of determining competing rights to percolating water. The court denied damages but in doing so adopted the "American" or "reasonable use" rule for future cases.

The distinction between the strict common law or "English" rule and the "American" or "reasonable use" rule is that under the latter "the right of the landowner to subterranean or percolating waters is limited to a reasonable and beneficial use of the waters under his land, and he has no right to waste them through malice or indifference, if, by such waste he injures a neighboring land owner." If, however, the use of the water is found to be "legitimate" the owner is entitled to all he can use regardless of the depletion caused to his neighbor's supply.

The reasonable use rule for ground water should not be confused with the reasonable use rule applied to surface waters. The former reasonable use rule does not grant each overlying owner a right to a proportionate share of the ground water in the basin. It merely places limited restraints on the use the overlying owner may make of the water. He cannot waste it by letting it flow from the well but as long as his use is considered "legitimate" he is entitled to all the water he desires. The limited scope of the reasonable use rule is illustrated by an analogous early Kentucky case from the law of oil and gas. In Louisville Gas Co. v. Central Kentucky.
Natural Gas\textsuperscript{61} two adjacent leasees competed for the contract to supply gas to Louisville. The contract was awarded to plaintiff and defendant retaliated by extracting large amounts of gas to manufacture carbon black. 90,000,000 cubic feet were extracted to produce a quantity lampblack worth about $12.00. The Court of Appeals enjoined the continued operation of the factory reasoning that "plaintiff and defendant have each the right to take gas from the common source of supply, but neither may by waste destroy the rights of the other." The reasonable use doctrine thus makes it virtually impossible to coordinate surface rights with ground water rights because it places minimal restraints on the overlying owners scope of use.

The successful assertion of riparian rights to an underground stream depends on a showing that the stream was a known as opposed to a hidden underground stream. If the overlying owner makes a reasonable use of water supplied by underground springs he is not liable to adjoining land owners for injuries to their wells if the springs are fed by "hidden underground streams flowing in unknown channels or percolating waters."\textsuperscript{52} Thus, hidden underground streams are treated by the same rules as applied to percolating waters. In Kentucky all ground water is presumed to be percolating. This means that the party asserting the applicability of riparian rights must prove that there is an underground stream. Once this is proven that burden shifts to the other party to prove that it is unknown and does not flow in a definite and fixed channel. In \textit{Commonwealth}

\textsuperscript{61}117 Ky. 71, 77 S.W. 368 (1903).

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the Court of Appeals affirmed a judgment against the Department of Highways for interference with a known underground stream and indicated some of the evidence which will be necessary to get a case to the jury on this issue. The court held that the existence of a line of green grass which grew even in dry weather was sufficient to take the case to the jury.

Mention should be made of the rules developed in California to allocate ground water. California has a hybred law of water rights for it embraces both the riparian and appropriative system. Riparians have first preference to the water and if a surplus exists, it may be appropriated and diverted to non-riparian lands. As conflicts among pumpers became acute, the California Supreme Court realized that both the English common law rule and "reasonable use" modification were unsuited for the arid west. In Katz v. Walkinshaw the California Supreme Court formulated the doctrine of correlative rights which held that each overlying owner had a right to a proportionate share of the common pool, thus applying the concepts developed to allocate surface streams to ground water basins. Conflicts continued to grow especially among municipalities which were more often appropriators rather than overlying owners. In City of Pasadena v. City of Alhambra the court was called on to adjudicate rights to the Raymond basin serving much of the San Gabriel

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63 345 S.W.2d 46 (1961).

64 141 Cal. 116, 74 Pac. 766 (1903).

Valley in Los Angeles County. Most claimants were appropriators seeking to adjudicate rights because of the continued decline in the water table. The California Supreme Court did not attempt to determine priorities to rigorously apply the doctrine of prior appropriation but instead developed a new theory—mutual prescription—to allocate the supply. Each pumper had to reduce his withdrawals by the ratio of his rate of withdrawal for the previous five years to the safe annual yield.

K.R.S. 151.120 appears to have abolished the common law distinction between waters flowing in known and defined underground streams and percolating water. All water beneath the ground is now public water and a permit must be secured for its withdrawal. Kentucky has thus taken a major step toward the coordination of surface and ground water rights for the interrelationship between the two systems can now be considered in the Division's decision to deny, grant, or condition a permit.

The declaration that all ground water is now public water could be challenged on the grounds that as applied to percolating waters it is an unconstitutional taking of property without just compensation. This argument is stronger in the case of percolating waters than in the case of modification of surface rights because of the repeated declarations by the Court of Appeals that such waters are the absolute property of the overlying owner. A number of western states have faced this argument in applying the doctrine of prior appropriation to ground waters. Early cases held ground water appropriation statutes unconstitutional but the more recent cases have held them constitutional.\[^{66}\] The rationale has been that the public interest in the efficient allocation of water resources requires

that private property rights be subject to reasonable limitations. The
general problems of the constitutionality of Chapter 151 are discussed
infra and are applicable to the constitutionality of declaring percolating
waters public.

ACQUISITION OF RIGHTS BY PRESCRIPTION

Riparian rights may be acquired by prescription. The person asserting
a prescriptive right to an ascertained amount of water must prove that his
use has been (1) open and notorious, (2) continuous, and (3) adverse to the
interests of the party against whom the prescriptive right is claimed for
the statutory period permitted by the statute for actions to recover
interests in real property. The period is fifteen years in Kentucky.

Consumptive prescriptive rights are often difficult to assert because it
must be shown that the downstream riparian against whom the right is claimed
has suffered substantial injury as a result of the alleged adverse use. If
the use is made pursuant to an agreement between the two parties, it can
not be prescriptive unless it has exceeded the scope of the agreement for
the statutory period.

Chapter 151 does not specify the relationship between prescriptive
rights and the permit system. It could be argued that KRS 151.150 means
that acquisition of a permit is now the exclusive method for obtaining a
water and thus prescriptive rights can not be obtained after 1967. However,
the more appropriate analogy might be to the recording acts where adverse
possession has always been a recognized exception in order to protect
those who have relied on the existence of firm rights based on a long period

67 Anderson v. Cincinnati Southern Ry., 86 Ky. 44, 49 (1887).
68 KRS 413.010.
of continuous actual use. If this analogy is accepted by the Court of Appeals, prescriptive and the permit system are two mutually exclusive methods of obtaining water rights.

69 For an argument that prescriptive rights should be exempted from the permit system see Kletzing, Prescriptive Water Rights in California: Is Application a Prerequisite?, 39 Calif. L. Rev. 369 (1951). The contrary view is stated in Craig, Prescriptive Water Rights in California and the Necessity for a Valid Statutory Appropriation, 42 Calif. L. Rev. 219 (1954).
Chapter III

PURPOSE OF CHAPTER 151

KRS ch. 151 creates a new system of water rights. It contains elements of the riparian system and of the doctrine of prior appropriation but does not contain all elements of either system. Like President Franklin D. Roosevelt's New Deal it is neither fish nor foul. To understand the changes made by the new system in the common law of riparian rights, it is first useful to summarize briefly the chief criticisms which have been made against it and the theories of water allocation urged by welfare economists. Structural reforms in the existing legal system have been in response to demands for greater efficiency in the allocation of our water resources.

The major defect in the riparian system has been its inability to create rights to a firm quantity of water in advance of litigation and the fact that often water can not be transferred to non-riparian land unless the user is able to bear the cost of purchasing the riparian land. These defects are not serious when there are few water shortages, but they become extremely serious when prolonged shortages exist or incompatible uses are proposed. Some economists maintain that the function of water law is to create firm rights so that the free market can operate. If rights can be quantified for time and amount, they will become freely transferrable like any other species of property and the market will

operate to allocate them to their optimum use. There are of course several
defects in the market system. For example, it does not provide for the
allocation of rights which may have little or no market value but which
should be recognized. The preservation of a wild river is a good example
of the kind of use which would not be achieved under the market system but
which may be in the public interest.

Thus, there is a need for some state modification of the common law of
riparian rights if water is to be put to its most efficient use and the
public interest protected. Chapter 151 contains a lengthy statement of
purpose which states the Commonwealth's intention to regulate future uses
of water in broad and sweeping terms.

151.110 Water Resources, Policy Stated.
The conservation, development and proper use of the water
resources of the Commonwealth of Kentucky has become of vital
importance as a result of population expansion and concentra-
tion, industrial growth, technological advances and an ever
increasing demand on water for varied industrial, municipal
and recreational uses. It is recognized by the General
Assembly that excessive rainfall during certain seasons of
the year causes damages from overflowing streams. However,
prolonged droughts at other seasons curtail industrial,
municipal, agricultural and recreational uses of water and
seriously threaten the continued growth and economic well
being of the Commonwealth. The advancement of the safety,
happiness and welfare of the people and the protection of
property require that the power inherent in the people be
utilized to promote and to regulate the conservation, develop-
ment and most beneficial use of the water resources. It is
hereby declared that the general welfare requires that the water resources of the Commonwealth be put to the beneficial use to the fullest extent of which they are capable, that the waste or non-beneficial use of water be prevented, and that the conservation and beneficial use of water be exercised in the interest of the people. Therefore, it is declared the policy of the Commonwealth to actively encourage and to provide financial, technical or other support for projects that will control and store our water resources in order that the continued growth and development of the Commonwealth might be assured. To that end, it is declared to be the purpose of KRS Chapters 146, 149, 151, 262 and 350.029 and 433.750 to 433.757 for the Commonwealth to permit, regulate, and participate in the construction or financing officialities to store surplus surface water for future use; to conserve and develop the ground water resources of the Commonwealth; to protect the rights of all persons equitably and reasonably interested in the use and availability of water; to prohibit the pollution of water resources and to maintain the normal flow of all streams so that the proper quantity and quality of water will be available at all times to the people of the Commonwealth; to provide the adequate disposition of water among the people of the Commonwealth entitled to its use during severe droughts or times of emergency; to prevent harmful overflows and flooding; to regulate the construction, maintenance and operation of all dams and other barriers of streams; to prevent the obstruction of streams
and floodways by the dumping of substances therein; to keep accurate records on the amount of water withdrawal from streams and watercourses and reasonably regulate the amount of withdrawal of public water; and to engage in other activities as may be necessary to conserve and develop the water resources of the Commonwealth of Kentucky.

The primary purpose of this section was to establish a firm basis for state regulation in the event of a constitutional challenge to the statute but it also gives some indication of the scope of contemplated public regulation. KRS 151.110 theoretically envisions an active role for the state for it touches on almost all aspects of water planning and regulation. This is reenforced by the declaration that the state's police power must be used both "to promote and to regulate the conservation, development and most beneficial use of the water resources," of the Commonwealth.72 The phrase "beneficial use" is imported from Western State constitutions and statutes which generally provide that beneficial use is the basis, the measure, and the limit of the right to use water. The term has never been precisely defined and functions much the same as the concept of reasonable use in the doctrine of riparian rights. It defines broad categories of use which are deemed socially desirable by the state. It does not, however, incorporate precise criteria for allocating water. Thus, at best it can serve to define outer limits of the individual's right to use water in order to prevent the wasteful use of natural resources.72a

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72 The Division is empowered to study existing problems in the area and, with the approval of the Department of Natural Resources, propose any needed legislation. KRS 151.220 (2)

72a KRS 151.110 (1966) states that one of the reasons for enacting the statute was to prevent "the waste or nonbeneficial use of water...."
For example, in 1926 the California Supreme Court held that a riparian was entitled to the seasonable overflow in order to irrigate uplands and thus was required to install costly irrigation works. The consequences of this holding meant that downstream riparians and appropriators would often have little water during the spring although much larger amounts would be available if the upper riparian were limited to water actually needed to raise his crops. The specter of a full scale return to the natural flow theory lead to the enactment of Article 28, section 3 of the California Constitution which provided, "It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of this State be put to beneficial use . . . and that waste or unreasonable use or unreasonable methods of use be prevented . . . ." The California Supreme Court subsequently held that a riparian had no "natural right" to the full use of the seasonable overflow and was entitled only to a proportionate share of the overflow. Claims were to be adjusted by the concept of reasonable use. Herminghouse and the subsequent revision of

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74 Cal. Constitution Art. 28, Section 3 (1928).

