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Abstract (Purpose, method, results, conclusions)

The unique situation concerning water rights in Hawaii presents some particularly difficult legal questions. This report analyzes the constitution, "taking" issues involved if Hawaii were to move from its present, judicially created system of water rights to a system allocating water based on limited-duration permits. Such a problem arises under the fifth amendment of the United States Constitution (prohibiting the taking of property without just compensation) because present Hawaiian water rights, namely riparian appurtenant and konohiki water rights, could be considered "property". Replacing such rights with permits of limited duration, or the failure to grant a permit to an existing inchoate use, might therefore be considered a taking. Hence, the issue as to whether or not compensation in such cases is constitutionally compelled casts a pall of legal and economic uncertainty over the adoption of a permit system. This report develops a model for answering these questions based on the following steps: (1) the determination of the present state of water rights, (2) ascertainment of the degree to which these rights constitute "property" in a constitutional sense, (3) an assessment of the degree to which a comprehensive regulatory system is required by the constitutional amendment on water resources, (4) a discussion of the desirability of a limited-duration permit system, (5) the derivation of a test for determining whether a taking has occurred, and (6) the isolation of different factual patterns which would raise a taking question. The constitutional analysis proceeds under the assumption of a pre-McBryde state of affairs since this presents a "worst case" scenario and magnifies the constitutional issues involved. In conclusion, a limited duration permit system is recommended as a constitutionally permissible and viable means of maintaining the needed flexibility to meet future demands and shifting uses.
WATER RIGHTS, WATER REGULATION
AND THE "TAKING ISSUE" IN HAWAI'I

William Kloos
Nathan Aipa
Williamson B.C. Chang

Technical Report No. 150

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ABSTRACT

The unique situation concerning water rights in Hawai'i presents some particularly difficult legal questions. This report analyzes the constitution, "taking" issues involved if Hawai'i were to move from its present, judicially created system of water rights to a system allocating water based on limited-duration permits. Such a problem arises under the fifth amendment of the United States Constitution (prohibiting the taking of property without just compensation) because present Hawaiian water rights, namely riparian, appurtenant, and konohiki water rights, could be considered "property". Replacing such rights with permits of limited duration, or the failure to grant a permit to an existing inchoate use, might therefore be considered a taking. Hence, the issue as to whether or not compensation in such cases is constitutionally compelled casts a pall of legal and economic uncertainty over the adoption of a permit system. This report develops a model for answering these questions based on the following steps: (1) the determination of the present state of water rights, (2) ascertainment of the degree to which these rights constitute "property" in a constitutional sense, (3) an assessment of the degree to which a comprehensive regulatory system is required by the constitutional amendment on water resources, (4) a discussion of the desirability of a limited-duration permit system, (5) the derivation of a test for determining whether a taking has occurred, and (6) the isolation of different factual patterns which would raise a taking question. The constitutional analysis proceeds under the assumption of a pre-McBryde state of affairs since this presents a "worst case" scenario and magnifies the constitutional issues involved. In conclusion, a limited duration permit system is recommended as a constitutionally permissible and viable means of maintaining the needed flexibility to meet future demands and shifting uses.
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I. INTRODUCTION

In the past several years in Hawai'i there has been a growing awareness of the need to more carefully regulate the development and allocation of Hawai'i's water resources and more clearly define the nature of private right to water use. Some important sources of water are reaching the limits of their development.\(^1\) Competition for inexpensive water sources has increased litigation over water rights, and some of this litigation\(^2\) has resulted in surprising changes in the interpretation of the laws, customs, and usages that define Hawai'i's unique body of water rights laws. These concerns culminated in a constitutional mandate for comprehensive regulation of water use for protection of the resource and for the benefit of the public.\(^3\) A comprehensive review of Hawai'i's water resources problems by the State Water Commission has recommended controlling the development and use of all ground and surface waters under a permit system operated by a state board. The Hawai'i legislature has considered some proposals for meeting the regulatory mandate.\(^4\)

This report addresses the question that inevitably arises whenever property rights are restricted or destroyed by public action—that is, will the new regulations be a valid exercise of the state's broad police power for which no compensation must be paid, or will the regulations restrict private rights so much as to constitute a "taking" of property that requires compensation under the constitution? Mainland experience suggests that litigation of the taking question will inevitably flow from any major shifts in water use rights.

Answering the question first requires an understanding of existing water use rights and how they would be restricted under a new regulatory scheme. Part II describes Hawai'i's water rights and how they differ from rights in other states. Some water use rights in Hawai'i are unique because they derive from Hawai'i laws and historic usage and custom with only limited borrowings from the major common law doctrines.

Part III examines how current rights would be restricted under a new regulatory program. This necessarily requires making assumptions about the essential elements of a new regulatory system and determining the scope of the constitutional mandate. Unlike Hawai'i's experience in drafting state land use regulation, an area which Hawai'i pioneered among the states, Hawai'i can draw upon the diverse experience of other states that have been extending and modernizing public control of water use for decades.

The change from current water use rights to restricted rights under new regulations sets the state for analysis of the taking question in part IV. This part reviews other states' experience with the taking issue in the shift to public control. While the cases generally uphold water regulation as a valid exercise of the police power, the explanation of the theories employed is not extensive. Utilization of the holdings in other states is further limited by the fact that Hawai'i has a different starting point in its unique water rights laws; this changes the extent to which Hawai'i regulations would affect property rights.
Part V summarizes the conclusions from the takings analysis and makes related recommendations as to provisions of the future regulations.

Part VI discusses how two important water decisions (McBryde and Reppun) handed down by the Hawaii Supreme Court subsequent to the completion of parts I through V will affect the issues raised in this report.

I. NOTES

1. See STATE WATER COMMISSION, HAWAII'S WATER RESOURCES, DIRECTIONS FOR THE FUTURE (1979) [hereinafter cited as STATE WATER COMMISSION].


3. HAWAII CONST. art. XI, § 7:

   The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.

   The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources.

4. See section III.E. infra.
II. HAWAI'I WATER RIGHTS LAW IN CONTEXT

A. DOMINANT WATER RIGHTS DOCTRINES IN THE UNITED STATES

An overview of dominant water rights doctrines is a useful introduction to current water rights in Hawai'i because some elements of these doctrines operate here. More importantly, these doctrines are the starting point for public regulation through permit systems. Comprehensive approaches to public regulation, including many recommendations of the State Water Commission, rely upon specific features and standards from these doctrines.

1. Surface Water Doctrines

Two major doctrines of law have traditionally governed the allocation of surface waters. Riparian law predominates in states east of the Mississippi River. Prior appropriation law is dominant in the west, but a number of western states are known as "mixed" states because they traditionally recognized riparian rights as well although they vary greatly in the importance presently afforded to riparian rights.¹

Prior appropriation recognizes water rights as arising from the actual beneficial use of water, rather than from any connection with land ownership. Basing the right in actual use reflects the more arid character of the western states and the need to maximize productive use of all water. Once acquired, appropriate rights are of indefinite duration, but they may be lost through nonuse. Appropriations are limited to specific quantities of water.

The major condition on the exercise of the right is that the use be beneficial. Beneficial use is commonly held to be the basis, measure, and limit to the use of water. Waste is precluded, but case law, and statutes do not precisely delimit the meaning of "beneficial"; rather the standard is applied pragmatically in individual situations. The method of diversion and application must also be efficient under the circumstances. Change in the place of diversion and the place of use have traditionally been allowed under the doctrine.

Temporal priority is another distinguishing feature of prior appropriation. Each appropriator acquires a protected interest in water use, but that interest is inferior to that of appropriators who came earlier in time. The appropriator who is first in time is first in right. An earlier appropriator is entitled to draw his full amount before a later appropriator may draw any water. A user's location along a stream is not relevant to determining priority of use. As a property right not tied to particular land, the appropriative right can be severed from the land and sold.

All western states following prior appropriation, with the exception of Colorado, now manage the system within a comprehensive administrative permit system. These permitting procedures generally provide for denial of a permit to protect a senior appropriator or the public interest, and they may require modification of the permit to make changes in the appropriation,
such as in the place of diversion, place or nature of use, or transfer of right.

The riparian doctrine developed in the eastern states. Its most fundamental characteristic is that the right to use water arises from the ownership of riparian land, that is, land adjacent to the water. While this rule of law would be harsh on non-riparians in the arid west, it is less so in the wetter states of the east. The riparian owner has no right to an absolute quantity of water. Rather, the riparian right is correlative, which means that each right holder must consider the needs of all others having a right to use.

The riparian owner's right to make consumptive use of water depends on whether the jurisdiction follows the natural flow doctrine or the reasonable use rule. The natural flow doctrine was the traditional rule in the northeastern states, which afforded each riparian owner the right to have the stream flow in its natural state, substantially undiminished by any users. Uses which consume water are limited to "natural" uses, such as for drinking water and household purposes. There is no limit on the amount any riparian may take for "natural" uses. Water may be put to "artificial" uses, such as mining or manufacturing, only if the flow to downstream riparians is not materially affected. A downstream riparian need not show actual damage in order to enjoin an upstream "artificial" use that diminishes the natural flow.

With the decline of water-powered industries in the east and greater need to put water to beneficial and consumptive uses, the "reasonable use" rule displaced "natural flow" as the majority position in the east. This rule allows consumptive use of water by riparians so long as the use is reasonable with respect to the needs of other riparian users. Reasonableness of use is a factual determination made on a case-by-case basis and only as between riparians. No consideration is given to the needs of non-riparians. Although all riparians are said to be coequals, when there is a shortfall the reasonableness determination, which may reflect factors like rainfall, historical uses, place and purpose of diversion, and other factors, may find some uses to be unreasonable.

The "reasonable use" rule also recognizes the "natural" and "artificial" use distinction. All "natural" uses are reasonable and are preferred over artificial uses.

Some riparian jurisdiction recognize a "watershed limitation", which prohibits the use of water on land outside the watershed even though that land may be part of a riparian parcel. The watershed limitation restricts the beneficial use of water, but it protects existing and future riparian users in the watershed receiving the water from excess flow.

Jurisdictions vary in their approach to the use of water on nonriparian land in the watershed. Some jurisdictions hold such use to be wrong per se; others follow the rule that use on non-riparian land is enjoinable if another riparian is injured thereby; the most liberal approach considers such use as one factor in the overall factual determination of reasonableness.
The riparian doctrine, as exemplified in the natural flow principle, emphasizes maintaining the status quo. Current variations in the law reflect efforts to modernize the doctrine by allowing beneficial use of water on more land areas. Recent adoption of permit systems in some riparian states also reflect efforts to improve beneficial applications of water.

Eight western states follow exclusively prior appropriation and are collectively termed "Colorado" states. The remaining nine states, which traditionally recognized both riparianism and appropriation, are termed "California" states, although the present day importance of riparian rights varies considerably among these. ²

2. Groundwater Doctrines

Common law distinguishes between subsurface water in defined underground streams and percolating water. Well-defined underground streams generally follow the law of surface waters, although some states no longer treat such streams differently from percolating water.