75 Peabody v. City of Vallejo, 2 Cal.2d 351, 40 P.2d 486 (1935). See also Tulare Irrigation Dist. v. Lindsay-Stratmore Irrigation Dist., 3 Cal.2d 489, 45 P.2d 972 (1935). The cases are also notable for their emphasis on engineering rather than legal solutions as the preferred method of settling water use conflicts. The court held that the 1928 amendment contained the power to implement a physical solution to allocate the water among the respective claimants.
the California constitution illustrate the limitations the state may impose on water use to promote its "beneficial use." The state may limit the right to use water to the minimum rather than the maximum amount necessary to support the activity in order to achieve an optimum allocation among the greatest numbers of claimants. The reasonable use rule of riparian rights also gives the court the power to limit individual use practices which seem wasteful in view of the large numbers of competing demands on the resource. Thus, under both common law and KRS Ch. 151 the state has the power to curtail excessive water use demands.
Chapter IV

STRUCTURE OF WATER RESOURCES PLANNING

The 1966 revision of Chapter 151 created a Division of Water within the Department of Natural Resources. The Division of Water has three basic functions: (1) Long range planning for the use of the Commonwealth's Water Resources, (2) Implementation of state water plans, and (3) Adjudication of Individual Claims. This section will analyze the structure of the Division in an attempt to determine it has been organized in a manner which will allow it to carry out its functions efficiently. To do this it will be useful to compare relatively simple structure of water resources planning and regulation in Kentucky with the complex planning and regulatory structures created in California.

California has three separate bodies to plan and implement its state water policy: 76 (1) The California Water Commission, (2) The State Water Rights Board, and (3) The Department of Water Resources within the Resources Agency. The California Water Commission is to serve as the long range planning agency. It is composed of public citizens and it was conceived as a watchdog over the Department of Water Resources. The basic powers of the Commission are the right to file appropriations on all major sources of unappropriated water and then to release these priorities to agencies in accordance with the California State Water Plan.

76 See Strauss and Murphy, California Water Law in Perspective West's Annotated California Water Codes 1 - 36 - 40 (1956).
Kentucky has no equivalent authority. Chapter 151 creates a Kentucky Water Resources Authority. The Authority is composed of the Governor, the Commissioner of Natural Resources, the Commissioner of Health, the Commissioner of Commerce, the Commissioner of Agriculture, and the Attorney General. The Authority is empowered to engage in long range planning but its chief function is to act as the state agency for contracting with the Corps of Engineers for water supply space in their multipurpose reservoirs. Such an agency has neither the time or the technical skills to engage in long range water resources planning. However, as water supplies become more scarce in Kentucky, the state may wish to consider the creation of an agency composed of citizen members to formulate policy for the long range use of the state's water resources. The first step would be to create a body whose powers were advisory only.

77 KRS 151.130 (1966)
The water Resources Authority of Kentucky is empowered to co-ordinate the programs of all state agencies in the conservation, development and wise use of public water. KRS 151.360 (2) Its principal powers are: (1) The construction and regulation of water resource projects within the Commonwealth, KRS 151.370 (1966). (2) The purchase and exercise of the rights of eminent domain for the right to use lands selected by the Authority for water resources projects, KRS 151.370 (2) (1966) (3) To issue revenue bonds to pay for the projects, as well as to charge and collect revenues for the use of the services and facilities of projects, KRS 151.370 (3,4) (1966). (4) To make and enter into such agreements with the Federal Government, the Commonwealth, or any other political subdivisions incidental to the execution of its other enumerated powers. KRS 151.370 (8) (1966).

77a The Division is concentrating its efforts on a five year data gathering and analysis program in order to acquire the factual basis necessary to coordinate the development of the state's water resources. The program is described in Department of Natural Resources, Division of Water, Water Resource Planning in Kentucky 92 - 95 (1967).
California separates the adjudicative function from the planning and implementation function. Permits to appropriate are handled by the State Water Rights Board. The Board receives applications for permits to appropriate, holds hearings, and decides whether to grant or deny the permit. A separate adjudicative body is necessary in a water-short state because of the many conflicting demands on a limited resource. The judicial nature of the California State Water Rights Board procedures also insures that a greater number of interested parties will be heard. For example, an applicant in California has to publish his application at his own expense while in Kentucky the applicant is not required to do so. The statute provides no procedure for public hearings on permit applications.

The Division of Water performs both an adjudicatory and planning function. It is empowered to issue permits for the withdrawal of water as well as to formulate long range plans for the use of the state's water. At the present time the Division's functions are confined to data gathering and analysis and review of federal water plans. However, a potential conflict between the division's functions may exist in the future. The Division is charged both with protecting private and public interests. It can issue permits to private individuals as well as plan and implement state projects. This could lead to situations where it would be faced with a conflict of interest situation in deciding to issue or deny a permit. If these situations arise with any frequency, it may be necessary to separate the adjudication function from the planning function by the

\[77a\] The Division is concentrating its efforts on a five year data gathering and analysis program in order to acquire the factual basis necessary to coordinate the development of the state's water resources. The program is described in Department of Natural Resources, Division of Water, Water Resource Planning in Kentucky 92 - 95 (1967).
creation of a quasi-judicial agency to hear permit applications. The
public interest would be represented before the adjudication agency by
the Division of Water and private interests might be better served if
permit applications were heard by an impartial administrative body.

The most important water resources planning and program implementation
in Kentucky will be done by the United States Army Corps of Engineers.
The Corps has jurisdiction over navigable waters within the state. This
jurisdiction stems from the commerce clause and an unbroken chain of Supreme
Court decisions has given the Corps almost unlimited power to plan and
construct multi-purpose reservoirs for flood control, municipal water
supply, and recreation. The Corp's power over the navigable waters of

78 In U.S. v. Rio Grande Irrigation Co., 174 U.S. 690 (1898) the
Supreme Court held that the federal government could enjoin the construction
of a dam whose purpose was to impound water for irrigation which was located
in the non-navigable headwaters of a navigable river because downstream
navigability would be effected. As improvement of navigation became a
secondary purpose for federal intervention, the Supreme Court developed the
fiction that as long as some relationship between navigability (which was
early defined as water which was navigable in fact for purposes of commerce,
The Daniel Bell, 10 Wall 557 (1870) and commerce was shown the project
could be operated for other "incidental" purposes such as flood control and
storage. The Supreme Court almost abandoned the fiction in the First
Arizona against California litigation, 283 U.S. 423 (1931) by holding first
that if the river was once used for navigation and subsequently abandoned,
the federal government had the power to restore the river for that use.
The significance of the opinion, however, was its sweeping declaration that
as long as some nexus between navigation and the project was shown all other
incidental uses, even if they were in fact the main purposes for the project,
were validated. In making this sweeping grant of power the Court indicated
that they would not undertake a detailed review of congressional declaration
of navigability. Federal jurisdiction was extended to the non-navigable
tributaries of a navigable stream in Oklahoma ex rel Phillips v. Guy F.
Atkinson Co., 313 U.S. 508 (1941). The final blow to the navigation fiction
was dealt in 1955 when the Supreme Court held that the Federal Power Commission
could assert jurisdiction over a project which would be built on a non-
navigable tributary of a navigable stream for the purposes of generating
power to be sold in interstate commerce but which would have no effect on
downstream navigability. FPC v. Union Electric, 381 U.S. 90 (1964). Commerce
rather than navigability is now the basis of federal jurisdiction. See
generally Morreale, Federal Power over Western Waters, the Navigation Power
and the Rule of No Compensation, 3 Natural Resources J. 1-13 (1963).
the state is a paramount to that of the state. They are required by statute to give state agencies an opportunity to review project proposals but the state has no power to compel or reject a project. Further, the Corps has the power to administer the distribution and use of water according to regulations and policies which may conflict with state law. Although the Corp's power is great, they have not chosen to use it in a manner to engender bitter federal-state conflicts as has been the case between the U.S. Bureau of Reclamation and the western states. The Corps has made it a policy of obtaining local and state approval prior to construction of a project and thus the style of Corps-state relations is generally harmonious.


80 See Goldberg, Interposition - Wild West Water Style, 17 Stan. L. Rev. 1 (1964) for a discussion of the cases.

Chapter V

FUNCTION OF PERMIT SYSTEM

The Kentucky permit system can serve three functions in the allocation of the state's water:

(1) It can provide a means of securing accurate data on the amount of water presently being used. This data can be correlated with stream flow and ground water information so that accurate projections about future use and demand can be made. The primary purpose for passage of the statute was to provide a means of gathering this data and this will remain the chief function of the statute during its early years.

(2) It can provide a means of coordinating water resource development so that the wasteful duplication of facilities can be prevented. For example, if two public agencies or private entities desire to build substantially identical projects which would serve the same class of users, the Division could grant the permit which, in their discretion, has the most favorable cost-benefit ratio. Courts have interpreted the

82 KRS 151.220 (1966) authorizes the Division of Water to undertake a research program in order to formulate a state-wide flood control and water development program. The Division is given the authority to undertake continuous studies and to cooperate with local, other state, and federal agencies involved in water resources planning and development.

83 Louisville Courier Journal, Sunday, August 6, 1967, Sec. F., p. 3, col. 3.

permit system for appropriations to empower state agencies to grant only one of two or more competing applications because it has the most favorable cost-benefit ratio.

(3) The permit system can provide an administrative means of adjudicating rights between competing private parties, competing public agencies or combinations of the two. The extent to which KRS Ch. 151 substitutes a new system of water rights for the riparian system is not clear, but the statute can rationally be construed to substitute administrative for judicial adjudication for KRS 151.110 specifies that regulation of water rights is one of the purposes.

All persons (public or private) desiring to withdraw, divert, or transfer public water must register with the Division of Water and submit an application for a permit. However, the legal status of a permit is not clearly delineated by KRS Ch. 151. Kentucky has not adopted the prior appropriation system for KRS 151.200 makes it clear that priority of the date of the permit's issuance will not govern the allocation of water in times of scarcity. KRS 151.200(1) provides:

"Not withstanding the existence of any permits for the withdrawal, diversion, or transfer of public water, in times of drought, emergency, or other similar situations requiring a balancing of rights and availability of water between water users, the division, with the approval of the authority may temporarily allocate the available public water supply among water users and restrict the water withdrawal rights to permit holders, until such time as the condition is relieved and the best interests of the public are served."
This section is the antithesis of the doctrine of prior appropriation. The economic utility of an appropriation permit is that the user can estimate in advance how he will stand in times of scarcity and thus proceed through the market to acquire other rights should he need them to protect himself. A Kentucky permit, however, gives the holder no basis to determine how much water he will be entitled to in times of scarcity. All that KRS 151.200(1) does is carry over the most economically undesirable features of the riparian system. The only perceivable change is that determinations of reasonable use are now made by administrative rather than judicial forums. This section will be discussed infra.

It is, however, clear that substantial modifications in the riparian system were implemented. KRS 151.200(2) abolishes, for example, the restriction that withdraws must be used within the watershed if other riparians could be injured by a trans-basin diversion. The Division may now issue a permit for the transfer of public water from "one stream or watershed area to another, where such transfer is consistent with the wise use of the public water of the Commonwealth and is in the best interests of the public." The watershed restriction has been one of the most criticized features of the riparian system and will be discussed infra.

The relationship between KRS 151 and the riparian system is further confused by the description of the rights conferred by a permit contained in KRS 151.170(1). It provides that all permits issued . . . shall be specific in terms of quantity, time, place and rate of diversion, transfer or withdrawal of public water." This looks like an attempt to quantify water rights and thus evidences a legislative intent to
replace the riparian system. However, this inference is not supported by the next sentence of the statute which reads, "Such permits represent a limited right of use and do not vest ownership nor an absolute right to withdraw or use the water." This section makes it unclear whether the permit supercedes or merely complements the riparian system with a registration system designed to gather information.