The law of percolating water, or groundwater, is diverse. Some western states follow the prior appropriation doctrine, which predicates the right to use on actual beneficial use. Other doctrines base groundwater rights on the ownership of overlying land and can be roughly grouped as the "absolute ownership" doctrine, the "American rule", and the "correlative rights" doctrine. The absolute ownership doctrine and American rule are similar in that they are based on the theory that the overlying owner has a proprietary interest in the corpus of the water, instead of merely a right to use the water. This is something of a misconception since water cannot be owned absolutely until reduced to possession or control. But both of these rules recognize in the overlying owner an exclusive right of access to the water through his land. The overlying owner may use the water regardless of any injury to surrounding owners. The American rule differs from absolute ownership only with respect to transportation of groundwater for use in a different area. While absolute ownership would allow such transport and use regardless of injury to others, the American rule prohibits such transport if a water supply of another is damaged thereby. The American rule is now the majority position.

The correlative rights doctrine differs by recognizing only an equal and correlative right of each landowner over a common groundwater source to make use of the water. As with surface riparian law, there is no absolute right to a quantity of water. When the supply is insufficient to meet the needs of all users, the available supply is equitably apportioned among the owners. Some states permit transport of water for use on non-overlying lands subject to no injury to other correlative right holders. ³

II.A. NOTES

1. For a succinct summary of the water law principles associated with prior appropriation and common law doctrines see Ausness, Water Use

2. For a more extensive discussion of these doctrines see 1 R. CLARK, WATERS AND WATER RIGHTS, §§18-19 (1972), 5 id. §§401 (prior appropriation law); 5 id. §§405-15 ("Colorado" doctrine re surface waters); 7 id. §§610-20 (riparian law of eastern states) [hereinafter cited as WATERS AND WATER RIGHTS].

3. For a more extensive discussion of groundwater doctrines see WATERS AND WATER RIGHTS, supra note II.A.-2, at §§440-46; 7 id. §619.
B. WATER RIGHTS IN HAWAI' I

Water rights in Hawai'i is a system of law that is both unique in the United States and presently something of a legal jumble. The body of law is based on ancient Hawaiian customs and supplemented selectively with the common law.

Recently Hawai'i water law was radically changed when the Supreme Court reinterpreted the historical basis for the major indigenous water rights. Continued litigation over the legality of this judicial initiative has left considerable confusion. This section summarizes the development and present uncertain status of Hawai'i rights law and sets out the assumptions for the regulatory analysis that follows.

1. Major Factors Shaping current Water Rights Laws in Hawai'i

The present unique and confused status of Hawai'i water rights is the culmination of three distinct developments over the last century and a half: the survival of ancient Hawaiian customs; the selected engraftments of the common law; and the pending litigation arising from the Supreme Court's recent reinterpretation of the ancient principles. The foundation of water law in ancient customs is evidenced by the Supreme Court's statement that, "Our system of water rights is based upon and is the outgrowth of ancient Hawaiian customs and the methods of Hawaiians in dealing with the subject of water."

The ancient rights can be classified generally as "appurtenant" rights and "konohiki" or "surplus" water rights. These rights crystallized during the period of land reform in the mid-1800s. In the "Great Mahaulele" the King, the owner of all land and water, divided all lands between the crown, the government, the chiefs or konohikis, and native tenants or hoa'ainas. A land commission adjudicated the rights of the private claimants under the division. The bulk of the private lands (about 2.5 million acres) went to the konohikis, but the much smaller awards (about 30,000 acres) going to the native lands.

Appurtenant right derive from water uses of Hawaiian tenants from ancient times. In ancient times Hawaiians diverted water from natural streams for agricultural and domestic purposes by means of artificial ditches or auwais. The ditches connected with streams "become a permanent feature of the topography of the localities where they were constructed". This ancient use of water evolved into a "legal appurtenance, or easement, or incident to the land" during the period of land reform. Furthermore, ancient use of water was not required to secure water rights. Use of water on a parcel at the time it was conveyed was the basis for a water right even though the use was not literally ancient. Both these rights are included within the term "appurtenant" rights.

The konohiki right refers to surface water rights accompanying Royal grants of large land areas, or ahupua'a, to the chiefs, grants which carried all natural resources not explicitly reserved by the King for his own use. The surface water flowing on lands granted to the konohikis was subject first to the water needs of the appurtenant right holders on the smaller grants of land within the ahupua'a. Once the appurtenant uses were
met, the konohiki had an unqualified right to use the remaining surface waters flowing entirely within the ahupua'a. Hence, the konohiki water right was also referred to as "surplus waters". Due to its much larger volume as compared with the appurtenant rights, the konohiki waters figured importantly in later development of large scale agriculture.

The first clear application of the common law occurred in 1917 with adjudication of a riparian right. The stage had been set by earlier legislative adoption of the common law and by frequent judicial references over the preceding 50 years supporting possible application of riparian principles to Hawai'i. Where a surface water system flowed entirely within a single ahupua'a, there was no room for riparian principles because konohiki and appurtenant rights accounted for all waters. Riparian case law developed to allocate water in situations where surface water developed on one ahupua'a and crossed another in different ownership before reaching the sea. The Court's major early decisions on riparianism effectively divided the konohiki or surplus waters into categories differentiating between "normal surplus" waters and "freshet and storm" surplus waters, and it treated them differently. The holding applied riparian rules to storm and freshet surplus as between the upper and lower konohiki right holders, but rejected riparianism with regard to the normal surplus, thus leaving the use of these waters solely to the upper landowner.

The limited adoption of riparianism for surface waters that cross ahupua'a thus creates a complex structure of water rights. An appropriate metaphor would describe the watercourse as a sandwich of water rights as viewed by a person standing in the streambed and looking upstream at a cross section. At the lowest level, drawing from the most dependable flow, are the waters for the appurtenant rights. At the uppermost level are the storm and the freshet surplus to be used under riparian rules. The substantial remainder sandwiched between the appurtenant and riparian rights, is the normal surplus, which is part of the konohiki right belonging to the owner of the land on which the water arises.

The common law was also engrafted in 1929 to control groundwater rights. The ancient Hawaiians did not use groundwater resources; thus, the common law correlative rights are the exclusive source of laws.

The recent decision in McBryde Sugar Co. v. Robinson and its progeny shows the Hawaii Supreme Court's intention to rewrite much of Hawai'i water law and the present uncertainty of its success. The McBryde case litigated the right of various land owners, including the State, to waters of the Hanapepe River. The court affirmed the lower court's determination of appurtenant rights in the stream, but it drastically rewrote konohiki and riparian rights. First, the court held that all of the surplus water in the state, including normal and storm and freshet surplus, is the property of the State; it cannot be privately owned. Second, the court construed an 1850 legislative enactment as the Hawai'i codification of the contemporary doctrine of riparianism as it existed in Massachusetts. This "natural flow" doctrine, with its emphasis on nonconsumptive use of water, effectively undermines the legal basis for the extensive irrigation systems that now support Hawai'i's agricultural industry.

The final outcome of this legal overhaul is in doubt. The private
litigants in McBryde, seemingly deprived of long-settled rights to use water, challenged the decision in Federal Court. The Federal District Court, finding the McBryde decision an unconstitutional "taking" of property, avoided the decision and enjoined any state enforcement. The state's appeal of the Federal Court decision, on both substantial and procedural grounds, is pending. Amid the temporary uncertainty, the discussion of water rights that follows must necessarily reflect the law prior to and post McBryde.

2. Hawai'i Water Rights Prior to McBryde

a. APPURTenANT WATER RIGHTS. The appurtenant right is an entitlement to the quantity of water in use immediately prior to the time the land passed into private ownership. Since most appurtenant lands were originally in taro cultivation, the quantity of water necessary for taro cultivation at the inception of the right is the traditional measure of the appurtenant water right. The quantity remains the same even if the consumptive uses change or the water is diverted to non-appurtenant lands. Adjudication of appurtenant rights rarely discuss specific quantities. In lieu of precise methods of measurement to resolve early water disputes, adjudications generally divided the stream flow into stated fractions. The high priority of the appurtenant right is well settled. Appurtenant uses must be accommodated before the owner of the large surrounding lands having konohiki rights can use the remaining surplus waters.

As with riparian rights, appurtenant rights are not lost by mere non-use. The court has allowed reapplication of water to lands which witnesses referred to as kula or dry lands. Unlike riparian rights, however, they can be lost by abandonment.

Wells Hutchins concludes that appurtenant rights are severable from the land and that they can be sold separately. This has been the historical practice, but the legal support for the severability right is not clear cut. Cases dealing with severability fail to clearly identify the water rights involved as appurtenant rights, or they deal with leasing of rights rather than severance by sale.

Several aspects of the appurtenant right parallel common law principles in accommodating multiple users in a single source of water. Although appurtenant right holders are entitled to different quantities of water, the individual rights are generally considered equal with respect to each other. For example, when the flow is insufficient for the aggregate appurtenant demand, all users must reduce proportionately. The right to transfer water for use on non-appurtenant lands, to the extent that right exists, is subject to the condition that no injury results to other appurtenant users.

It is common practice to transport appurtenant water for use on non-appurtenant lands in the same ahupua'a, on a different ahupua'a, and in a different watershed. There is no clear legal authority for a transfer right of such a broad scope. The broad judicial statements condoning transfer appear in cases with facts about transfer to non-appurtenant lands within the same ahupua'a. This would clearly put intra ahupua'a transfers within the
appurtenant right. One case has condoned a transfer from one ahupua'a to another ahupua'a in the same "water system". This leaves open the question of whether the right includes transfer to other "water systems".

b. KONOHIKI OR SURPLUS RIGHTS. For streams that lie entirely within the ahupua'a land unit, the konohiki, or his successor, had the exclusive right to use waters beyond those required to meet the paramount needs of the appurtenant users. Where waters arise on one ahupua'a and flow onto a lower one in different ownership, then the upper owner has the konohiki rights only in the "surplus normal flow". Riparian rules apply to the remainder of the surplus flow, termed "storm and freshet surplus". The court's most extensive exposition of the nature of this right is in Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., where it said:

Surplus water...is the property of the konohiki, to do with as he pleases, and is not appurtenant to any portion of the ahupua'a. By ancient Hawaiian custom this was so. Originally the King was the sole owner of the water as he was of the rest of the land and could do with either or both as he pleased.... But no limitation...ever existed...to his power to use the surplus waters as he saw fit.... During recent years konohikis have in many instances diverted from the ahupua'a the surplus water either wholly or in large part.