The dominant purpose behind the enactment of KRS ch. 151 was to secure adequate data for future water resources planning. If this were the only purpose, then it would be logical to conclude that the permit system is designed only to give the Division accurate water data and does not supercede the doctrine of riparian rights. However, there are substantial modifications in the common law doctrine—the abolition of the watershed rule and the distinction between percolating ground water and ground water in a subsurface stream support the rational inference that the permit system was intended to supercede the common law except

85 KRS 151.160 provides: (1) All public water withdrawn pursuant to a permit under KRS 151.140, must be recorded and a report thereof kept and sent to the division as hereinafter provided. (2) Beginning July 1, 1967, all persons, business, industries, cities, counties, water districts and other political subdivisions withdrawing, diverting or transferring public water under a permit from the division, must record the amount of water withdrawn, diverted or transferred each day. Quarterly reports, on forms to be supplied by the division, indicating amounts of public water withdrawn, diverted or transferred, shall be timely submitted to the division. (3) The division or any of its authorized representatives shall have the right to enter and inspect water withdrawal records at all times to determine whether such records are correct and in proper order. (4) The willful failure to keep accurate records of the withdrawal, diversion, or transfer of public water or the failure to timely submit quarterly reports upon demand by the division shall subject the permit holder to being called for a hearing before the division and possible penalties under KRS 151.990.
where it is specifically preserved by an exemption. This inference is further supported by the existence of Sections 150 and 160 as well as 110's statement of policy. Section 150 states in general terms the requirement that every person desiring to use public water must secure a permit, while Section 160 specifically empowers the Division to gather accurate data by requiring quarterly reports of withdrawals actually made under the permit and giving the Division the right to inspect withdrawal records. The two separate sections are evidence that the legislature contemplated that the function of the permit system would be both regulatory and information gathering.

The legal status of a permit should be clarified by the legislature. The statute should clearly indicate whether the legislation is designed solely to facilitate data gathering for public planning or whether the permit gives the holder a property right to use the allotted amount of water and thus creates a new system of water rights. As the following discussion of the permit procedure and exemptions will indicate the present statute is a hodgepodge of riparian rights, prior appropriation, the Iowa permit system, and several novel concepts. All these add up to an incomplete water use regulation statute in need of substantial clarification.
Chapter VI

OPERATION OF PERMIT SYSTEM

EXEMPTIONS

KRS 151.140 provides:

No person, business, industry, city, county, water district, or other political subdivision shall have the right to withdraw, divert, or transfer public water from a stream, lake, ground water source or other body of water, unless such person, business, industry, city, county, water district or other political subdivision has been granted a permit by the division for such withdrawal, diversion, or transfer of water.

The definition of public water expands the previous statutory definition. K.R.S. 262.680 provided:

"Water occurring in any natural stream, natural lake or other natural water body in the Commonwealth which may be applied to any useful and beneficial purpose is hereby declared to be a natural resource and public water of the Commonwealth and subject to control and regulation for the public welfare."

K.R.S. 151.120 now provides:

[151.120 Public Water of Commonwealth, What Constitutes.]

(1) Water occurring in any stream, lake, ground water, subterranean water or other body of water in the Commonwealth
which may be applied to any useful and beneficial purpose
is hereby declared to be a natural resource and public water
of the Commonwealth and subject to control or regulation
for the public welfare as provided in KRS Chapters 146,
149, 151, 262 and 350.029 and 433.750 to 433.757.
(2) Diffused surface water which flows vagrantly over
the surface of the ground shall not be regarded as public
water, and the owner of land on which such water falls or
flows shall have the right to its use. Water left standing
in natural pools in a natural stream when the natural flow
of the stream has ceased, shall not be regarded as public
water and the owners of land contiguous to that water shall
have the rights to its use.

The statute contains broad exemptions. The exemption for impoundment
of diffused surface waters has been previously discussed. The broadest
exemption is for domestic and agricultural uses. KRS 151.140 states:

Provided however, no permit shall be required and nothing
herein shall interfere with the use of water for agricultural
and domestic purposes including irrigation.

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86 KRS 151.140 also exempts water injected underground in conjunction
with operations for the production of oil or gas. These uses of water
are regulated by the Department of Mines and Minerals. KRS 353.570
requires any person desiring to inject water into the ground e.g.,
for purposes of instituting a secondary recovery operation--to obtain
a permit from the Department of Mines and Minerals. A plat of the pro-
posed well is required and spacing requirements may be imposed by the
Department.
The use of water for industrial processing or manufacturing is also exempted provided that the water is returned in "substantially the same quantity and condition as it is withdrawn . . .". The purpose of this section is to exempt non-consumptive withdrawals. Agreeably there is no need to regulate these types of withdrawal since by definition the water is available for re-use downstream and the main problems with these withdrawals are quality rather than quantity problems. However, the wording of this sentence could cause problems for those immediately downstream from the industry because there is no requirement that the water be returned to the stream at the locus of withdrawal. This will, of course, be done in most cases but a user immediately adjacent to the industry could be injured if the manufacturer is given unlimited discretion in choosing his point of return.

The exemption for domestic uses is a codification of the common law and is carried over from the 1955 statutory codification of the riparian doctrine. The statute defines meaning of "domestic purposes" as follows: "The word domestic purpose shall mean the use of water for ordinary household purposes, and drinking water for poultry, livestock and domestic animals." The common law domestic preference was originally limited to

87 KRS 151.140 (1966)
K.R.S. 151.120 also exempts "water left standing in natural pools in a natural stream when the natural flow of the stream has ceased" from the definition of public water. The owners of land contiguous to the pools have equal rights to its use.

88 KRS 151.100(10) Cf. Iowa Code, section 445A.1 (1962) which limits the domestic preference and exemption to "Ordinary household purposes, use of water for poultry, livestock, and domestic animals . . .". See Hines, A Decade of Experience Under the Iowa Water Permit System--Part 1, 7 Nat. Resources J. 499, 508-509 (1967).
the ordinary needs of a single household and livestock necessary to support it and Section 100(2) appears to incorporate this definition range. The uses allowable under the domestic preference will not affect a significant amount of water and little is lost if such withdrawals are not included in a regulatory scheme. However, some courts have applied the domestic preference to institutions and commercial resorts. This is an unwarranted extension of the common law preference and should not follow under KRS 151.100(10). If a comprehensive regulatory scheme is to be implemented, the preference should be confined to small withdrawals related to a single household. The exemption for all agricultural uses including irrigation greatly expands the previous law. It was commonly assumed that the domestic preference would be limited to water for the immediate household needs of the farmer and would not be extended to water for an ag-business such as irrigation of tobacco and stock watering as it now is. The reason for the exemption is undoubtedly the immense political muscle of the Farm Bureau which views with extreme alarm any regulation of farm activities. Similar exemptions, for example, were obtained in the 1966 revision of planning and zoning enabling

89 It has been assumed that the domestic preference would not apply to commercial agricultural operations. See Water Rights Law in Kentucky, Legislative Research Commission, Research Publication 23, 8 (1965).


91 Under the Mississippi appropriation system the exemption for domestic uses is provided but the user may establish a statutory right. Miss. Code Ann. §5956-04(a) (1956).
There is no economic or social justification for the exemption and it should be eliminated as soon as political circumstances permit. Agriculture is increasingly becoming a business rather than a way of life. Voluntary sales of farmland are resulting in the increased consolidation of tracts in order that economics of scale can be achieved in farming operations. Larger amounts of water will be diverted for agricultural purposes and this exemption could frustrate state-wide coordination of water use for a potentially large source of supply will be unregulated.\textsuperscript{93}

KRS 151.210(2) provides that the owner or groups of owners of land contiguous to public water who are operating under a withdrawal permit have the right to impound such water behind a dam in the natural stream bed or on their land "when the flow of the stream or level of the lake is such that impounding will not impair existing uses, or will not interfere with the beneficial use by other water users." The intent of this section is unclear. It follows the section preserving the preference for domestic uses and could be interpreted to establish a preference for riparian users although it does not specifically so state. It could be argued that Kentucky has adopted a modified version of California's dual system of water rights which gives riparians a preference to the water and confines appropriators to surplus waters.\textsuperscript{93a} This would mean that a

\textsuperscript{92}KRS 100.203(4) (1966) provides: Text provisions to the effect that land which is used solely for agricultural, farming, dairying, stock-raising, or similar purposes shall have no regulations imposed as to building permits, certificates of occupancy, height, yard, location or courts requirements for agricultural buildings, except that (a) setback lines may be required for the protection of existing and proposed streets and highways, and (b) that all buildings or structures in a designated floodway or flood plain or which tend to increase flood heights or obstruct the flow of flood waters may be fully regulated.

\textsuperscript{93}The Department reported that tobacco is the principal crop which could require irrigation. If a drought year occurred, some 36,000 acres would require 4,320,000,000 gallons of water. Kentucky Water Resources, supra note 4 at 22.

\textsuperscript{93a}See Duckworth v. Watsonville Water Co., 170 Cal. 425, 170 Pac. 58 (1915).
A riparian permit holder would prevail over a non-riparian in times of shortage. However, the wording of Section 210(2) is not wholly consistent with this analogy because the right to impound is conditioned on non-interference with "a beneficial use by other water users." This would seem to mean that the riparian is given no preference and may only impound if the water is available. This is simply a codification of the principle that an impoundment is not a per se unreasonable use. If this is correct, the section adds nothing substantive to the Chapter except to further reassure farmers that nothing has changed.

The section may, however, have been included to implement that policy contained in KRS 151.110 of maintaining the normal flow of all streams. For example, the Iowa Water Code contains a provision requiring the regulatory agency to protect the established average minimum flow of the stream when permits for consumptive uses are granted.93b If this is the function of Section 210(2) the division will be required to classify Kentucky's streams according to their functions. The flows necessary to sustain fish and wildlife, recreation, water quality, and downstream needs must be calculated and form the basis for denying or granting a permit. If this is the purpose of the section, it should be clarified and amplified so that the public may know the factors the division is empowered to consider in establishing minimum flows and lake levels.

93b Iowa Code 455A.1 (1962). See Hines, A Decade of Experience under the Iowa Water Permit System, 7 Natural Resources J. 499, 537-546 (1967) for a discussion of the problems which will be encountered in administering minimum flows and lake levels. The special problems of wildlife protection are discussed, Russell, A Survey of Streambank Wildlife Habitat (Paper presented at the Twentieth Annual Meeting of the Southeastern Association of Game and Fish Commissioners, October 24-26, 1966, Asheville, North Carolina).
APPLICATION PROCEDURE

The procedure for acquiring a permit is deceptively simple. KRS 151.150 requires that an application be submitted. (A copy of the application is set out in the appendix). The major emphasis in Ch. 151 is on accurate reporting of data rather than adjudications of conflicts. During the first year after KRS Ch. 151 became effective about 600 permits were issued which were numbered and coded by county and river basin and inserted into a computer program. The same is done with the required quarterly withdrawal reports.

The procedure for obtaining a permit after an application is filed is not clear. The Division is not required to hold a hearing prior to issuance. In this respect Kentucky differs from other states, such as Iowa, which have modified the riparian system for they require that the administering agency hold a hearing to determine if the permit should be issued.94 The Kentucky procedure is spelled out in KRS 151.170(2). The Division is required to conduct an investigation to determine if the quantity, time, place or rate of withdrawal will be detrimental to the public interest or to the rights of other public users. If it is found that public and private rights will not be affected, the permit must be issued. The use of the word "shall" indicates that if the Division makes these two findings but refused to issue a permit a writ of mandamus for its issuance could be obtained. The last sentence of the subsection provides "No permit shall be denied to a responsible applicant who has

established an amount of water for which he has a need for a useful
purpose, provided the requested amount of water is available." The
intent of this sentence and its relation to the preceding one specifying
the findings the Division must make is unclear. It was probably intended
to allay the fears of existing users that the new scheme would take away
existing rights. However, the sentence introduces two new terms
"responsible applicant" and "useful purpose" which are capable of admin-
ISTRATION determination. Thus, the sentence actually gives the Division
broad powers over the issuance of a permit because it may investigate the
financial responsibility of a proposed applicant and the economic utility
of the proposed use. It is conceivable that the division could find that
water is available and other rights would not be adversely affected but
still refuse to issue a permit because they do not deem the applicant
"responsible" or the proposed use "useful." The applicant would have a
right to judicial review of these determinations but could not obtain a
writ of mandamus because of the descretionary nature of the division's
function.

POWER OF DIVISION OF WATER TO ALLOCATE DURING PERIODS OF SHORTAGE

KRS 151.200 authorizes the division to make temporary allocations
among permit holders "in times of drought, emergency or other similar
situations requiring the balancing of rights and available water among
users." This method of administrative allocation is not found in either
the common law of riparian rights or the doctrine of prior appropriation
as it developed in the far west. It is analogous to the powers given to
public officials during the first settlement of the Far West before the
development of a coherent body of water law doctrines. When the Mormons reached Utah in 1847 they were not burdened by any rigid notions of the righteousness of the free enterprise system. Water was considered the property of the state (it should be emphasized that it was the property of the state and not the public) and county courts were given the power to allocate water "as in their judgment shall best . . . subserve the interests of settlement in the distribution of water for irrigation." 95 Wyoming passed a statute very similar to this in 1876. 96 According to one of the leading legal historians of the development of western water law, the doctrine of prior appropriation replaced these early attempts at administrative allocation of water after lawyers began to be alarmed at the power which became concentrated in the state—plus the fact that the administrative allocation was labeled French and Italian and thus per se inferior. 97

Section 200 simultaneously rejects the doctrine of prior appropriation and substitutes a new standard for apportionment for the concept of reasonable use embodied in the common law of riparian rights. Administrative allocation has been substituted for judicial adjudication of rights. However, in practice the division will probably undertake the same kinds of inquiries as have the courts in determining whether a proposed use is reasonable and in adjudicating correlative rights. The unfortunate aspect

95 No citation is available. The statute is quoted and discussed in Lasky, From Prior Appropriation to Economic Distribution of Water by the State Via Irrigation Administration, 1 Rock Mt. L. Rev. 161, 167 (1929).

96 Combined Laws of Wyo. of 1876, ch. 65, Sec. 4.

97 Lasky, supra, note 95 168-170.
of Section 200 is that it incorporates into the permit system all the undesirable features of the riparian system. The same uncertainty as to the amount to which a riparian will be entitled in times of scarcity is carried over into the permit system. Thus, nothing appears to have been gained by Section 200.

The section, in this author's opinion, confuses the role of administrative allocation in a free market system for water rights. The goal of a water law system should be to encourage users to put water to its optimum use consistent with the public interest. This can be achieved through a system of administrative allocation which hears applications for a permit by holding a hearing to determine if a permit should be issued. The purpose of the hearing is to define the relationship between the proposed use and the public interest. The administrative agency should make the following inquiries to determine whether the permit should be issued: (1) Is the proposed use efficient or will another proposed use serve the same users more efficiently? For example, if a city and water district are in competition to serve a fringe area of the city, it would be proper for the division to determine which of the two uses will result in the vast expensive distribution of water, (2) Will the proposed use affect the reservation of water for public uses such as recreation which will be allocated by the existing market system of water rights. (3) Should the water be presently developed or reserved for future public or private uses? (4) Will the proposed use shift external costs to other users and members of the public when these costs should properly be borne by the

\[97a\] This model is taken from Trelease, Policies for Water Law: Property Rights, Economic Forces, and Public Regulation, 5 Natural Resources J. 1 (1965). The concepts are fully discussed in the article.
the permit holder?

If the administrative agency concludes that the proposed use is consistent with the above criteria a permit should be issued. The permit received should be capable of being used like any other species of property such as land. It should be definite in amount, time and place as provided in KRS 151.170(2). But, it should also allow the holder to rely on the existence of a firm supply in times of scarcity. This does not mean that he should be able to rely on the perpetual existence of the amount and conditions contained in the permit but it does mean that he should be able to calculate the amount of curtailment he must suffer and either adjust his activity accordingly or proceed through the market to acquire other permit holder's rights as insurance. This can be done two ways" (1) either the prior appropriation system can be adopted as it has been in Mississippi, or (2) some sort of correlative rights system can be formulated similar to doctrine of mutual prescription developed by the California Supreme Court in the ground water cases (discussed earlier) where each user knows the percentage of the curtailment he must bear. Either one of these two systems combined with the previously discussed public criteria for allocation would produce a market system which will encourage optimum uses consistent with the public interest. The Kentucky permit system as embodied in KRS 151.200 in theory will not accomplish this. This is irrelevant as long as there are no conflicts among users but could impede the efficient distribution of water when they begin to occur.

A related defect in Chapter 151 is its failure to specify the
duration of the permit. KRS 151.170(1) provides such permits represent a limited right of use and do not vest ownership nor an absolute right to withdraw or use the water." It would be preferable if the permit holder were given a right in perpetuity to use the water subject to its being extinguished under the following two conditions: (1) the use of the water has been abandoned, or (2) the division finds under KRS 151.170(4) that the permit holder is using substantially less than the permit amount. This last section gives the state ample powers to eliminate wasteful uses of water and the broad language of subsection (1) is not needed. If the duration of the right is specified the market can then operate to shift uses as new demands arise or the state can use its power to condemn the right if it decides the water should be put to different use.

Chapter 151 contains no provision making the permit appurtenant to the land of the holder. Thus, it may be transferred without a simultaneous transfer of some interest in the property. The absence of an appurtenancy requirement will make water rights more freely alienable than under the riparian system where the person desiring water had also to bear the cost of purchasing riparian land.

One of the obvious objectives of KRS 151.200(1) was to provide a method for apportioning municipal water supplies during short run droughts. The traditional methods of insuring the continued availability of municipal water supplies have been a legislative grant of the power of eminent domain.

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98 See Trelease, supra at note 97 at 23-26.

99 See Yentzer v. Hemenway, 440 P.2d 7 (Wyo. 1968). The state has the power to cancel a permit in whole or in part depending on the extent of the abandonment.
or a preference. If a municipality is given the power of eminent domain, those persons who claim interference with their rights are restricted to an action for damages and can not obtain injunctive relief. If the city is given a true preference, other non-preferred users must curtail their use in order to supply their wants. It is too early to ascertain the effectiveness of Section 200(1) and thus a detailed evaluation will not be attempted at this time.

TRANSBASIN DIVERSIONS

KRS 151.200(2) which provides that the division may authorize the transfer of diversion of public water from one watershed to another "where such transfer is consistent with the wise use of public water of the Commonwealth and is in the best interests of the public," abolishes the watershed limitation in the common law riparian system. The limitation's rationale, set out in the leading Massachusetts case of Stratton v. Mount Hermon Boys School, was that a trans-watershed diversion would decrease the amount of return flow available to downstream users and thus upset the hydrologic cycle. The limitation has never been an absolute barrier to trans-watershed diversions for an injunction will not be granted if the proposed diversion were reasonable and riparians within the watershed could show no present need for the water. The doctrine has been criticized because it can lead to the waste for resources, if rigidly applied, because it may deny needed present uses to reserve the

100 216 Mass. 83, 103 N.E. 87 (1913). Stratton recognized that injury must be shown before an injunction could be granted.

101 See, e.g., Texas Co. v. Burkett, 177 Tex. 16, 297 S.W. 273 (1927).
water for future uses which may never materialize. Section 151.200(2) could be interpreted merely to codify the generally accepted common law exception discussed above to the doctrine, but its language indicates that its intended scope was broader.

Section 200(2) should be interpreted to give the division the power to use the permit system to implement basin and state-wide water plans. Basin and state-wide water plans require a comprehensive analysis of the relationships between uses within and without the basin. It must also consider factors such as the impact of the proposed diversion of the public interest in recreation and fish and wildlife preservation.

Of the many factors which must be taken into account by the division, one of the most important is the present and future needs of the area of origin of the water. These areas, such as Eastern Kentucky, often have large surpluses of water but often argue that water should not be transferred outside the area because it must be reserved for future and undetermined demands. The division must consider long and short run demands such as this in determining whether to grant or issue a permit for a trans-watershed diversion.103

102 For a discussion of legislative protection of areas of origin see Johnson and Knippa, Transbasin Diversion of Water, 43 Texas L. Rev. 1035 (1965).

103 Vested riparian rights can not be injured by a trans-watershed diversion, although they may be condemned for use outside the watershed. For a statute authorizing condemnation if consistent with certain criteria see N. C. Gen. Stat. §162A-7(c) (1964).
The importance of Section 200(2) is that now the state is not bound by non-functional classifications such as the watershed of origin but may issue or deny permits based on their relationship to basin and state-wide water plans. 104

104 See Ref. 102 at 1057-1061. The authors approve a statute such as KRS 151.200(2) if it is used to grant or deny permits in conjunction with a state-wide water plan.
Chapter VII

REGULATION OF DAM CONSTRUCTION

The new legislation gives the Division of Water new powers to coordinate the construction of dams and other structural improvements. KRS 151.250 requires that any private person or organization and all public entities except the State Highway Department desiring to construct, reconstruct, relocate, or improve "any dam, embankment, levee, dike bridge, fill or other obstruction . . . across or any stream . . . ." must obtain a permit from the Division. The only requirement imposed by ch. 151 is that the application contain the plans and specifications for the proposed structure but the Division may issue regulations for the issuance of permits and the application procedure. The plans and specifications must be drawn by a professional engineer licensed under KRS Ch. 322. The Division has the power to exempt structures from the permit requirement by regulation if they decide that a permit is not necessary "in the interest of safety or the retention of water supply." If these regulations are enacted, relief for small farmers who desire to build small ponds or engage in minor fill work can be implemented without sacrificing the objectives of the statute. 105

The Division has twenty (2) working days after receipt of the plans to reach a decision and notify the applicant if a permit will be granted.

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105 For a discussion of depth, area, height and other exemptions from a similar Maryland statute see Galbreath, Maryland Water Law: Water Laws and Legal Principals Affecting the Use of Water in Maryland 65-66 (1965).
The Division has the power to grant a permit subject to the acceptance of modifications. KRS 151.250 appears to incorporate two standards to guide the Division in making their decision. The first is safety. This is obvious and should cause little controversy. The second is "retention of water supply" and the general standard of beneficial use. Section 250(3) specifies that "Nothing in this section is intended to give the Division any jurisdiction or control over the construction, reconstruction, improvement, enlargement, maintenance or operation of any drainage district, ditch, or system established for agricultural purpose, or to require the same when such obstruction of the stream or floodway is determined by the division to be a detriment to or hindrance to the beneficial use of water resources in the area . . .".

106 The statute does not specify if failure to approve within twenty (20) working days will result in automatic approval for the applicant. Similar language in subdivision enabling legislation which requires that the administrative agency has an affirmative duty to disapprove within the statutory period or the permit will be considered. See, e.g., KRS 100.183 (1966).


108 A frequent source of litigation between riparians is over damage caused by obstructions placed in the stream which cause water to back up or flood onto the land of others. A riparian is liable if he causes damage to another riparian by an unreasonable obstruction. Crabtree Coal Mining Co. v. Hamby's Adm'r 183 Ky. 647, 90 S.W. 226 (1906). KRS 151.250 (2) (1966) is an attempt to minimize litigation by forcing the applicant to consider the potential damage his obstructions might cause in advance and to take the necessary steps to eliminate it so that there will be no need for litigation after the fill has been completed. 250(2) provides: No person, city, county or other political subdivision of the state shall commence the filling of any area with earth, debris, or any other material, or raise the level of any area in any manner, or place a building, barrier or obstruction of any sort on any area located adjacent to a river or stream so that such filling, raising or obstruction will in any way affect the flow of water in the channel or in the floodway of the stream unless plans and specifications for such work have been submitted to and approved by the division and a permit issued as required in subsection (1) above. KRS 151.310 (1966) prohibits non-fill deposits which "will in any way restrict or disturb the flow of water in the channel or in the floodway of any stream except where a permit has been issued . . . under KRS 151.250 . . ." Encroachments on federal and state dams are also prohibited.
This section was probably intended to allay the fears of farmers and other agricultural interests against the specter of state control but it is difficult to gage its impact on permit applications.