This statement defines the broadest of use rights, including the right to transfer waters to any point, sever them from the land, and put them to any use including a wasteful use. It is premised on the theory that the King in ancient times was the sole owner with complete authority in the disposition of water. Those who take exception to the historical accuracy of the King's role as "owner", rather than "trustee", therefore question the historical foundation for this definition of the konohiki right. It nevertheless remains the pre-McBryde definition of the konohiki right.

c. RIPARIAN RIGHTS. Where surface waters flow across an ahupua'a in different ownership, the riparian doctrine applies to the storm and freshet surplus waters. Konohiki rights apply to the normal surplus.

The riparian rule adopted by the court in Carter is one of reasonable use with a preference for domestic uses. The court succinctly stated:

[Each ahupua'a is entitled to a reasonable use of such water, first, for domestic use upon the upper ahupua'a, then for the like use upon the lower ahupua'a, and lastly, for artificial purposes upon each ahupua'a, the upper having the right to use the surplus flow without diminishing it to such an extent as to deprive the lower of its just proportion under existing circumstances.]

This description of the riparian right is notable for its application of the reasonable use limitation even to domestic uses. The common law did not limit the upper riparian consumption for domestic or "natural" uses. There is a suggestion in the Carter case that transfer of riparian waters for use on non-riparian land is permitted only if no riparian is injured thereby.

d. GROUNDWATER RIGHTS. In its only statement on the issue of groundwater rights the court adopted the rule of correlative rights. The door was open to the court for this engrafting of the common law because, as the
court noted, the King had failed to reserve water rights, as he had reserved
mineral rights, when he disposed of lands."2 Reasonable use by all over-
lying landowners in a way that does not injure other users was the thrust
of the court's conclusion. It said:

Their rights are correlative. Each should so exercise his right as
not to deprive others of their rights in whole or in part. In times
of plenty greater freedom of use probably can be permitted and ordi-
narily would be permitted without question. In times of greater
scarcity or of threatened scarcity or deterioration in quality of
waters, all would be required under this view to so conduct themselves
in their use of the water as not to take more than their reasonable
share."3

In its general discussion distinguishing correlative rules from other
groundwater doctrines, the court noted that correlative rules contemplated
use on non-overlying lands in some circumstances,"4 but explicitly declined
to elaborate on Hawaii'i rules beyond the quote above."5 It did, however,
reject the common law doctrine of absolute ownership and the doctrine of
reasonable use.

3. Hawaii'i Water Rights Subsequent to McBryde

The McBryde decision addressed all surface water rights in its re-
writing of the law. It did not address groundwater rights. This section
summarizes the changes in each surface water doctrine.

a. KOHONIKI OR SURPLUS WATER RIGHTS. The McBryde court held that the
surplus waters of Hawaii'i were owned by the state, not by private parties."6
This assertion was based on the court's conclusion that a law implementing
the division of land to the konohikis in the Great Mahele reserved to the
King the right to use water."7 In view of this reservation, there was no
transfer of the right to water into private hands.

Thus by the Mahele...right to water was not intended to be, could
not be, and was not transferred to the awardee, and the ownership of
water in natural watercourses, streams and rivers remained in the
people of Hawaii for their common good."8

The effect of the reservation, in the court's view, was analogous to the
contemporary common law rule that running water is the property of no one,
but is publici juris—the common property of all to be used by those who had
a right of access to it."9 This holding appears to extinguish the konohiki
right theory as an independent ground for water use by present day succes-
sors to konohiki lands.

b. RIPARIAN RIGHTS. McBryde held that the riparian natural flow doc-
trine applies in Hawaii'i."0 This means that all the surplus waters governed
by the konohiki and limited riparian principles prior to McBryde are now
governed by riparian principles of natural flow."1 The court found an ex-
plicit statutory adoption of riparianism in 1850 legislation and concluded
this was an enactment of riparian principles effective in Massachusetts in
1850."2 The right was summarized as follows:
We therefore hold that under the statute a proprietory of land adjoining natural watercourses has riparian water rights...the right to use water therein without prejudicing the riparian rights of others and the right to the natural flow of the stream without substantial diminution and in the shape and size given it by nature. This right is incapable of measurement into number of gallons per day. Of course, the riparian right appertains only to land adjoining a natural watercourse for its use.\(^5\)

The court did not explicitly treat the issue of transferability of water by riparians. The non-diminution standard would clearly preclude transfer of water out of a watershed in a way that it does not return to the stream course. But the issue of use of riparians on non-riparian land in the same watershed remains open.

c. APPURTENANT RIGHTS. In the course of affirming the trial's determination of the respective appurtenant rights, the McBryde court narrowly defined the scope of that right. It concluded that appurtenant water "may only be used in connection with that particular parcel of land which the right is appurtenant".\(^5\) This effectively precludes the longstanding practice of transporting water to other lands and watersheds and the practice of severing the appurtenant right for sale separately from the land.

4. Effects of McBryde and Assumptions for Regulatory Analysis

The analysis of constitutional acceptability of regulatory control of water use requires clear assumptions about the preregulatory property rights that are being restricted. The Robinson decision which voided McBryde may be overturned on appeal if there is no substantive due process claim when a state court retroactively changes the law or if the Robinson court improperly exercised jurisdiction.\(^5\) In that event, McBryde would be law, and acceptability of water regulations should start with the private property rights reflected therein.

But starting with McBryde as the definition of preregulation water rights would still leave some confusion as to the full scope of those rights. For example, do the former holders of konohiki rights in McBryde still have the right to continue their use of water even though it is no longer their private property?\(^5\) Is the McBryde court's apparent prohibition of transfer of appurtenant waters only dicta in this decision?\(^5\) Of course, if Robinson is upheld on appeal then the regulatory impact must be measured against pre-McBryde water rights and the property interests therein.

In view of the uncertainties and the possibilities that Robinson will be upheld, the acceptability of regulating pre-McBryde water rights is examined in this report.
II.B. NOTES

1. For a thorough discussion of Hawai'i water rights prior to the most recent recent litigation see II W. HUTCHINS, WATER RIGHTS LAWS IN NINETEEN WESTERN STATES chs. 12, 20 (1974); W. HUTCHINS, THE HAWAIIAN SYSTEM OF WATER RIGHTS (1946) [hereinafter cited as Hutchins].


3. A third, "prescriptive" right, is recognized. Early Hawaiian cases frequently used this term when referring to appurtenant rights, see Territory v. Gay, 31 Hawaii 376, 383-84 (1930), but this is a misnomer. Prescriptive rights are those obtained adversely from a previous owner through "actual, notorious, continuous and hostile use". Id.

4. HUTCHINS, supra note II.B.1, at 31.


6. HUTCHINS, supra note II.B.1, at 102.

7. Id.

8. Id. Moreover, the deed conveying land need not mention the appurtenant right for the right to pass. Carter v. Territory, 24 Hawaii 47, 58 (1917).


10. In 1892 the Hawai'i legislature adopted the common law to supplement judicial precedents and Hawai'i national usage. LAWS HAWAII ch. 57, §5 (1982) (current version at HAWAII REV. STAT. §1-1 (1976)).

11. Although the cases preceding Carter did not rule on riparian rights, the court's dicta shows an assumption that riparian principles were applicable in Hawaii. See Peck v. Bailey, 8 Hawaii 658, 661-62, 670-72 (1867) (discussion riparian natural flow principles in detail; recognizing appurtenant rights as superior to riparian rights; stating riparian law not applicable to this case); Wailuku Sugar Co. v. Widemann, 6 Hawaii 185, 187 (1876) (assuming, but not deciding for lack of evidence, that a party might claim a riparian use right if it could prove a history of uninterrupted flow); Haiku Sugar Co. v. Birch, 4 Hawaii 275, 277 (1880) (where the issue was taxation of
water rights acquired by separate conveyance, the court distinguished these rights from riparian rights which are not separately conveyed).


15. Id. at 200, 504 P2d at 1345.


18. See Unraveling Robinson, supra note II.B.1. The author develops the proposition that there was no "taking" in the McBryde decision because there can be no substantive due process claim arising out of a state supreme court decision which retroactively changes the law. Furthermore, the author contends that review of the state supreme court decision in McBryde was properly beyond the jurisdiction of the lower federal court in Robinson.

18.1. Hutchins, supra note 1, at 106 (citing Carter v. Territory, 24 Hawaii 47, 64, 66, 71 (1917)); Territory v. Gay, 31 Hawaii 376, 383 (1930). Earlier cases based quantity more upon long-continued use, or use from time immemorial, which necessarily antedated land commission awards. See Peck v. Bailey, 8 Hawaii 658, 662, 671, 673 (1867); Wilfong v. Bailey, 3 Hawaii 479, 480 (1873); Mele v. Ahuna, 6 Hawaii 346, 349 (1882); Wong Kim v. Kioula, 4 Hawaii 504 (1882); Liliuokalani v. Pang Sam, 5 Hawaii 13 (1883), Loo Chit Sam v. Wong Kim, 5 Hawaii 130 (1884), 5 Hawaii 200 (1884); Maikai v. A. Hastings and Co., 5 Hawaii 133 (1884); Davis v. Afong, 5 Hawaii 216, 224 (1884).

19. Hutchins, supra note II.B.1, at 107. Appurtenant rights have also been recognized for household and other domestic purposes. Territory v. Gay, 31 Hawaii 376, 395-96 (1930).


21. Divisions were such as "one-half or one-third to each contestant; or upon the entire flow of the stream at the customary point of diversion and with the customary means of diversion; or upon the usual flow from a certain structure or from certain lands; or upon rotation..."
of the entire flow or of a stated fraction of the flow among various lands for a given number of days or hours or of the day at a time."

HUTCHINS, supra note II.B.1, at 106.

22. See Hawaiian Commercial and Sugar Co. v. Wailuku Sugar Co., 14 Hawaii, 61 (1902), 15 Hawaii 675, 680 (1904), 16 Hawaii 113, 115 (1904); Palolo Land & Improvement Co. v. Wong Quai, 15 Hawaii 554, 562 (1904); Carter v. Territory, 24 Hawaii 47, 70-71 (1917); Foster v. Waiahole Water Co., 25 Hawaii 726, 734 (1921); Territory v. Gay, 31 Hawaii 376, 382, 384 (1930). Any lease of property within an ahupua'a was also subject to the appurtenant rights in the area. The lessee had to look to the konohiki or lessor for a supply of water. Maikai v. A. Hastings & Co., 5 Hawaii 133, 133-34 (1884). Of course appurtenant rights also have priority over holders of riparian rights. Peck v. Bailey, 8 Hawaii 658, 661 (1867).

23. Loo Chit Sam v. Wong Kim, 5 Hawaii 200, 201 (1884).

24. Alleged abandonment presents a question of intention and fact with the burden on the party making the allegation. Carter v. Territory, 24 Hawaii 47, 55 (1917). See Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 15 Hawaii 765, 691 (1904). In Carter the abandoned irrigation water reverted to the territory, the adjudicated owner of the ahupua'a. In view of the private nature of water rights, presumably the reversion to the Territory was in its capacity as owner of the konohiki water rights, not as representative of the public. HUTCHINS, supra note II.B.1, at 47.

25. HUTCHINS, supra note II.B.1, at 121.

26. Tsunoda v. Young Sun Kow, 23 Hawaii 660, 674 (1917) (Robertson, C.J., dissenting). "The right to take water from a flowing well or stream may be separated by the owner from the title to the land by grant or reservation, and upon such separation the right to the water would become an easement in the land." The terms "ancient appurtenant rights" or "taro water rights" were not used in the case.

27. In re Taxes, Waiahole Water Co., Ltd., 21 Hawaii 769 (1913). This case held that water rights that have been severed in ownership from lands to which they were originally "appurtenant" may be assessed separately for purposes of taxation. The case fails to indicate whether "appurtenant" means "appurtenant water rights".


29. HUTCHINS, supra note II.B.1, at 108.

30. Peck v. Bailey, 8 Hawaii 658, 672-73 (1867). In Carter v. Territory, 24 Hawaii 47, 60-61 (1917) the court said: "Where ditches are shown to have been entitled by ancient use to take from a stream a definite proportion of the water normally flowing therein the same division is to be maintained in times of diminished flow.... The rule is the same where the division is by time instead of a proportion of the water." See also Yick Wai Co. v. Ah Soong, 13 Hawaii 378, 382

32. See Peck v. Bailey, 8 Hawaii 658, 666 (1867); Kahookiekie v. Keanini, 8 Hawaii 310, 312 (1891); Lonoaeas v. Wailuku Sugar Co., 9 Hawaii 651, 665 (1895); Wong Leong v. Irwin, 10 Hawaii 265, 269 (1896); Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 15 Hawaii 675, 680 (1904).

33. Wong Leong v. Irwin, 10 Hawaii 265 (1896).


34. 15 Hawaii 675 (1904); See also Peck v. Bailey, 8 Hawaii 658 (1867).

35. 15 Hawaii at 680.


37. See Water Rights in Hawaii, supra note II.B.1, at 148-53.

38. This different treatment for separate categories of waters resulted from divergent opinions of justices in the leading cases. In Carter v. Territory, 24 Hawaii 47 (1917), in which the Court first declared riparian principles and adjudicated a riparian right, the Court used some language suggesting it was applying riparian principles to all surplus waters. See Water Rights in Hawaii, supra note II.B.1, at 183-85 and n. 254. The factual dispute in Carter, however, involved only storm and freshet surplus, not normal surplus, and the Carter holding was so limited by Territory v. Gay, 31 Hawaii 376 (1930).

The facts by Gay involved conflict over normal surplus and three separate opinions were filed, none being designated the opinion of the court. Justice Perry opposed application of riparianism in Hawai’i and would have overturned its application in Carter, thus applying konohiki rights to all surplus waters. Justice Banks favored application of riparianism to all surplus waters, normal and storm and freshet. Justice Parsons controlled the outcome by concurring in Perry’s application of konohiki rights to the normal surplus but dissenting from their extension to storm and freshet surplus (and overturning of Carter) because only the issue of normal surplus was before the court.


40. Id. at 67.


42. Id. at 934.
43. **Id. at 925.**

44. **Id. at 923.**

45. **Id. at 933.** The limited discussion was sufficient because the issue in *City Mill* dealt with the constitutionality of a water regulation. It was not an adjudication of conflicting water rights.

46. 54 Hawaii at 187, 504 P2d at 1339: "[W]e hold that as between the state and McBryde, and between McBryde and Gay & Robinson [the parties claiming konohiki or surplus water rights], the state is the owner of the water in the Koula Stream and Hanapepe River."

47. The laws implementing the division of land explicitly reserved the sovereign prerogative to "encourage and even enforce the usufruct of lands for the common good." **Id. at 186, 504 P2d at 1338.** The court concluded that the use of water is one of the most important usufructs of land, hence the right to water was reserved by the King in the land of grants. **Id.**

48. **Id. at 186-7, 504 P2d at 1339.**

49. **Id. 504 P2d at 1339.**

50. **Id. at 198, 504 P2d at 1344.**

51. The court dealt with the Gay decision by saying that case adjudicated rights in "normal daily surplus water" and concluding there is no such surplus under the natural flow doctrine. **Id. at 199, 504 P2d at 1345.**

52. **Id. at 192-3, 197, 504 P2d at 1341-42, 1344.** The legislation, Enactment of Further Principles, 1850 Laws Hawaii 202 (codified at REV. LAWS HAWAII §7-1 (1976)), provided:

> The people also shall have a right to drinking water, and running water, and the right of way. The springs of water, and running water, and roads shall be free to all, should they need them, on all lands granted in fee simple: Provided, that this shall not be applicable to wells and water courses which individuals have made for their own use.

Since the statute excluded artificial water courses, the court read "running water" to mean the right to have water flowing in natural streams and rivers.

52.1. 54 Hawaii at 197-8, 504 P2d at 1344.

53. **Id. at 191, 504 P2d at 1341.** The court specifically overruled any contrary indications in earlier case law.

54. **See footnote II.B.18 supra.**

55. Although the implication of the court's adoption of the riparian natural flow doctrine would seem to preclude continuance of the
existing konohiki consumptive uses, the court in McBrirde did not say the parties could not continue their current uses. In asserting state ownership of water the court could mean ownership in the publici juris sense, that is, the State has the power to regulate or control use. See Water Rights in Hawaii, supra note II.B.1, at 216-18. Even if the court meant ownership in a proprietary sense, there is a recent Hawai'i precedent for recognizing an equitable right in konohiki users to continue existing uses. See United Congregational & Evangelical Churches v. Heirs of Kamamanu, 59 Hawaii 334, 582 P2d 208 (1978), discussed in Unraveling Robinson, supra note II.B.1, at 93 n. 182.

56. The court's statement on transferability of water under the riparian and appurtenant rights were not required to resolve the issue before the court. See Water Rights in Hawaii, supra note II.B.1, at 213-15.
The preceding sections discussed the rules defining water rights in Hawai'i and other jurisdictions without addressing the nature of water rights as a form of property. A clear understanding of the latter is a necessary preliminary to examining the acceptability of regulation. The thesis offered here is that all water rights, including both ancient Hawaiian and common law rights, are rights to use water, not rights of ownership in water. An individual's property is found in the use rights that apply to him, not in his physical ownership of water as a commodity.¹

The notion of "ownership" of water confuses the analysis of property rights in water. Confusion arises from the natural inclination to think of "ownership" of water in physical or proprietary terms, as we think of ownership of land or personal property. Hence, some pre-McBryde cases refer to water as "property of the konohiki", and the absolute ownership approach to groundwater in some states views the ownership of water in the same sense as the ownership of land. But this notion of ownership conflicts with hydrological reality. In its natural state ground and surface water flows to a lower level. Although water can be owned in a proprietary way once it is captured or reduced to physical control, proprietary ownership of flowing or percolating water is not possible. Water, as a fluid and migrating phenomena similar to air or wild animals, resists simple and certain property concepts applicable to land and chattels.²

The property interest in water lies in the right to use water, to capture water, and put it to some use.³ A water right is an intangible use right.⁴ This has traditionally been the description of the riparian and appropriation rights to surface waters, and now commonly describes groundwater rights. Even courts formerly following the absolute ownership theory for groundwater have little trouble bringing the law into conformity with hydrological reality by shifting to a use right description.⁵

No water use right is absolute. All right holders are obviously subject to the physical limitation of natural fluctuations in supply. Beyond that, the state and federal government have power over some waters, such as navigable waters, which qualify the right to use. The most significant qualification, however, are the reciprocal rights of other users in the same body of water. These limitations, taken together, mean that the use right is "a right to capture water, subject to a variety of rules which assure paramount rights for many purposes of the government and reciprocal rights of others who have access to water".⁶

The peculiarities of Hawai'i water law do not change the character of the property interest in water as a use right.⁷ Cases dealing with appurtenant and konohiki rights use language suggesting proprietary ownership of flowing waters. Cases refer to these waters as "real estate" and to surplus waters as the "property of the konohiki".⁸ This gloss of proprietary ownership is traceable to the court's reasoning that appurtenant and konohiki rightholders succeeded to the ownership in water formerly enjoyed by the King, which was traditionally thought of in a proprietary sense. However, nothing in the holdings of these cases hinges on proprietary notions about water as property. The cases typically adjudicated conflicting
claims to water. The outcomes in Gay and its predecessors would have been the same whether the court viewed its action as adjudicating conflicting claims to ownership of water or conflicting claims to use water. Finally, notwithstanding the more definite character of the konohiki right, proprietary notions of ownership are equally fallacious from a hydrological standpoint as they are with the less definite common law rights.10

II.C. NOTES

1. Not all dimensions of a water use right are property merits protection from overzealous regulation. Part IV.A infra examines what aspects of the use rights in Hawai'i amount to property.


8. E.g., Kaneohe Ranch Co. v. Ah On, 11 Hawaii 275, 276 (1898).


10. Consider, for example, a hypothetical surface stream whose flow arises and terminates completely within an ahupu'a in single ownership. Assuming there are no appurtenant claims to water, the konohiki or owner of the ahupu'a has an absolutely unqualified right to the entire flow. The right holder still has no ownership in a proprietary sense. The stream discharges into the ocean. To claim proprietary ownership, the right holder would have to either assert ownership of stream water now diffused in the ocean or admit that his ownership terminated with the discharge into the ocean, an event beyond his control. Either choice is fundamentally inconsistent with
proprietary notions of ownership. The landowner has instead an absolutely unqualified right to use the water as it flows across his land.
III. REGULATORY MANDATE, ALTERNATIVES, AND ISSUES

Hawai'i has not yet enacted the regulatory scheme mandated by the 1979 constitution. This section examines the shape that the new controls might take in view of the constitutional language, regulatory trends in other states, the effectiveness of existing Hawai'i controls, and draft proposals already put before the Hawai'i legislature. A specific scheme, which is a modification of the Model Water Code, is posted as a basis for the takings analysis that follows in Part IV.

A. CONSTITUTIONAL MANDATE TO REGULATE

The 1978 amendment strongly mandates state regulation of water development and use for public benefit. The provision requires establishment of a control agency and includes considerable language about how the agency shall carry out its duties and deal with specific water use rights. This extra language raises issues related to the scope of future controls.

1. State "Ownership" of Water

The water resources amendment as adopted makes no reference to public or private "ownership" of water resources. The absence of any assertion of any public character or ownership indicates the drafters' view that the ownership question is properly a matter for judicial determination and their view that assertion of public ownership is irrelevant to public regulatory power over water. In fact, the final form of the provision omitted draft language asserting a "public trust" in all waters because "trust" implies ownership.