This definition of beneficial use appears to be different than the definition incorporated into the policy statement and by implication into the standards for granting a use permit. In this latter context beneficial use is a one dimensional standard for it merely defines broad categories of socially desirable uses. If the water is available and the use fits within one of the broad categories, the permit should be granted. The definition in KRS 151.250 combined with the implication in 250(1) that the Division is to consider the impact of the project of the state's water supply appears to be more like the requirement in planning and zoning enabling legislation that the ordinance be in accordance with the comprehensive plan. Section 250(3) contemplates the eventual existence of state-wide and watershed development plans which should give the division and the courts objective criteria to determine if a proposed structure is consistent with the coordinated development of the area's water resources. Presumably if the Division finds that the proposed facility duplicates existing facilities or that any other proposed system of structures has a lower cost-benefit ratio, the permit could be denied under 250(3).

KRS 151.270 preserves a right of judicial review for any person who wishes to contest Division denial or modification of a permit. The applicant has sixty days to file an appeal from a division order in the circuit court. The proper circuit court is not specified but presumably the legislature intended the same rights to be conferred on parties contesting denial of a structure permit as those contesting a use permit.
permit so the circuit court of the county in which the applicant resides would be the proper forum. The case will be heard without a jury and the proponent of the project has the burden of proof. The usual right of appeal to the Court of Appeals is provided. 109

If a person starts construction without a permit he is liable to a maximum fine of one thousand (1,000.00) dollars for each separate day that the offense continues. 110 In addition to being liable to a fine, he may enjoined from further work on the project. The permit holder may not deviate from the approved plans without the permission of the Division. The statute defines an offense in addition to starting construction without a permit as "Any substantial deviation from approved plans . . ." 111

The Division has the authority to periodically inspect any structure which restricts the flow of water in a stream. 112 If structural defects which could cause personal injury or property damage are discovered, the Division may schedule a hearing to determine what corrective measures must be taken. 113 After the hearing an order to make the necessary repairs may be issued. The failure to comply with a remedial order is a violation under KRS 151.990. 114 The permit holder may appeal to the circuit court and eventually to the Court of Appeals.

If any structure is found to be a "serious threat" to life or property, the Division shall direct the Attorney General to secure a mandatory injunction against the owner for the correction or removal of the structure. 115

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110 KRS 151.990 (1966).
111 KRS 151.280(2) (1966).
114 KRS 151.290(3) (1966).
Chapter VIII

PROCEDURAL RIGHTS OF APPLICANTS AND THIRD PARTIES

A RIGHT TO HEARING

The Kentucky statutory scheme differs from those enacted in other states such as Iowa because a hearing is not required prior to the issuance of a permit. The director of the division has the authority to make three choices when he receives an application for a permit. He may issue it for the amount requested, he may issue it for less than the amount requested. It is found that a reduction would "be in the best interests of the public or other water users," and he may deny it if it is found that sufficient water for the proposed use is not available. In addition the permit may subsequently be amended if it is found that the user is using less than the granted amount.

The division merely notifies the applicant if the permit has been issued in the requested amount. If it intends to modify or deny, the division must notify the applicant and give him the opportunity to appear before the division. If the division still modifies or denies the permit, the applicant may appeal to the circuit court of the county in which he resides within thirty (30) days after issuance of a division.

117 KRS 151.170(2) (1966).
118 Ibid.
order. This procedure for a hearing before the division guarantees the rights of applicants to procedural due process and thus is not subject to constitutional defects.

The rights of third parties are not similarly protected. This would not be a serious defect if the purpose of the permit system is confined to information gathering but it is if used for regulatory purposes, and third party rights to the use of public water are adversely affected. The legislature contemplated that third party rights are a relevant factor for the division to consider in permit applications. The question thus becomes: do third parties have sufficient rights to entitle them to legal protection if they desire to contest the issuance of a permit?

The question requires a determination of whether third parties have a substantial interest in a division order. It would seem that they clearly do since KRS 151.170 makes it theoretically possible for the division to issue a permit which might reduce the amount of water to which they might be entitled had they appeared before the division. However,

119 KRS 151.180 provides: Notice and hearing before denial of permit; appeals. Prior to the denial of an application for a water withdrawal permit or the issuance of a permit for amounts less than the applicant applied for, the person, business, industry, city, county, water district or other political subdivision aggrieved thereby, shall be notified by the division and given an opportunity to appear before the division and be heard. Within thirty days of an order of the division denying a permit, or an order issuing a permit in amounts less than those applied for, the aggrieved person may appeal the order of the division to the circuit court of the county in which the applicant resides as provided in KRS 151.190 (1966, c. 23, 22).

120 For a discussion of third party rights to appeal administrative orders, see Oberst, Parties to Administrative Hearings, 40 Mich. L. Rev. 578, 402-404, and Hines, supra note 53-61.
the Court of Appeals could find that third parties are not adversely affected by division orders because a permit lacks finality since they are entitled to appeal to the circuit court under KRS 151.190 which preserves a right of judicial review to any party aggrieved by a commission order. Thus, it is probable that the Court of Appeals would find that a division order is not final because the issue of third party rights can be litigated by a court and are not settled by division action.

There is another procedural right involved which may be controlling in deciding if the third party provisions are free from constitutional defect. Third parties have a constitutional right to adequate notice of pending proceedings affecting their interests in order to protect their right to due process. KRS 151.180 requires that notice of an adverse order be given only to aggrieved applicants. No similar duty exists for third parties. Thus, under KRS ch. 151 the third party has no method of ascertaining the existence of the issuance of a permit which might be adverse to his interests except by chance.

The constitutional standard of a person's right to notice of proceedings which may affect his interests is: "The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is on itself reasonably certain to inform those affected ... or, where conditions so not substantially permit such notice, that the form chosen is not substantially less likely to bring home notice other than feasible and customary substitutes." 121 Because

KRS ch. 151 provides no requirement that third parties be notified of a pending permit application or that a permit has been issued, I conclude that the rights of third parties have not been given the required constitutional protection. Thus, a permit should be subject to collateral attack by a third party who considers his rights affected by the issuance of a permit.

A 1956 Kansas federal district court decision might indicate, however, that KRS ch. 151 is not constitutionally defective because it does not provide for notice to third parties whose rights might be affected by issuance of a permit. In *Baumann v. Smrha* 122 it was argued that the Kansas appropriation statute was unconstitutional because it did not give third parties notice of a permit hearing. The statute provided that all permits would be issued subject to vested rights and the court held that since vested rights must be protected, by definition a third party could not be injured by the issuance of a permit. KRS 151.170(2) does not expressly require protection of vested rights (the problem of protection of vested riparian rights is discussed in the next section) and thus it does not appear that the rationale of *Baumann* can be applied to KRS ch. 151.

In addition the court's reasoning ignores the problem of effective protection to third parties. The requirement that vested rights be protected should not be equated with a third party's rights to notice. The former requirement saves the statute from being held an unconstitutional taking but it does not insure a procedure for protection of third party's rights.

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to due process. In order that these rights be effectively preserved a court should hold that third parties were entitled both to protection of existing rights from elimination by administrative action and to notice when these rights might be affected.

RIGHT TO APPEAL

The requirement that applicants and third parties must wait until entry of a final order before appealing to the circuit court is a codification of the rule that a litigant must exhaust his administrative remedies before appealing to the courts. There are several objections to this which are recognized in Kentucky. The applicant need not exhaust his administrative remedies if he wishes to attach the constitutionality of the statute or the provision being applied to him. The applicant also need not exhaust if he can show that exhaustion would be futile, or if he can show that the policy of the administrative agency is fixed and will not vary in subsequent administrative actions.

The statute does not specify any standards for judicial review other than the substantial evidence test. It will probably be assumed by the Court of Appeals that the statute incorporates other generally accepted standards such as (1) action in excess of granted powers and (2) lack of procedural due process. The Court of Appeals in American Beauty Homes 123 reviewed the numerous standards of judicial review adopted at various times by the General Assembly and concluded that all verbal formulations could be reduced to a single standard:

123 379 S.W.2d 450 (Ky. 1964).
The uncorrelated legislative attempts to designate specific considerations controlling the scope of judicial review are aimed in the proper general direction, but the fact of the matter is that they have not materially affected or changed the pattern of review. This is so because the scope of review is basically founded upon the independent exercise of judicial power, and limitations imposed by the legislature will not prevail if they fail to protect the legal rights of a complaining party. As we have heretofore indicated, the courts can and will safeguard those rights when questions of law properly present the ultimate issue of arbitrary action on the part of an administrative agency. 124

Standards of judicial review give the Court of Appeals a great deal of trouble. This stems from the continued hostility of members of the Kentucky bar to administrative agencies and a reliance on the courts to decide all legal questions. For a number of years applicants aggrieved by an order of the Louisville and Jefferson County Planning Commission were entitled to a trial de novo in the Jefferson County circuit court. The court was free to make its own findings and substitute them for those of the commission. In 1964 the Court of Appeals held that this procedure was unconstitutional because it resulted in a delegation of legislative functions to judicial bodies. In setting the standards for judicial review KRS 151.190 attempts to steer a course between delegating legislative functions to the courts and giving the courts an active supervisory role over the work of the division.

KRS 151.190 provides:

Any person aggrieved by a final order of the division may obtain a review of the order by filing in the circuit court of the county in which the applicant resides, within thirty

124 379 S.W.2d 457 (Ky. 1964).
days after entry of the order, a written petition praying that the order be modified or set aside in whole or in part. A copy of the petition shall be forthwith served upon the division, and thereupon the division shall certify and file in court a copy of the record before the division, including therein all pleadings, orders, documentary exhibits, any stenographic transcript of testimony before the division. When these have been filed, the court shall have exclusive jurisdiction to affirm, modify, enforce or set aside the order, in whole or in part. No objection to the order may be considered by the court unless it was urged before the division or there was reasonable grounds for failure to do so. The findings of the division as to the facts, if supported by substantial evidence, are conclusive. If either party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for failure to adduce the evidence in the hearing before the division, the court may order the additional evidence to be taken before the division in such a manner and upon such condition as the court may
consider proper. The division may modify its findings as to the facts, by reason of the additional evidence so taken; and it shall file any modified or new findings with the court, which if supported by substantial evidence shall be conclusive, and may file any recommendation for the modification or setting aside of the original order. The commencement of proceedings under this section does not, unless specifically ordered by the court, operate as a stay of the division's order. An appeal may be taken from the judgment of the circuit court to the Court of Appeals on the same terms and conditions as an appeal is taken in any civil action.

(1966, c. 23, § 23)

The first part of the section enacts the substantial evidence standard. This is the traditional standard of judicial review and limits the court's function to a determination of whether the division complied an adequate factual basis for its conclusions. The burden to prove that the findings are not supported by substantial evidence is placed on the applicant. The court must still, however, determine whether the reasons given by the commission are conclusions of fact or law. The former are not reviewable except under the standard discussed above while the latter are fully reviewable and the court is free to substitute the decision for the divisions.

This kind of determination could prove troublesome for the courts. Many of the determinations the division is authorized make, such as whether the proposed use is for a "useful purpose," call for value judgments rather than for scientific determinations which can be verified
by objective criteria such as finding that a sufficient quantity of water is or is not available to satisfy the amount requested in a permit. It is likely that courts will categorize determinations such as "useful purpose" as questions of law and thus subject to review. A good example of the kind of categorizations the court will make is found in City of Covington v. Board of Commissioners of Kenton County Water District. The district filed an application for a certificate of public convenience to extend its service which was denied by the Commission. The reason given was that it would result in a duplication of the city's facilities and thus the proposed extension would be a wasteful allocation of water. The trial judge reversed this finding on the theory that a determination of wastefulness was one of law and thus he was entitled to make it. He found that the facilities would not be wasteful because they could serve the area at a lower rate than could the city. The Court of Appeals affirmed on the broader ground that the commission's finding of duplication was unreasonable because there was no assurance that the City's water supply would continue to be available to the district. This case illustrates the great flexibility courts have in reviewing administrative determinations by their ability to characterize questions as ones of law rather than fact. A court not wishing to review such a determination could conclude that these were precisely the kinds of questions which call for great expertise and were thus delegated to an administrative agency and invoke the substantial evidence rule to affirm the agency ruling. But, if the courts desire they can take an active role in reviewing division determinations. This is

125371 S.W.2d 20 (Ky. 1963).
further underscored by the court's power to hear additional evidence if the applicant can prove that reasonable grounds existed for failing to introduce the evidence in a hearing before the division.