The drafters' hesitancy to assert public ownership may reflect the pendency of the McBryde litigation. But their conclusion that assertion of public ownership is unnecessary is certainly well founded. Other states' experience indicates that such an assertion adds nothing to the government's power to regulate development and use. In some states that have asserted some form of public ownership, the leading cases validating state permit systems and state distribution of water have turned on findings of valid exercise of the public power rather than any significance of the public ownership statement.

2. Scope of Regulatory Mandate: Are Some Rights Immune from Regulation?

The constitution's lengthy treatment of specific water rights leaves ample room for judicial construction and poses some risk that the court will constrain the scope and effectiveness of regulation. The relevant language in the amendment provides that the "water resources agency...shall, as provided by law, ...establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses". This lan-
anguage may be viewed as creating, explicitly and by omission, three classifications of water rights and treating them differently: (1) all appurtenant rights must be assured and, hence, immune from any regulation; (2) existing riparian and correlative uses are exempt from regulation, but the remainder of these common law rights may be restricted; (3) silence regarding konohiki rights means they may be fully regulated. The drafters' silence regarding konohiki rights is explainable by the McBrady decision and the ensuing litigation which raise doubts as to whether konohiki rights still exist. The different treatment of appurtenant and common law rights is more troublesome. Legislative history offers no clue why protections might be extended to all konohiki rights but only to existing common law uses. Common law right holders may claim this differentiation offends equal protection principles, but this constitutional claim would fail given the court's extreme deference to classifications drawn by social and economic legislation.9

What, then, is meant by the language assuring appurtenant rights and common law existing uses? Although legislative history is silent, several factors support rejecting a protective construction putting these rights and uses outside the scope of regulation. First, guaranteeing all appurtenant rights and common law uses would conflict with both the overall purpose and the explicit language of the water resources amendment. The purpose of regulating uses for the public benefit is abundantly clear from the section's first sentence. Any insulation of rights or uses compromises achievement of this objective. If these rights and uses are insulated, then consideration of the public interest or public benefit would have no bearing on how the waters associated with appurtenant rights or common law existing uses are consumed in the future.10 The practical impact of this exemption from management for the public interest would be greatest in the area of groundwater resources.11 In short, a protective construction would seriously compromise the regulatory purpose. It would also conflict with the language of the last clause of the provision which directs the agency to "establish procedures for regulating all uses of Hawaii's water resources."12 That language on its face anticipates regulating existing common law uses and uses undue appurtenant rights.

Second, a protective construction would afford common law users new rights they did not enjoy prior to the amendment.13 But the amendment does not purport to create new rights for any users; on the contrary, its stated purpose and tenor intend limiting private rights for the public welfare.

As a general principle of constitutional construction, where provisions appear to be in conflict, courts favor a construction that harmonizes the provisions and gives each an operative meaning.14 Conflict between the protective language and the explicit mandate to regulate all uses can only be reduced by construing language "assuring...rights and...existing...uses" require something less than absolute preservation. A plausible harmonizing construction would find in the protective language only a requirement that some rights and uses be afforded to appurtenant and common law interests in the formulation of criteria and priorities. That is, the protected right holders and users cannot be completely shut out of the new regulatory scheme.
III.A. NOTES

1. HAWAII CONSTITUTION, art. XI, §7. Text of provision appears in note 1.3 supra.


3. Id. at 1026.

4. Id.

5. For a thorough analysis of the various forms in which public ownership has been asserted in the constitutions and statutes of western states and the insignificance of the assertions for intrastate regulation, see Trelease, Government Ownership and Trusteeship of Water, 45 CALIF. L. REV. 638 (1957).

6. See id. at 642-44 and nn. 39-40 (citing Nebraska and Wyoming cases as examples).

7. The first sentence of the amendment would be sufficient to ensure water regulation without risking serious limitations by judicial construction. The wordy provision is reminiscent of California's unfortunate experience. That state's constitutional amendment regulating water rights was a specific response to court decisions upholding the priority of riparian over appropriative rights. But the wordy constitutional treatment left sufficient room for the California Court to protect those aspects of riparian rights which posed the greatest management inefficiencies. See notes IV.C.1.47 to 53 and accompanying text.

8. HAWAII CONST., art. XI, §7 (emphasis added).

9. See, e.g., Village of Belle Terre v. Borras, 416 U.S. 1 (1974). Common law rightholders would have no claim under the equal protection clause of the Hawaii constitution since the classification is drawn in that document. If challenged under the Federal Equal Protection Clause, the classification will be upheld if it is reasonably related to the purpose of the provision. See Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949). A challenger would argue that the provision is intended to provide for controlling water use for the public benefit. In its protective language users are classified based on legal doctrines (ancient Hawaiian rights and common law rights) which are collections of rules of use. The legal doctrines themselves have no bearing on whether water use benefits the public. Hence, the classification is based on feigned, not real differences. But federal courts will premise rationality upon any conceivable state of facts that might support a distinction, e.g., id. at 110, Kotch v. Bd. of River Port Pilot Comm'rs 330 U.S. 552, 555 (1947), which amounts to near total deference to such legislative classifications. A court would readily assume that the drafters might have concluded that appurtenant use rules are comparatively more beneficial to the public, and the inquiry would end.
10. Under the law of appurtenant rights the public interest or welfare is not a factor in how water is used. If the constitution now protects all appurtenant rights, it would be guaranteeing the right to make any use of water, even a wasteful use. Common Law rules of reasonableness make existing riparian and correlative uses more sensitive to the surrounding circumstances and the needs and uses of others. But even the existing common law uses are not necessarily sensitive to the public interest because the restraints on use are the reciprocal rights of other common law users, not the interests of the public at large.

11. Since correlative rights is the exclusive groundwater law, all existing groundwater uses would be protected from regulation. Appurtenant surface water uses are a small fraction of the total surface water flow. The majority of surface water uses, described as konohiki rights prior to McBryde would be subject to full regulation. The scope of existing riparian consumptive uses put beyond regulation depends on whether pre-McBryde or post-McBryde law is followed. In any event the quantity involved in this consumption is comparatively small.

12. HAWAII CONST. art. XI, §7 (emphasis added).

13. A protective construction would allow existing uses to continue, presumably indefinitely. There is no such common right. The common law permits only reasonable uses, and what is reasonable and therefore allowable changes with the times and circumstances.

A common law user might even read the amendment to preserve a right to use the quantity of water presently being consumed. This, too, would be the creation of a new right to specific quantities of water.

The choices Hawai'i makes in designing its future management program will determine the harshness of the impact on those with property in water rights; hence, these management choices are important to the taking issue. But successfully meeting management objectives should be the foremost consideration in designing the regulatory scheme. Four criteria are suggested here for evaluating the performance of regulatory alternatives. No regulatory system will maximize performance on all the criteria, but the criteria provide a simple framework for considering specific strategies and for comparing regulatory options with the effectiveness of existing controls.

An ideal regulatory scheme should accomplish four things: (1) protect groundwater and surface water resources; (2) ensure the greatest economic and social utility of water uses; (3) provide for security of rights to water use; and (4) ensure coordination of land use and water use decisions.

Protection of all water resources is an obvious goal explicit in the constitution. It is most useful in signaling the need to bring development and use of all water resources under a single regulatory framework that reflects the hydrological realities of surface and groundwater systems.

Recognizing that both the social and economic utility of water use are to be encouraged has implications for both initial allocation and later reallocation of water. Economic productivity is not the only measure of utility. Some uses, such as maintenance of minimum stream flows, may have a high social value, generate very little economic return, but still be the use best serving the public interest in a particular situation. Maximizing the overall utility of water use also means that the regulatory system must provide flexibility to reallocate water to new uses reflecting new needs and changing public values.

Some approaches to ensuring flexibility to change uses, such as very short-term permits, decrease the security of water use rights. But water rights should be secure enough to encourage the private investment which puts water to productive uses. There are physical, legal, and tenure aspects to security for water users. Physical security involves certainty in the flow of water as it is affected by natural and climatic factors. A holder of a water right has legal security if he has speedy, effective protection from illegal infringement by others. Tenure security involves protection from legal infringement on the use right by government. Absolute security is impossible. Any right holder, for example, will be subject to the natural fluctuations of supply (physical tenure) and the government's eminent domain power (tenure security). In theory, however, more secure rights should lead to more productive uses.

The need for coordination of land-use and water-use decisions stems from the nature of land and water as limited resources in Hawai'i. Since a major land use or water use decision typically has implications for the other scarce resource, tradeoffs in the efficient use of both resources are inherent in many decisions. For example, committing water to a new longterm agricultural use may preclude development of nearby land that is suitable for urban use. Rarely can a single decision result in maximum efficient use
of land and water resources. Coordinating land and water decisions will not mitigate the need to trade off efficiencies, but it will help to identify the tradeoffs so that explicit policy choices are made in each decision.

III.B. NOTES

1. Encouraging social as well as economic utility in making allocative choices would seem to be implicit in the constitution's mandate to regulate "for the benefit of ...[the] people." HAWAII CONST. art XI, §7. The State Water Commission recognized social utility factors explicitly in its minimum stream flow recommendations and implicitly in its strong position favoring administrative allocation of water under guidelines rather than a free market approach. STATE WATER COMMISSION, supra note 1.1, at 17, 18, 32-37.


4. Applying these notions of security to investment in productive use of water, one would expect high productive use by a holder of a water right who has first claim on the sustainable yield of a groundwater source for a specific quantity of water (physical security); has an immediate and efficient administrative or judicial remedy against any infringement by another (legal security); and holds the right indefinitely or for a term of years that is subject only to condemnation powers (tenure security). In contrast lower productivity would be expected from the holder of coequal right who must share the source with users coming later in time, who must invoke the judicial process and show injury in order to enjoin a competing user, and whose right can be revoked at the discretion of an administrative body in favor of a more beneficial use by another.

5. The need for coordination is most apparent in land use district classifications. See HAWAII REV. STAT. ch. 205 (1976 & supp. 1980). Decisions by the state land use commission make the long run commitment of lands to urban or agricultural uses and thereby determine the nature and relative demand for future water uses.
C. HAWAI'I'S PRESENT REGULATORY SCHEME

1. Existing Controls

In addition to the potential state regulation under the 1978 constitutional provision, there are currently regulatory controls in place at the state and county levels.¹

a. GROUND-WATER USE ACT. The 1961 Ground-Water Use Act² gave the Board of Land and Natural Resources (Board) the authority to identify "designated ground-water areas" where the water resource is particularly threatened and to comprehensively regulate the water use in that area under a permit system. The legislation is a modified codification of the Model Water Use Act of the late 1950s. The statute lay idle until 1979 when the Board adopted rules³ to implement the act and made the first area designation in the Pearl Harbor basin.