**Improper Delegation of Powers:**

It may be argued that K.R.S. ch. 151 is unconstitutional because it constitutes an improper delegation of legislative power to an administrative agency. Prior to the New Deal many attempted regulatory schemes were struck down on this ground, but the United States Supreme Court has not used this ground as a means of invalidating federal regulatory schemes since the New Deal. While many state courts have used this theory to bolster judicial hostility to administrative regulation, Kentucky is not one of them and it is unlikely that ch. 151 will be found to be an improper delegation of legislative powers to an administrative agency.

The general test for legislative delegations has traditionally been whether the administrative agency has been given sufficient standards so that arbitrary actions can be curbed. This test has given the courts a great deal of trouble because in complex regulatory schemes the legislature is forced to define the agencies discretion in broad terms and courts have upheld delegations saying that precise standards existed when none in fact did. A leading scholar of administrative law has long argued that the court were incorrect in focusing on the problems of standards and instead should focus on the adequacy of procedural due process. This view has been adopted by the Court of Appeals in *Butler v. United Cerebral Palsy of Northern Kentucky, Inc.* 126 The court upheld statute against a charge, among other things, of unconstitutional

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126 352 S.W.2d 203 (Ky. 1961).
delegation which provided for public aid to private institutions which educated "exceptional children." After noting "In its laconic simplicity leaves much to be desired" and reviewing the doctrine of unconstitutional delegation Judge Palmore upheld it after a candid explanation of the delegation problem and its solution.

"In the study from which we have quoted it is further demonstrated, by numerous examples from this and other courts, that in order to find the effective law "one must look past the theory to the holdings. The correlation between the theory and the holdings is characteristically low, and when it is high the holdings have been unfortunate when examined in the light of practical needs of effective government." Let us, then, examine this law in terms of the practical needs of effective government, and in terms of safeguards against abuse and injustice. The legislature wants to encourage and lend a modicum of support to the special education of a certain class of people. It does not wish, in so doing, to waste the taxpayers' money. The members of the legislature are allowed to meet in regular session only 60 days every two years. They have neither the time, facilities, nor qualifications to do more than indicate the class and fix the amount to be spent. At the state's disposal, however, is its board of education, an agency fully and better qualified than the legislature to establish and carry out whatever further policies and procedures may be necessary or desirable. This body also is one of the most responsible and long-established agencies of the state government. Is there any real danger that it would, even if it could, abuse the responsibilities conferred upon it by this act? We think not. Moreover, since arbitrary power does not exist in this
Commonwealth, any discriminatory treatment is inherently reviewable by the courts. Cf. 73 C.J.S. Public Administrative Bodies and Procedure § 164, pp. 506-507; Davis, Administrative Law Treatise, 28.21, Vol. 4, pp. 112-113. 127

The same reasoning applies to K.R.S. Ch. 151. The existence of procedural defects has been discussed previously. It is possible that the court might find certain sections of the statute unconstitutional for these reasons but it is unlikely that they would find the statute to be unconstitutional because it results in an attempted delegation of legislative functions without sufficient standards. The standards contained in K.R.S. ch. 151 are much more precise than those upheld in Butler and could be found constitutional even under a more traditional analysis than the one adopted in that case.

127Id. at 208.
Chapter IX

CONSTITUTIONALITY OF CHAPTER 151

KRS Ch. 151 presents important constitutional problems. The state may regulate the use of water to further public objectives pursuant to its police power within the limits imposed by the federal and state constitutions. The major constitutional limitations are the due process and equal protection clauses of the fifth amendment, which is applicable to the state's through the fourteenth, prohibits the "taking" of private property by a unit of government without the payment of just compensation. Doctrinal formulations of state authority and its limitations such as "police power," "private property," and "taking" have no inherent meaning except as they are applied to specific situations for their inherent vagueness makes it impossible to formulate definitions of uniform applicability. Much government action in some manner affects the use and therefore the value of private property. Sometimes the value of property is decreased as in the case of a denial of request for rezoning from residential to commercial. Othertimes the individual is benefited by government action as in the case of an upland owner whose property value is increased because development in the flood plain beneath his land is restricted thus limiting the amount of land available for development. Economists and other social scientists have no way of defining with precision all of the costs and

benefits of a given governmental decision and the law has required no such precision. The due process and equal protection clauses thus do not prohibit all governmental regulation which decreases the value of private property but only if it results in the "taking" of "property". The terms are conclusionary labels and provide few criteria to determine if a given regulation is valid or invalid for they are often pinned-on to justify a decision made on a more elaborate but imprecise rationale.

The courts make two kinds of inquiries in deciding the constitutionality of regulatory schemes such as Ch. 151. The first inquiry deals with the purpose of the regulation. The second focuses on the impact of the regulation on the individual property owner. Courts often speak of balancing or weighting the purpose with its impact on the individual but this formulation of the constitutional standard obscures the hard value choices the court is making for the two approaches are inconsistent. The most praiseworthy of objectives--such as the construction of a flood control reservoir--may financially ruin an individual. No one would suggest that an individual farmer should gratuitously cede his land to the federal government for a flood control reservoir on the rationale that the benefits to society outweigh his individual loss. Yet, this same rationale is often used to support government regulations

129 The cases sustaining the use of the police power to limit or even prohibit the extraction of natural resources graphically illustrate the breadth of the power. See e.g., Blancett v. Montgomery, 398 S.W.2d 877 (Ky. 1965) (City may prohibit the extraction of oil within its corporate limits); Consolidated Rock Products v. City of Los Angeles, 57 Cal. 2d 515 370 P.2d 342 (Calif. 1962) appeal dismissed, 371 U.S. 36 (1962) (prohibition of quarrying operation to protect quality of air in city which advertised itself as a health center) See generally Sax, Takings and the Police Power 7, Yale L.J. 36 (1964).
which severely decrease the value of one individual's property. The courts have evolved no consistent standards to enable lawyers to predict whether a given regulation will be found a valid police power regulation or an invalid taking and at best the cases suggest some rough guidelines and the doctrinal formulations scholars have suggested prove difficult to apply in hard cases.

The first line of inquiry pursued by the courts is the purpose of the regulation. The courts require that the government demonstrate a nexus between the regulation and the public welfare. This is generally not a difficult burden and often a court will look no further than the recitals of purpose in the act. The court does not require a showing that some quantifiable benefits to the public will occur. It requires only that there is a legitimate public purpose behind the regulatory scheme and that the methods chosen are reasonable methods of achieving its objective. Once this is established the burden of proof shifts to the party attempting to invalidate the regulation.\textsuperscript{130} This is a difficult burden to meet for it must be shown that statute is clearly arbitrary and unreasonable, has no substantial relation to the public health, safety, morals, or general welfare.

There is no doubt as to the legitimacy of the purpose of Ch. 151. Regulation of the development of natural resources has been a historic concern and function of government. Water is a resource which is

\textsuperscript{130}Williamson v. Lee Optical, 348 U.S. 483 (1955). The Kentucky Court of Appeals has adopted the same presumption of constitutionality and standards of judicial review. See e.g., Fried v. Louisville and Jefferson County Planning and Zoning Commission, 258 S.W.2d 465 (1953), and City of Richlawn v. Mahon, 313 Ky. 265, 230 S.W.2d 902 (1950).
essential to the continued vitality of the state's economy for supply will remain relatively constant but use demands will intensify as the population increases. The failure to make an efficient allocation of this resource could result in major economic disruptions in the long run to the ultimate detriment of substantial numbers of the state's citizens. The need for comprehensive water resources planning and regulation can be expanded at great length but it is now generally well accepted and it is inconceivable to think that the Court of Appeals would not find the objective legitimate.

The question which cannot be answered with any certainty is once having found the objective legitimate, will the Court of Appeals find ch. 151 constitutional? The legitimacy of the objective should not obscure the court from making an inquiry into the impact of the statute on existing uses of water. This first requires a determination of what rights were "vested" prior to the enactment of Ch. 151 and whether they have been "taken". The courts which have considered similar schemes have generally held that they are constitutional as long as vested rights have not been impaired.

The statute makes no attempt to create a category of prior rights which are vested. It is not fully clear if the state is now the source

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131 The importance of state-wide water planning for recreation was recognized by the Court of Appeals in Commonwealth of Kentucky, Department of Highways v. Thomas (Opinion unpublished as of date of writing. Decision rendered December 15, 1967).

of rights or if riparian rights will continue to control the allocation of water. As has been discussed earlier, this monograph is assuming that new rights will be neither appropriative or riparian but will be state created [Underlining added]. On this assumption the most important question are whether present consumptive rights will be impaired and whether unused riparian rights will be held to be vested. Earlier courts and writers have assumed that the natural flow theory or the reasonable use theory required that all rights, consumptive and unused, would be vested and thus could not be subject to state regulation unless the riparian was compensated for their impairment. It is clear, however, that state legislatures are not subject to such rigid limitations.

The determination of what rights are "vested" and which are not can not be made by any precise formula. "Vested" can be most accurately described as a conclusionary label applied by the courts after they had decided that the state should not be able to interfere with the individual's use of the resource without paying compensation to him. An analysis of the decisions which have considered the question reveals that sweeping statements such as one made in a study prepared by the Kentucky Legislative Research Commission that "The general rule is that riparian rights since they are vested property rights, cannot be taken or terminated by the state without compensation to the owners" is so broad as to be meaningless. Some forms of riparian uses have traditionally been subject to police power regulation and thus the state has not had to compensate when they were impaired. For example, some courts have upheld the right of the state or city to prohibit bathing and swimming
in a lake in order to protect the purity of a municipal water supply.\textsuperscript{133} The right to bathe, swim, and fish are recognized riparian rights but so classifying them does not immunize them from state regulation.

KRS 151.120 declares much of the water in the Commonwealth to be public. The purpose of the section is to create a firm theoretical basis of state exercise of the police power. The declaration that water is public has historically served as a basis for state regulation. In a recent case the Minnesota Supreme Court State v. Kulvar\textsuperscript{134} sustained a statute similar to Kentucky's which declared much of the water of state public and created a permit system. The court said that the statute was justified because:

"It is fundamental that, in this state and elsewhere, that the state in its sovereign capacity possesses a proprietary interest in the public waters of the state. Riparian Rights are subordinate to the rights of the public and subject to reasonable control and regulation by the state."\textsuperscript{135}

The foundation of modern assertions that water is public water stems from Roman law. The Romans conceptualized natural resources such as air and water as part of a negative community-	extit{res communes}-with

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\textsuperscript{134} 266 Minn. 408, 123 N.W.2d 699 (1963).

\textsuperscript{135} 123 N.W.2d at 706-7.
\end{footnotesize}
the consequence that they were the property of everyone until reduced to possession by an individual.\textsuperscript{136} The English adopted the Roman view calling water \textit{publi juris} until reduced to possession. The Roman theory of the negative community does not logically imply that the state has the power to regulate water but it has been adapted for that purpose. The state adopted the theory that while the waters are "owned" by the entire citizenry they are also held in trust by the state for the general public. State declarations of trusteeship were initially confined to navigable waters in order to protect rights such as the right of the general public to fish in a navigable stream. However, the western states have used the trust theory to support comprehensive regulatory schemes over all of the water within its boundaries and presumably the same option--as Kentucky has taken--is open to the Eastern states.\textsuperscript{137} There is much confusion in the trust analogy and references to handy Latin phrases such as \textit{res communes} or the hypnotic \textit{publi juris}. It would be more candid for the courts to rest a regulatory scheme as Chapter 151 on the state's general police power subject to the traditional contributitional limitations. \textit{Kulvar}, however, is an example of the use of the trust theory to sustain a use regulation statute and should be followed by the Court of Appeals. Validation of the regulatory scheme does not, however, dispose of the question of whether "vested rights" are entitled to

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\item For a historical discussion of the development of Roman and English Common Law see 1 Wiel, Water Rights in the Western States, 2-13 (3rd ed. 1911).
\item For a more detailed explanation of this position see Trelease, Government Ownership and Trusteeship of Water, 145 Calif. L. Rev. 638 (1957).
\end{enumerate}
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protection. The Court of Appeals could hold that a regulatory scheme was constitutional as an exercise of the police power but find Chapter 151 unconstitutional because it fails to protect vested rights. The concept of "vested rights" is generally used to protect individuals who would be hurt by a new application of the law because they were induced to rely on the continued existence of the previous law. A frequently litigated problem which requires a determination of whether a right is vested is a person whose property is unzoned at the time he starts construction of a building but it is subsequently zoned to exclude the contemplated use. The court must determine if he has a vested right to a nonconforming use. To decide this it generally inquires into the extent to which he would suffer financially if he were forced to cease construction and whether his reliance was in good faith and thus justified. The Court of Appeals could hold that only consumptive rights and not unused riparian rights need be protected by analoging from two recent cases in the law of future interests and zoning which have considered the problem of protecting vested rights.

In 1960 Kentucky abolished the distinction between a right of re-entry and a possibility of reverter. A single future interest—a right of re-entry—was created and their traditional exemption from the policy behind the rule against perpetuities was abolished by limiting the right to re-enter upon breach of a condition to a period not longer than thirty years after their creation. Interests created prior to 1960 were allowed to continue in perpetuity if they were registered by 1965, otherwise they were to terminate within 30 years after the date of their creation.138

Atkinson v. Kish, 139 the court had to construe a will which contained a restraint on alienation which in turn created a right of re-entry in the heirs of the grantor. The restraint had not been exercised within thirty years after its creation nor had it been registered. The court held it was no longer enforceable and in so doing included a footnote which implied that the 1960 statutory scheme was constitutional although the court's reasoning was deceptively simple. It held that the right of re-entry in the heirs was not a vested right and thus not entitled to constitutional protection. 140 This is a gross overstatement of the status of right of re-entry, and belies the complexity of the problem. What the court seems to be saying is that holders of such rights are not entitled to rely on the continued existence of the right because the statute was enacted for a legitimate purpose (elimination of clogs on titles) and provided notice that the right would cease after a certain period unless certain reasonable steps were taken to preserve it. Since the holders had the opportunity to preserve the right and failed to take it, it is unreasonable to conclude they relied to their detriment hence the right is not "vested".

In Ashland Lumber Co. v. Williams, 141 a lumber company desired to extend a non-conforming use. They obtained an opinion from the building inspector and city attorney that their expansion was permissible. After the building was ninety percent completed neighbors brought a successful action before the Board of Adjustment to cancel the permit. The case was appealed to the circuit court where the lumber company admitted that

139 20 S.W.2d 104 (Ky. 1967)
140 Id. at 109 note 5.
141 Ashland Lumber Co. v. Williams 411 S.W.2d 909 (Ky. 1966).
its activity violated the zoning ordinance but held it had a vested right to complete the expansion because they had relied to their detriment. The court rejected this argument because the lumber company had relied on the opinions of officials who did not have the authority to authorize an expansion. *Ashland* indicates that a finding of vested right is a function of justified reliance on the continued existence of the right and could be used to support an argument that Chapter 151 is constitutional as long as prior consumptive rights are protected.

One of the major defects in Chapter 151 is its failure to specify clearly the statutes of consumptive rights prior to July 1, 1967. It is unlikely that any prior uses will be terminated or diminished under the statute but the possibility exists. The only section which can be read to protect prior rights is KRS 151.170(2) which requires the director to determine if issuance of a permit will be detrimental to the "rights of other public water users". If this section is construed to preclude the extinguishment or diminishment of prior consumptive uses then the statute should be held constitutional. If it is not, the Court of Appeals might find Chapter 151 unconstitutional in so far as it fails to protect vested rights. 142

Kentucky would do well to amend Chapter 151 to grant express protection to prior consumptive uses. The best method of accomplishing this consistent with the objectives of Chapter 151 would be to require existing riparian users to quantify their rights within a given period. Those who quantified their rights by registering with the division would receive a vested right while those who did not would lose their right.

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Oregon implemented a similar statute in 1909 and the State Supreme Court held it constitutional.\textsuperscript{143} If this decision is followed in Kentucky, only prior consumptive uses need be accorded the status of vested rights. This procedure should give the Division the necessary flexibility it needs in implementing a new system of water rights without harming prior users who have come to rely on the availability of a fixed quantity of water. The limitation of protection to prior consumptive uses will not make it possible for prior users to assert paper rights to large quantities of water so the broad policy objectives of Chapter 151 should not be impeded.

Chapter X

SPECIAL PROBLEMS OF RECREATION WITH EMPHASIS ON THE NAVIGATION SERVITUDE

Kentucky has a great potential for recreation. In fact, it could be argued that its long run economic growth lies in transforming itself into an agricultural and recreational reserve for the East and Midwest as the state has a wide-variety of sources of water-based recreation from free-flowing mountain streams to large lakes behind multi-purpose reservoirs.

The major legal problems in the recreational use of water will center around the following questions: (1) can a permit be secured to divert or use water for recreational development, (2) can a state withdraw water from development to preserve it for aesthetic and recreational purposes? (3) what rights does the public have to the use of public water where the banks are in private ownership and what rights do individual riparian and littoral owners have vis a vis one another? (4) what public control will be maintained over shoreland development?

Chapter 151 does not contain a list of beneficial uses nor does it contain a list of preferences to determine how water will be allocated among various categories of users in time of scarcity. KRS 151.100 does list the growing demand for water for recreational uses as a reason for enactment of the statute. It is thus probable that the court will look to the common law - and perhaps the law of prior appropriation -
in determining if a permit can be issued for recreational uses. It is necessary to distinguish between various kinds of recreation activities, although the law has not yet begun to make such distinctions. It is useful to distinguish between demands for general outdoor recreation and unique natural recreation areas. The use of water for a commercial fishing pond versus preservation of a stream for hiking, sport-fishing and similar uses illustrate the two types of demands. The doctrine of riparian rights and prior appropriation have always recognized that water be used for recreational activities was a reasonable or beneficial use but most of the uses have involved general outdoor recreation.

Thus, the division should, at least, grant permits for the diversion of water for recreational activities such as swimming pools, golf courses, small recreation lakes, and other commercial recreation activities. Impoundments for recreational uses pursuant to KRS 151.210(2), discussed earlier, should also be permitted. Decisions to preserve water for unique natural recreation activities are best made in the name of the general public and will be discussed in the next section.

Many recreation activities are consistent with the concept of multiple-use development, while others are not. If the state wishes to

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145 See Prather v. Hoberg, 24 Cal. 2d 549, 150 P.2d 405 (1944) and Meyers v. Lafayette Golf Club, 197 Minn. 241, 266 N.W. 861 (1936) (golf course may withdraw water from lake to irrigate its greens).
implement a balanced recreation plan, it will be necessary to withdraw certain streams from development in order that they may be preserved as scenic rivers, fishing and canoeing streams. This monograph will not discuss the criteria which should be used to make such withdrawals or the appropriate procedures which should be established within the state government structure to make these decisions. This report will be concerned only with the power of the division to refuse to issue a permit because it conflicts with the state recreation plan or to issue a permit to an appropriate state agency which would have the effect of withdrawing the water from further development.

This question has been considered by several western courts and state agencies. They have involved attempts by the proposed user to secure affirmative protection for his use by giving it the status of a perfected appropriation. The courts and state agencies have all held that water can not be appropriated for preservation of fish and wildlife and scenic beauty because an appropriation requires a diversion and no diversion has been made.\footnote{See Cascade Town and Water Co. v. Empire Land and Water Co., 181 Fed. 1011 (D.C. Colo. 1909) modified 205 Fed. 123 (8th Cir. 1913). For an extended discussion of the problems of preservation of scenic rivers see Tarlock, Preservation of Scenic Rivers, 55 Ky. L. J. 745, 756-57 (1967).} These results have been criticized for carrying the diversion requirement to a logical but non-functional extreme and these cases should not be followed in Kentucky. If the division finds that use of water for preservation and fish and wildlife and scenic beauty is consistent with state water and recreation planning, a permit should be issued to an appropriate state agency guaranteeing their right to a minimum flow.
Likewise the division should deny a permit to a private individual or other public entity if they find that the proposed use would be inconsistent with state water recreation plans. There is ample language in Section 170 to support such a denial. The division has the power to deny a permit if the proposed withdrawal will be detrimental to the public interests. Preservation of scenic beauty is now recognized as a legitimate function of the state and thus the division's power to grant or deny a permit for this purpose should be found valid by the Court of Appeals.

A major source of public rights to make recreational uses of water is the navigation power. The power stems from the right of the Kings of England to control the seas and inland waterways which were affected by the ebb and flow of the tide to guarantee public rights such as fishing and transit. This restrictive definition of navigability was rejected by the American courts because it was unsuited for a nation of non-tidal inland waterways. The Supreme Court based the power to control and develop waterways for purposes of navigation on the commerce clause and held that a stream was navigable if it was navigable in fact for purposes of commerce. As government intervention in water resource development expanded from navigation to flood control, water supply, and recreation development the navigation power was used to sustain these new federal activities. The navigation power was extended to the states after the American Revolution. They assumed title to the beds beneath navigable waters and hence dominion

147See, e.g., Moore v. Ward, 377 S.W.2d 881 (Ky. 1964) which upheld the control of billboards as a legitimate function of the state pursuant to its police power.

over them. 149 This development is beyond the scope of this monograph and been briefly outlined earlier. The significant point here is that the navigation power is the source of public rights to swim, fish, boat, and enjoy the scenic beauty of navigable bodies of water even if the bed and banks are held in private ownership. 150 The public can not, of course, trespass private property to gain access to navigable waters.

The navigation power involves two separate questions which have often been confused by the courts. The first involves the use of the power as a basis for government intervention. The second involves the use of the power as a basis for not compensating the property owner who has suffered injury as a result of a project undertaken pursuant to the navigation power. The courts have generally held that the navigation power imposes a servitude in favor of the federal government which makes it impossible for a private individual to acquire a compensable interest in navigable waters. Thus, the courts have denied compensation for loss of rights for a variety of injuries such as the destruction of an oyster bed, 151 the raising of the level of the water up to the ordinary high water mark, 152 and the value of the site for power generation facilities. 153 Unfortunately, the courts have never sharply distinguished between the use of the power

149 41 U.S. (Pet.) 368 (1824)

150 See Reis, Policy and Planning for Recreational Use of Inland Waters, 40 Temple L.Q. 159 (1967) for a discussion of public rights to the use of water for recreational purposes.

151 Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913).

152 United States v. Chicago, M., St. P. & Pac. R.R. 312 U.S. 592 (1941)

to validate federal or state action and the use of the power to destroy property without paying compensation. There is a need to make this distinction by delineating the scope of the power and to determining what kinds of property interests should be protected against destruction without compensation. The use of power to justify the development of water resources for recreation underscores the need for the courts to grapple with these two questions. Fortunately, the Kentucky Court of Appeals has never blindly invoked the navigation power as a basis for non-compensation and the two leading cases show an awareness of the need to treat separately the two questions outlined above.

The Kentucky Court of Appeals has adopted a strict definition of navigability consistent with the federal standard. In Natcher v. City of Bowling Green\textsuperscript{154} the court held that a stream must be navigable in fact for purposes of commerce and emphasized that "the mere capacity to pass a boat of any size, however small, from one stream to another (is not) sufficient to constitute a "navigable stream."\textsuperscript{155} Thus, public rights will be confined to the state major streams and lakes under this standard but this will guarantee that ample water is available to the public.