Regulatory control is invoked only after the Board's "designation" of an area. Designation is discretionary upon a finding of one of many conditions, including: use exceeding recharge, declining groundwater levels, rising chloride content, excessive waste, or proposed development that would lead to the above.⁴ Three aspects of the regulatory scheme are noteworthy: preservation of existing uses, issuance of permits for beneficial new uses, and added controls in times of shortage.

Existing legal uses predating the area designation are "preserved"⁵ to the extent they meet the new statutory standard of "beneficial use."⁶ Preserved uses are documented and certified.⁷ Changes in the quantity, purpose, or point or time of taking for a preserved use require prior authorization,⁸ but any pre-existing rights to convey a water right are protected.⁹ Preserved uses are lost if not used for a statutory period.¹⁰

Any new use requires a permit¹¹ issued for a variable period up to 50 years.¹² A permit is only issued if water is available, the use is beneficial, and it will not impair preserved uses.¹³ The beneficial use standard is accompanied by explicit rejection of prior legal principles linking the right to use particular land.¹⁴ Existing and new domestic uses for households are exempted from the certification and permitting procedures.¹⁵

In times of shortage the Board has added powers to limit or apportion use,¹⁶ but the statute creates certain general preference that constrain the Board. Domestic uses are preferred to all others. Preserved uses come before any made under permits. And if the Board establishes classes of uses under permits, then priorities within each class are based on time of issuance.¹⁷

b. COUNTY REGULATIONS. County charters provide for regulation by respective boards of water supply. The Honolulu charter is discussed here as an example. Broadly interpreted,¹⁸ the Honolulu charter allows the Honolulu Board of Water Supply (HBWS) to manage and control water resources.¹⁹ In 1980 the HBWS adopted rules regulating all wells, but it has avoided regulation of surface sources.²⁰ Groundwater rules adopted by the HBWS do not change the common law bases for the use right. The regulations are aimed primarily at controlling new drilling and controlling ali pumping in times
of shortage.

The drilling of new wells requires application to the HBWS.\textsuperscript{21} Disapproval is discretionary; approval may be refused if the new use will lead to overdraft, excessive lowering of the water table, excessive salt water intrusion, or interference with established uses.\textsuperscript{22} Increased pumping from existing wells predating the rule does not require application.

There is a general prohibition against waste from all wells,\textsuperscript{23} presumably including existing wells, and general authority for the HBWS to limit the withdrawal from any well causing overdraft conditions.\textsuperscript{24} Wells drilled after March 1972 must have devices to measure draft, and all well owners must provide any available information on request of the HBWS.\textsuperscript{25}

The rules set out mandatory use restrictions for HBWS consumers and all private well owners following a declaration of "alert" or "critical low water conditions." Private well owners' pumpage following a declaration can be reduced to a percentage of their highest average monthly use over the preceding five years. The maximum reduction is to 90\% in an "alert" situation and 70\% in a "critical" condition.\textsuperscript{26}

2. Performance of Hawai'i's Present Controls

Hawai'i's present system of water rights and regulation performs poorly when measured against the four criteria above. Whether viewed under the pre-McBryde or post-McBryde law, water laws largely fail to address questions of resource protection or the best uses of water; they offer limited security to present water users, and are poorly linked with land use decisions. In summary, the area of water resource management in Hawai'i is ready for comprehensive regulation.

a. CONSERVATION AND PROTECTION OF WATER RESOURCES. Conservation and protection standards are singularly absent in pre-McBryde water law. Surface water and groundwater laws merely define the respective rights of different classes of right holders to consume a particular water source. No basis exists for protection of a water source from damage by the collective action of right holders. Post-McBryde law offers some protection to surface water only incidentally through operation of the natural flow doctrine to riparians.

The present regulations have serious shortcomings as conservation and protection measures. For example, the HBWS controls apply only to groundwater and focus primarily on restricting uses when shortages occur; they are not designed to comprehensively manage the resource. Pumping from wells predating the HBWS rules is neither fully controlled nor adequately monitored. The major feature of the HBWS scheme, denial of applications to drill that will cause overdraft, lacks power because it remains discretionary. Common law principles of the use right remain largely intact. This poses the prospect of a race among pumpers who are held only to a "reasonable use" standard vis-a-vis other pumpers.\textsuperscript{27}

The Ground-Water Use Act adequately protects groundwater sources designated under the act. But its usefulness as a protective device is limited
by the discretionary nature of its application, its limited area coverage, and the inherent risk that major damage could occur to a groundwater area before the controls of the act are invoked. Furthermore, as the experience in designating the Pearl Harbor groundwater area demonstrated, inherent in an area-specific approach is the special problem of trying to identify the area to be regulated in order to protect a groundwater source whose boundaries and interrelationships are not clearly understood.

b. ENSURING ECONOMIC AND SOCIAL UTILITY OF USES. With the exception of permits that may be issued for new uses in selected areas under The Ground-Water Use Act, Hawai'i's present system of water rights and controls does not assure that water is put to the most productive economic and social uses. Water use is directed largely by private interests rather than the public interest. In this respect Hawai'i water rights law, whether viewed under pre-McBryde or post-McBryde rules, is subject to the same criticisms as mainland prior appropriation and riparian doctrines in their pure forms.

Prior appropriation is criticized as encouraging inefficient use of water. Because prior appropriators are limited to the amount of water used, beneficially there is a disincentive to use water more efficiently since the water right will be diminished by any amount saved. This dynamic discourages the most productive use of the total water supply. The konohiki and appurtenant right holders in Hawai'i have even less incentive to maximize efficient use because their rights to specific quantities do not lapse with nonuse. Furthermore, their water may be put to any use—even wasteful uses.

Prior appropriation is also criticized as fixing water into a pattern of uses which is resistant to the need to reallocate water to new uses. Water right holders in western states, although free in theory to transfer water rights, have tended to hold the water rights in connection with specific land for fear that sale of rights will permanently reduce the value and utility of the land. To the extent that this criticism is valid with respect to mainland experience, it is logically applicable to the holders of konohiki and appurtenant rights, who similarly hold severable rights to specific quantities of water. The statements of the McBryde court that appurtenant waters cannot be used as appurtenant land further restricts the potential to put water to its most productive use.

Riparian rights and correlative groundwater rights have similar shortcomings. In both bodies of law the initial right to use hinges on the ownership of certain kinds of land (either bordering a stream or overlying groundwater), rather than on the need or benefits of putting water to a particular use. The reasonableness standard, which is the measure of riparian and groundwater right, applies traditionally only among rightholders; it does not extend to reasonableness in light of the needs of the larger community. Finally, the "natural flow" doctrine established in McBryde is based on maintaining full stream flow for the benefit of riparians—a theory which is the antithesis of modern notions of consumptive use of water for productive purposes.

In summary, the present system of legal relations governing the allocation and reallocation of water in Hawai'i is largely devoid of rules ensuring that water is used in ways that are economically and socially most pro-
ductive. The most important question from the standpoint of ensuring that water is used in the public interest—what is the best use?—cannot be addressed on a significant scale under the present legal arrangement.

c. SECURITY OF RIGHTS. Present legal arrangements impose special insecurities on each Hawai'i water right which impinge negatively on private investment decisions. The appurtenant right, which has first claim on water and does not lapse through nonuse, has high physical and tenure security. But legal security is seriously qualified by the expense, inefficiency and uncertainty of court proceedings necessary to adjudicate the quantity of the right and to meet any challenges to that right from competing users. The McBryde statement about place of use restrictions also injects insecurity into the scope of the right. The konohiki right under pre-McBryde law has the greatest security, but it is qualified by the legal insecurity attendant with adjudicated appurtenant rights.

Riparians face uncertainties connected with the reciprocal rights of others to start or increase use. The narrow scope of the riparian right to "storm and freshet surplus" under pre-McBryde presents insecurities unique to Hawai'i. The physical security is so low due to the natural fluctuations of these waters as to probably preclude much productive use of the water. Riparians share with appurtenant holders the legal insecurities associated with the need to litigate alleged abuses by other riparians, and they carry the burden of proving they have suffered injury by the unreasonable use of others. Like riparians, groundwater right holders suffer low security attributable to the demands of users coming later in time and the need to litigate and show damage from alleged unreasonable use by others. The Ground-Water Use Act improves certainty of rights where it is applied. Most significantly, "preserved users" under the act have security as against demands of new users and are preferred in times of shortage. Furthermore, legal rights to specific quantities of water will be clearer under the statute and enforceable through more efficient administrative action.

d. COORDINATION OF WATER AND LAND DECISIONS. Formal mechanisms are lacking for coordinating major public decisions regarding land use and water use in Hawai'i. A complete summary of the relationship between land and water regulatory controls is beyond the scope of this discussion. But the decision-making criteria and processes of the State Land Use Commission (LUC), which classifies land for future urban, agricultural and conservation uses, amply demonstrate the lack of formal coordinative mechanisms.

Water resource allocation is not explicitly stated among the eight statutory criteria that constrain the LUC decisions. Three criteria are implicitly sensitive to water resource allocation. Two of these apply only to petitions for "urban" reclassifications and require adequacy of "public services and facilities" and maximizing the use of "existing services and facilities". The effectiveness of these criteria in linking water decisions even to urban reclassifications is questionable. The third criterion requires LUC consideration of the county general plan. However, non-binding consideration of planning documents that are not specific on the issue of water allocation does not effectively coordinate decisions.

Where the LUC has considered water allocation in connection with urban redistricting it has foregone the opportunities to treat the land/water
relationship in a coordinated manner. State plan legislation raises the prospect of better mechanisms for coordination in the future.

III.C. NOTES

1. This section does not address the relationship between state and county controls. For an introduction to current state/county relationships in water regulation, see Water Rights in Hawaii, supra note II.B.1, at 248-55.


3. Control of Ground-Water Use, Department of Land and Natural Resources Regulation 9 (June 1979).


5. Id. §177-15(a).

6. Id. §177-2(a).

7. Id. §177-16.

8. Id. §177-15(b).

9. Id. §177-15(c).

10. Id. §177-18.

11. Id. §177-19.

12. Id. §177-24.

13. Id. §177-22(b).

14. Id. §177-22(c).

15. Id. §177-13.

16. Id. §177-33.

17. Id. §177-33(a)(2).


19. Charter of the City and County of Honolulu art. VII, §§7-103(1), -105(j)

21. Id. §3-305(1).

22. Id. §3-306(4).

23. Id. §3-313(1).

24. Id. §3-313(2).

25. Id. §3-309(1).

26. Id. §3-319, -320.

27. Correlative rights rules encourage increased pumping until some other coequal right holder complains through judicial action. This problem is classically illustrated in City of Pasadena v. City of Alhambra, 33 Cal.2d 908, 207 P2d 17 (1949), which ended a race among pumpers in the Raymond Basin of California.

28. See F. MALONEY, R. AUSNESS, J. MORRIS, A MODEL WATER CODE, Commentary at 77-78, 158-59 (1972) [hereinafter cited as MODEL WATER CODE].