In Natcher the plaintiff's gravel bed was flooded, below the ordinary high water mark, by the construction of a municipal dam. The city argued that because the dam was designed to improve the navigability of the stream, they had no duty to compensate the injured riparian. The court rejected this argument after examining the purpose of the dam and concluded "a

\textsuperscript{154}264 Ky. 584, 95 S.W.2d 255 (1936).
\textsuperscript{155}95 S.W.2d at 259.
purpose to create a pool navigable by small craft only cannot be regarded as a purpose to improve navigation" and thus "there is a clear case for the enforcement of the constitutional guarantee compensation". There is ample precedent for denying compensation but the result is a good one. It distinguishes between the use of the power to validate the activity but not to deny compensation. The real question the court should ask is, what incidents of property ownership should the owner be entitled to rely on receiving compensation if they are destroyed pursuant to an exercise of the power? Kentucky has taken this approach in a recent case arising from the improvement of the short of Barkley Lake. Plaintiff owned a parcel with water access to the lake and a small portion was taken by the state for a right of way. This severed access by water from the main tract to an inlet which led to the lake but the state refused to allow compensation for the loss. The court reviewed the navigation cases and found cases denying and granting compensation for loss of access and decided to take a fresh look at the problem and allowed recovery. The court found precedent in Natcher but based its opinion principally on the effect denial of compensation would have on the state's recreational development.

"Let us keep in mind that the riparian rights of the land owned by appellees were created by the U.S. Government in the construction of Barkley Lake and the impounding of the water of the Cumberland River.

156 Ibid.

157 Department of Highways v. Thomas S.W.2d (1967) (opinion not reported at time of writing).
above the dam. It is simple logic that as soon as it became generally known that Barkley Dam was to be constructed and the high-water mark determined, appellee's property, like thousands of other acres of land adjoining artificial lakes in the Commonwealth, enjoyed a fantastic increase in value. The value is there; it is recognized by the buyer, the seller, and everyone else.

'It occurs to this court that the question in this case has weighty public policy considerations. This Commonwealth has more miles of navigable rivers than any other inland state in the Union (including the tortuous Cumberland, which raises its head in John Fox, Jr., country, the mountains of southeastern Kentucky, snakes its way south into the state of Tennessee before becoming homesick for its native land and streaking north to entirely embrace its mother state before spending itself in the beautiful Ohio.) The construction of numerous multipurpose dams has provided the fair state of Kentucky with more miles of lake shore line than any other state, with the possible exception of Minnesota. (Approximately 6,000 miles of shore line, containing 180,000 acres of surface water, and more dams are being built.) Industry is moving into our State at an accelerated rate. The population is increasing. Leisure time is also increasing with automation, resulting in greater demand for recreation. All of this tends to increase the value of land with access to our lakes. This court will not blindly disregard such obvious facts existing in this Commonwealth in regard to value of land suitable for camp sites fronting on public lakes with recreational facilities, and practically all of them enjoy such facilities.'

\[158\] Id. at ___...
Access rights are a good instance where compensation should be granted when they are destroyed pursuant to an exercise of the navigation power because the littoral or riparian owner should be induced to develop his property in reliance on the continued existence in order to encourage state recreational development of water access. Granting compensation will not unduly interfere with public improvements and should be an expense which must be added to the state's calculation of project costs. Compensation for other rights which may be asserted is not so clear and the court must pick and choose with care in defining compensable rights. For example, in Wood v. South River Drainage District, compensation a resort owner suffered a severe loss of business when a drainage district lowered the level of the water in the bay on which her resort was located. The court denied compensation because "The restriction appellant seeks to impose upon the free exercise by the supervisors of the powers entrusted to them for the public good might conceivably impair and interfere with the effective reclamation of lands in the district." The court's attempt to balance private against public interests is an unsatisfactory analysis and a better rationale might have been that plaintiff's reliance on the district maintaining a minimum lake level was unreasonable because its purpose was drainage. The same rationale would apply to compensation claims of property owners on the shores of flood control and water supply reservoirs but would be less persuasive if recreational use were the primary purpose of the facility. Hopefully the Court of Appeals will continue to decide conflicts involving the navigation servitude on a case by case basis examining such factors as justified reliance rather than invoking a blanket rule of no compensation.

159 422 S.W.2d 33 (Mo. 1967).
If a watercourse is found non-navigable the exclusive right to use the water for recreational purposes belongs to the shoreland owners. At common law the littoral owners had a right to enjoin diversions which reduced the level of the lake below its normal level.\textsuperscript{160} This application of the natural flow theory was rejected by some courts which held that conflicts should be settled by the reasonable use rule.\textsuperscript{161} This rule will not guarantee the littoral owners a minimum level although the leading case applying the theory enjoined diversions which would reduce the level below its normal height. It is probable that Kentucky would adopt the reasonable use standard but if KRS 151.210(2), discussed earlier, is applied to fix minimum lake levels, littoral owners will be protected by public action rather than by common law doctrines because the recreational function of a lake should certainly be a factor for the division to consider in fixing the minimum levels.

A related problem is the scope of the littoral owner's right to use the surface of the lake. Early courts adopted the theory that the littoral owners rights were determined by ownership of the underlying soil. The court thus divided the lake into an imaginary pie and confined each littoral owner to his wedge.\textsuperscript{162} A recent Florida case rejected this rule on the theory that it was impractical and impeded the recreational development of the state.\textsuperscript{163} Kentucky should follow the Florida Supreme Court for it makes little sense to attempt to confine users within imaginary

\textsuperscript{160}Taylor v. Tampa Coal Co. 43 So.2d 392 (Fla. 1949).

\textsuperscript{161}Harris v. Brooks 225 Ark. 435, 283 S.W.2d 129 (1955).

\textsuperscript{162}See e.g., Sanders v. De Roe, 207 Ind. 90 191 N.E. 331 (1934).

\textsuperscript{163}Hill v. McDuffie, 196 So.2d 790 (Fla. 1967).
boundaries. The doctrine of reasonable use, of course, applies and excessive uses by any one littoral owner which substantially interferes with the enjoyment of others can be enjoined. A good example of the kinds of limitations a court could impose is illustrated by a recent Washington decision, Botton v. State.\textsuperscript{164} The state acquired the fee to a strip of littoral property to provide access for fishermen but other large public groups soon turned the small lake in a go-go resort area. The private littoral owners sued arguing that such public use was decreasing the value of their property and was beyond the scope of the original purpose for acquiring the fee. The court agreed and held that the state's failure to restrict use to the original purpose had become unreasonable in light of the small size of the lake and the adverse effect the expanded use had on the value of other littoral owner's property. This reasonable use limitation should apply equally to excessive use by a private littoral owner.

Much of Kentucky's recreation potential may be lost if the state fails to control the development of the portion of the shore held in private ownership around the large multi-purpose reservoirs. Unregulated development will lead to a series of recreational slums attractive to no one. It is unrealistic to expect many units of local government to assume their responsibility in this area. A state program is needed and one recently enacted by Wisconsin serves as a good model.\textsuperscript{165} The counties

\textsuperscript{164} 420 P.2d 352 (Wash. 1966).

\textsuperscript{165} The Wisconsin Statute is outlined in Yanggen and Kusler, Natural Resource Protection through Shoreland Regulation: Wisconsin XLIV Land Economics 73 (1968).
should be given a specified period of time to prepare shoreland protection ordinances. If the counties fail to act or fail to enact "reasonable minimum standards" the state should have the power to adopt and enforce an ordinance. Minimum lot sizes, sanitation requirements, filling and grading, structural set backs, and maintenance of the habitat would be some of the problems which must be dealt with by the ordinances. This program should be complemented by a program to acquire scenic easements at crucial points along the shore to protect its environmental integrity.

166 The state may delegate the zoning power to state agencies rather than cities or counties if it chooses. Southeastern Displays, 1wc.v. Ward, 414 S.w.2d 573 (Ky. 1967).
Chapter XI

CONCLUSION

This report has focused on the laws relating to the allocation of the state's water. As conflicts become acute it will be necessary for the Division of Water to move from an information gathering and planning agency to a regulatory institution. As long as the Division confines its functions to the first category of activities it is unlikely that major problems will be encountered in the operation of the statute. If, however, it assumes regulatory functions serious problems could be encountered for several reasons:

(1) The statute fails to clarify the relationship between the common law of riparian rights and the permit system.

(2) The statute gives incomplete protection to the procedural rights of third parties and thus the statute is open to serious due process objections.

(3) The status of prior consumptive rights is not clarified and serious constitutional problems are raised.

(4) The statute contains unnecessarily broad exemptions such as the one for agricultural uses which could cripple its effectiveness.

Nonetheless the statute is important because it should accustom Kentucky water users to the operation of a statewide regulatory system. It will allow the Department to collect the necessary data to formulate long range plans which can serve as the basis for a well reasoned set of
amendments when the necessity for them arises, such as a system of priorities to operate during times of shortage.

There are other water problems which also merit serious attention. There is a need to examine the rules governing liability for causing conditions which result in the flooding of adjacent land. There is a need to analyze public programs to prevent flooding, such as flood plain zoning and the flood proofing of buildings. The control of water pollution is worthy of a separate study. The state is also plagued by the proliferation of small water districts which are often underfinanced and thus must compete with cities for service areas on the unincorporated fringes of metropolitan areas. This problem suggests the need to examine the laws governing the formation and operation of the state's water distribution organizations.

It is too early to evaluate the effectiveness of Chapter 151. It is impossible to determine if the establishment of a public administrative agency will work a substantial change in water use patterns or result in the more efficient use of the state's water resources. It is hoped that a follow-up to this study will be undertaken when sufficient experience under Chapter 151 has been accumulated to permit a meaningful evaluation of its effectiveness.
APPLICATION FOR WATER WITHDRAWAL PERMIT

(All information must be filled in to obtain permit - type or print)

Check one:

Municipality
Water District
Industrial Plant
Private Water Co.

(Corporate Name)

Telephone No. Address - Zip Code

Check one:

Executive Officer
Superintendent

Telephone No. Address - Zip Code

List person to be contacted, when necessary

(Name and Title)

Telephone No. Address - Zip Code

Name of Consulting Engineer

MARK U.S. Geological Survey 7½ Minute Topographical Map for your area showing location of the following (if applicable): Location of Water Treatment Plant(s); Location of Wells you are using; Location of Water Intake Facility(s); Boundaries of Distribution System; Location of Effluent Discharge(s); Location and Capacity of any Water Impoundments. USGS 7½ Minute Topographical Maps for your location can be obtained from the Kentucky Dept. of Commerce, New Capitol Annex Bldg., Frankfort, Kentucky 40601. Map plus postage plus sales tax totals 46 cents.

Rated Plant Capacity __________ GPD Ave. Plant Output __________ GPD

Amount of Water Purchased __________ Max. GPD

If Purchased, from whom (Explain why)

WATER USAGE:

PRESENT

Average Daily Withdrawal __________ GPD Max. Daily Withdrawal __________ GPD

No. Customers Billed __________ Estimated Population Served __________

Type of Use: Domestic __________ % Industrial __________ % Other __________ %

Describe Other, if used:

Type of Treatment:
Storage Facilities, Raw Water:
(Show number, type, and capacity)

Storage Facilities, Finished Water:
(Show number, type, and capacity)

EFFLUENT:
Show GPD Returned to Each Effluent Location:

What is the Quality of Effluent at each Location

FUTURE REQUIREMENTS: PROJECTED TO YEAR 1970 1975 1980
Average Withdrawal GPD
Maximum Summer Withdrawal GPD
Estimated No. Population to be served
Est. No. of Customers to be served
When will Reqmts. Exceed Availability
Do You Have a Plan to Provide Water Needed in the Future (Explain)

List any Water Districts who obtain all or part of their supply from your Water Treatment Plant and show amounts furnished them in GPD.
**SOURCE OF WATER:** If you have more than one source, show each source separately. (Reproduce this page and attach additional sheets to this application if necessary)

**Ground Water:**

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Type of Water Bearing Material

**OR**

**Surface Water:**

Name of Stream or Impoundment

Show Quantity Impounded (or Area and Average Depth)

Show Quantities Withdrawn in average GPD and Amounts you Request in your Permit, for each month and for each Separate Source:

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*(NOTE: If there is a significant variation between GPD you show as Withdrawn and Requested, explain fully in your covering letter)*

I do hereby certify that all of the foregoing statements are true and correct.

_________________________  ____________________________
Date                                      Signature of Authorized Applicant