30. The unsuitability of the natural flow theory for present day society was recognized by the McBryde court which simultaneously imposed the rule and invited legislative change. McBryde Sugar Co., Ltd. v. Robinson, 54 Hawaii 174, 189 n. 15, 504 P2d 1330, 1340 n. 15.


33. Id. §205-16.1 [Adoption of interim statewide land use guidance policy] (Supp. 1980).

34. Id. §205-16.1(2), 16.1(3) (emphasis added):

(2) Lands to be reclassified as an urban district shall have adequate public services and facilities or as can be so provided at reasonable costs to the petitioner.

(3) Maximum use shall be made of existing services and facilities, and scattered urban development shall be avoided.

35. Id. §205-16.1(3) does not clearly limit and has not been applied to limit new urban districts to areas that would maximize use of available water. Id. §205-16.1(2) only requires existing or prospective
adequacy of services. Furthermore, it is qualified by the word "public" which seemingly would exclude areas covered by private water systems.

36. Id. §205-16.1(6): "In establishing the boundaries the districts in each county, the commission shall give consideration to the general plan of the county."

37. E.g., the Honolulu General Plan is a collection of broad statements of goals and policies. GENERAL PLAN: CITY AND COUNTY OF HONOLULU 40-41 (Res. No. 238, 18 Jan. 1977).

38. The LUC redistricting of 227 acres to urban in Central Oahu in 1979 for future residential uses is an example. See in re Oceanic Properties, Inc., Land Use Commission, No. A 78-445 (1978). The increment of urban development was estimated to increase withdrawal by one million gallons per day from the Pearl Harbor Groundwater Basin, which was already at or very near its sustainable yield. The City Board of Water Supply, which would be the eventual water supplier, said it had no objection to the redistricting but refused to make the necessary commitment of water. See Letter of the Board of Water Supply, October 18, 1978, included as Exhibit 4 of the Dept. of Planning & Economic Development. The redistricting was approved nevertheless.

39. The State Plan, HAWAII REV. STAT. ch. 226 (Supp. 1980), mandates adoption of numerous "functional plans", including one for "water resource development." Id. §226-52(a)(3). The functional plans are now being formulated. Once they are adopted, decisions of the LUC must be in conformance therewith. Id. §§205-4(h), 226-52(6) (2)(D), -62.
D. REGULATORY TRENDS IN OTHER STATES AND REGULATORY CHOICES FOR HAWAI'I

In all of the western states and several eastern states little is left of the basic doctrines of prior appropriation and riparianism. Since the early part of this century there has been a consistent shift toward public regulation and management. The trends in regulation define the range of alternatives for Hawai'i.

1. Trends in Other States

a. PERMIT SYSTEMS. The permit system, first employed in Wyoming, is recognized as the sine qua non of modern water law. Except for Colorado, all western states now use an administrative permit system as the exclusive means for acquiring a surface water right. These systems have been long standing. In some states, like South Dakota, the permits were applied retroactively so that all water uses were documented and brought within the system. In others, like California, permits were applied prospectively, thus leaving some early appropriations undocumented and unregulated. The permit systems are similar in their major respects, but vary widely in their administrative details. Most allow anyone to apply to appropriate water for a "beneficial use", and some states indicate in statutes what uses are beneficial. The central tenet of prior appropriation—perpetuity of the water right for beneficial use—is preserved in all western permit systems. Most western states now also require permits to make any withdrawals of groundwater beyond domestic uses.

The trend to control by permits is also evidenced in eleven eastern states that have adopted a permit system of some type. Mississippi is an exception among some eastern states, having enacted a prior appropriation system for new uses on perpetual permits issued for "beneficial" uses.

b. RESTRICTIONS OF RIPARIAN RIGHTS IN WESTERN STATES. The doctrine states, with their dual tradition recognizing both riparian and appropriation law, faced the problem of reconciling the inherent conflicts in applying different bodies of law to the same sources of water. This makes their experience especially useful to Hawai'i's situation. Without exception these states moved inexorably toward restricting riparian rights by choosing to follow the more narrow rules in the broad collection of rules associated with riparianism and by imposing other specific restrictions. Each state made its own incremental adjustments as the need arose, with the result that there are differences in the techniques used to coordinate the rights, the respective roles of courts and legislatures in making the changes, and the residual importance of riparian rights.

To make all water available for consumptive uses, all of these states eliminated the riparian natural flow doctrine in favor of some reasonable or beneficial use standard. The more drastic step of eliminating unused riparian rights, the only means of fully protecting existing water users from future claims by riparians, has been followed in seven of the nine states. The general patterns of these actions include stabilizing riparian rights by recognizing and quantifying existing uses as of some date, providing for forfeiture of the right after a period of nonuse, and develop-
ment of future water uses under appropriation law and the public permit sys-

tem.11

California is unique among the dual states for continuing to recognize
the primacy of the riparian over the appropriative right. While riparians
are limited to reasonable-beneficial uses,15 they are protected from water
use by appropriators that damages actual or reasonably prospective riparian
uses.16 The riparian right to make future use at the expense of appropria-
tors is a major cause of disruptive uncertainty in California water law.17
Although the dual systems persist and riparian rights are valuable property
rights in a number of these states, riparian rights remain important only in
California and Texas.18

c. RECOGNITION OF PUBLIC INTEREST IN PERMIT ISSUANCE. Adoption of the
permit systems has allowed consideration of the public interest in initial
allocation decisions. Most western states provide for rejection of an
appropriation that is not in the public interest or is against the public
interest.19

d. COMPREHENSIVE REGULATORY SYSTEM. There is a clear trend among
eastern and western states modernizing their water laws in recent decades
to enact comprehensive regulatory schemes. Under this approach the state
applies a single standard to the use of all waters.20 Former rights based
on diverse western and common law doctrines for surface water and ground-
water are transformed into statutory rights. Ownership of appurtenant or
overlying land is not a factor in the statutory standard for use. Hence,
the potential number of users and productivity of uses are increased.

e. INCREASED SENSITIVITY TO IN-STREAM USES. Prior appropriation law
of western states has been changing in recent decades to preserve in-stream
values of water. The underlying principle of prior appropriation, diversion
of a stream for beneficial use, conflicts with scenic, recreational and
wildlife values which require protection of some flow from diversion. State
legislative responses to the problem vary and include expansion of the defi-
nition of beneficial use to include in-stream uses, direct legislative and
administrative appropriations for in-stream uses or reservation of water
from diversion, and establishment of minimum stream flows, among others.21

2. Regulatory Choices for Hawai‘i

Hawai‘i faces a few basic choices in designing a regulatory scheme for
water. The two most important deal with the nature of water rights in a new
system and the degree of administrative control versus free market control
in changing the uses of water.

a. WATER RIGHTS IN A NEW SYSTEM: TRADITIONAL RIGHTS VERSUS A NEW
STATUTORY RIGHT? Hawai‘i can choose either to keep its traditional system
of water rights and regulate uses thereunder, or it can abandon traditional
rights and substitute new statutory rights and administrative controls. The
former approach requires a two-step process. First, traditional rights
would be identified and clarified, perhaps by a legislative codification.
The codification would clear the air of the confusion raised by McBryde and
would presumably identify and clarify appurtenant, konohiki, riparian, and
correlative rights. Second, these traditional rights would be restricted either by legislative action or delegated administrative authority, to ensure their exercise for uses that are reasonable, beneficial, and in the public interest. This would presumably entail restricting the purposes, places, and method of use, adding abandonment provisions, and making similar restrictions. The legal basis of the water right would, however, remain the same. That is, the right to make any use at all would arise from ownership of land overlying or adjacent to water (correlative and riparian rights) or succession to land to which appurtenant or konohiki rights were originally attached. As is presently the situation, persons not holding these traditional rights could not use at all.

The alternative is to follow the approach of those states like Florida and Alaska which adopted a single new statutory standard for use. The "reasonable beneficial use" criteria of the Model Water Code is an example of such a standard. Existing traditional water rights are in effect exchanged for a permit to use under the new statutory standard. The second approach is no less an exercise of the police power than the first. The loss of rights in the exchange of the traditional use right for a statutory permit right under the second approach is analogous to the specific restrictions imposed on the traditional rights under the first approach in order to manage water use in the public interest. However, the second approach is fundamentally different in that land ownership is not the basis of the right to use. Anyone meeting the statutory standard can obtain a permit right.

California exemplifies the first approach, Florida and Alaska the second. California now administers appropriative rights to surface waters by permits. It retains riparian rights to surface waters but restricts them to "reasonable beneficial" uses, the same standard as for appropriations. And it retains correlative law for groundwater use. Florida and Alaska exemplify the second approach. Florida, a riparian state, adopted the Model Water Code with minor variations. The Model Water Code uses the standard of "reasonable beneficial use" which "means the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest." The Alaska Code provides for issuance of permits for uses that are "beneficial" and in the public interest. The Model Water Code applies the single standard even to existing uses, thus raising the possibility that some legal uses at the time of regulation may not qualify for a permit to continue. The Alaska Code "grandfathers" in some pre-existing uses that may not meet the code standard.

Adoption of a single statutory standard for use is the preferable option for Hawai‘i. First, the difficult and politically trying task of clarifying and codifying traditional water rights and then tailoring regulations to each peculiar body of law would be avoided. Second, preserving traditional rights under the first approach is not justified from a resource management standpoint. The diverse traditional legal doctrines do not relate rationally to resource management. Management problems are the same regardless of the law that applies to a body or flow of water. Third, converting all existing rights to a single permit system would be comparatively easy for Hawai‘i. The total land area is small and the number of right holders are comparatively few. Fourth, employing a single standard for all uses will avoid future problems that will arise from applying multiple
b. APPROACHES TO CONTROLLING THE FUTURE USES OF WATER: ADMINISTRATIVE DISCRETION VERSUS FREE MARKET. A second major choice in designing a regulatory system is determining what will limit the use of water after a permit is initially granted. How will water uses be changed, and how will water be allocated in times of shortage? Unlike the issue of a single standard discussed above, the choices are not dichotomous. But the range of alternatives is best illustrated by contrasting approaches that emphasize administrative discretion as opposed to free market forces. The administrative and free market approaches are respectively illustrated in the Florida and Alaska codes.

(1) Transferability and Duration of Permits. The contrasting approaches taken by Florida and Alaska with respect to the transferability and duration of permits illustrates the schools of thought on how to provide security to encourage private investment and productivity, and flexibility to change water to new uses in the future. The Florida Code and the Model Water Code follow an administrative model. They call for nontransferable permits of limited duration for all uses and rely on administrative discretion and issuance of new permits to change uses. Alaska follows a free market model. Permits are of unlimited duration and are freely transferable in the market place.

Freely transferable permits of unlimited duration grant rights that closely approximate the traditional western right of beneficial use and somewhat less closely the Hawaiian appurtenant and konohiki rights. These later rights were salable and perpetual. Permits of unlimited duration offer the greatest security for users. The more ardent advocates of freely transferable permits of unlimited duration cite the economic advantages associated with security of the right. Under this view new uses are encouraged through sale of rights in the marketplace—when the price is right. The role of the administrator in any transfer of rights is limited to assuring that the rights of third parties are not injured and that the sale is in the public interest.

This market-oriented approach is subject to the criticism that transfers are not frequent and water use is forced into rigid patterns.

A more significant weakness of freely transferable rights is that water is treated as a commodity which responds only to traditional economic incentives. Water would be expected to move to higher value uses to the detriment of lower value uses, such as agriculture or in-stream uses. This runs counter to the public interest element in the concept of reasonable beneficial use which broadens criteria for allocation beyond strictly economic measures.

Limited term permits are the most direct approach to assuring periodic reallocation to new uses, including nonmonetary uses, and reassessment of reasonableness of an existing use. The Model Water Code recommends up to 20-year permits generally and longer periods for cities. This approach has been criticized as being insensitive to investment amortization schedules and to values accrued in a continuing business. A more flexible approach that allows variable term permits to all users tailored to reason-
able needs to amortize investments would increase security with some loss of flexibility.18

(2) Allocation in Time of shortage. Florida and Alaska diverge in their approaches to dealing with shortages. Florida and the Model Water Code, following an administrative model, rely on the water agency to adopt an allocation plan to be used in times of shortage. The plan sets priorities for use based upon some classification of permits by source, method of diversion, and/or use. The plan is used in times of shortage; and more sweeping administrative powers are granted in times of emergency.19 Alaska strictly follows the rule of temporal priority, which means that in times of shortage uses for which permits were applied are cut off in reverse order.20 Administrative discretion and temporal priority are not exclusive alternatives. Other approaches are statutory preferences, proportionate reduction, and public sale.21

Critics of the administrative discretion model question the ability of an administrator to make decisions better than the marketplace and suggest that priority by seniority of permits offers greater certainty to permit holders in the face of inevitable shortages.22 Setting priorities by administrative discretion through a shortage plan, however, has the clear advantage of ensuring that those uses most important to the public health, safety, and welfare do not go without water.

In summary, the administrative model seems the more suitable approach for Hawai'i if this degree of public control can be asserted within constitutional limits. Nontransferable, limited duration permits means the public controls all major future decisions about water uses, not just the initial decisions. This degree of administrative control complements the comparable degree public control that the state now exercises over land uses through the state land-use law.

III.D. NOTES


2. For a description of permit systems in "Colorado" doctrine states, see 5 WATERS & WATER RIGHTS, supra note II.A.2, at ch. 23. For a description of systems in "California" doctrine states, see id. at ch. 24. Many western states shifted to permits systems soon after Wyoming pioneered the approach in 1890. The most recent shifts to permit systems among the "Colorado" doctrine states were Arizona and Montana in 1919 and 1973, respectively.


4. Wyoming and Utah, for example. See WATERS AND WATER RIGHTS, supra note II.A.2, at 235.

5. See 5 WATERS & WATER RIGHTS, supra note II.A.2, at §442.1.
6. These states are Del., Fla., Ind., Iowa, Ky., Md., Minn., N.J., N.C., S.C., and Wis. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 282 (1973). The remaining eastern states, with the exception of Miss., which adopted a prior appropriation system, still operate entirely under common law riparian principles. For a discussion of state water statutes, see NATIONAL WATER COMMISSION, A SUMMARY DIGEST OF STATE WATER LAWS (R. Dewsnup & D. Jensen, eds. 1973).

7. See MISS. CODE ANN. tit. 51, ch. 3 (1972).

8. For example, the riparian right to initiate or reinitiate use at any time and to receive at least some water even in times of shortage conflicts with allocating all waters in a stream to appropriators under strict temporal priorities. Similarly, an appropriator's permit right can never be secure if a riparian can claim water at any time for a reasonable use.

9. For a comprehensive analysis of the variety of state techniques used to coordinate these rights, see Trelease, Coordination of Riparian and Appropriative Rights to Use in Water, 33 Tex. L. Rev (1954) [hereinafter cited as Trelease, Coordination]. Although Trelease's inventory predated the most recent state coordinative measures, it remains exhaustive of the range of strategies employed. See also 5 WATERS AND WATER RIGHTS, supra note II.A.2, at §420.

10. See Trelease, Coordination, supra note III.D.9, at 35-41, for a discussion of the constitutional, statutory, or judicial means by which western states made this shift.


12. For example, California by constitutional amendment made "reasonable beneficial use" the standard for any use of source water. CAL. CONST. art. X, §2.

13. See Trelease, Coordination, supra note III.D.9, at 60-67. At the time Trelease wrote, only four states (Ore., Wash., Neb., and Kan.) had eliminated unused riparian rights. Three others have since followed: North Dakota (by N.D. CENT. CODE §61-01-01 (1960) (upheld in Baeth v. Hoisveen, 157 N.W. 2d 728, 732-33 (N.D. 1968)); South Dakota (by statute applicable to unused ground water rights but extended by judicial decision to surface waters in Belle Fourschle Irr. Dist. v. Smiley, 176 N.W. 2d 239 (S.D. 1970)); and Texas (by TEX. WATER CODE ANN. §§5.301 (1972)).

14. See Trelease, Coordination, supra note III.D.9, at 25.

15. See Chow v. City of Santa Barbara, 22 P2d 5 (Cal. 1933) (upholding CAL. CONST. art. XIV, §3).

17. See GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS: FINAL REPORT 20-21 (1978) [hereinafter cited as CALIFORNIA GOVERNOR'S COMMISSION].


19. E.g., AK12, REV. STAT. & ANN. §45-143 (1965) ("[w]hen the application or the proposed use conflicts with vested rights, is a menace to public safety, or is against the interests and welfare of the public, the application shall be rejected."); UTAH CODE ANN. §73-3-8 (1953) ("[w]here the State Engineer...has reason to believe that an application...will interfere with its more beneficial use...or will prove detrimental to the public welfare, it shall be his duty to withhold his approval.").


Legal devices for allocating water to instream uses have not fully protected the natural resources threatened. California provides a good example. In-stream uses are beneficial uses considered in determining the public interest in any permit application and in setting permit terms and conditions. Other statutory enactments protect specific rivers with special natural resource values. The state has recognized the present mechanisms fail to stop the impairment of in-stream values. A more direct and comprehensive approach, which includes in-stream flow standards set on a stream-by-stream basis, has been recommended. See CALIFORNIA GOVERNOR'S COMMISSION, supra note III.D.7, at 99-119.

22. FLA. STAT. ANN. ch. 373 (West 1974).

23. MODEL WATER CODE, supra note III.C.2, at §§2.03, 1.03(4); FLA. STAT. ANN. §373.019(5) West 1974).

24. ALASKA STAT. §46.15.080 (Michie 1977).

25. MODEL WATER CODE, supra note III.C.2, at §2.03(2); FLA. STAT. ANN. §373.226(2) (West 1974).

26. ALASKA STAT. §46.15.060 (Michie 1977); see Trelease Alaska, supra note III.D.1, at 31-34.
27. California provides a contrasting example. It has considered the advantages of following the trend among western states toward integrating all water uses in a single comprehensive framework. But it has concluded that the large area, diverse natural features of hydrology, and the billions of dollars worth of investment founded on current rights make a wholesale shift inadvisable. See CALIFORNIA GOVERNOR'S COMMISSION, supra note III.D.17, at 12-13, 166.

28. An example would be an irrigation flow made up of riparian, appurtenant, and groundwaters. A single standard would also simplify future conjunctive use of water which refers to the storage of surface waters in the ground for later withdrawal. For a discussion of conjunctive use developments in California see Gleason, Water Projects Go Underground, 5 ECOLOGY L.Q. 625 (1976).

29. FLA. STAT. ANN. §373.236 (West 1974); MODEL WATER CODE, supra note III.C.2, at §§2.03, 2.06, Commentary at 182.189.

30. ALASKA CONST. art. VIII, §16; ALASKA STAT. §16; ALASKA STAT. §46.15.100, .160 (Michie 1977).

The State Water Commission recommended nontransferable rights, perpetual permits for continued uses, and reasonable periods for new uses. STATE WATER COMMISSION, supra note 1.1, at 36, 34, 32.


32. Id. at 224-25.


34. NATIONAL WATER COMMISSION, supra note III.D.6, at 260.

35. For a recent critical analysis of the theory underlying the "commodity" school of thought on transfer of water rights, see Dunning, Reflections on the Transfer of Water Rights, 4 J. CONTEMP. L. 109 (1977). Dunning concludes that private transfers of rights may be advantageous in some limited situations where private parties have economic incentives to make the transfer and where no broader social objectives would be subverted by the transaction. This situation may exist, for example, between two agricultural activities. Id. at 113-14.

36. Even if it is acknowledged that a use should continue, periodic permit expiration allows reassessment of the necessary quantity methods, and other conditions of use.

37. MODEL WATER CODE, supra note III.C.2, at §2.06, Commentary at 189.90.

38. Twenty years may not be sufficient to amortize business investments, thus forcing the permit holder making long-term investments to gamble on the probability of renewal. Even if investments are fully amor-
tized, the permit lower at least loses the value of the going concern, i.e., the continuing ability to make a profit. Trelease, The Wise Administrator, supra note III.C.4, at 219-20.

39. The NATIONAL WATER COMMISSION supra note III.D.6, at 287, recommends tying permits to amortization schedules. Permit renewal is automatic unless, upon expiration, the decision is made to shift use to a narrowly defined range of public uses, such as increasing minimum stream flows or meeting municipal needs. Id. at 286-93. The Commission also recommends linking limited duration permits with free transfer of rights. Id. at 292-93. Under this approach the market is the major mechanism for changing uses.

40. FLA. STAT. ANN. §373.246 (west 1974); MODEL WATER CODE, supra note III.C.2, at §2.09, Commentary at 192-95.

41. ALASKA STAT. §46.15.130 (Michie 1977).


The Hawai'i Ground-Water Act combines administrative discretion and statutory preferences, including a preference for users predating the regulation. See Section III.C., supra. A statutory preference for pre-existing users would ease the impact of the regulation on those users. The State Water Commission recommended a combination of statutory preferences for pre-existing users and administrative discretion under a plan. But the commission's proposal does not call for a plan until a shortage is declared. STATE WATER COMMISSION, supra note 1.1 at 16. Adoption of a plan in advance of a shortage would save time in dealing with a shortage and increase permit holders' certainty as to where they stand.

43. See Trelease, The Wise Administrator, supra note III.C.3 at 220-23. Trelease argues that reducing allocations by a prior adopted plan leaves a permit holder in an uncertain position to the extent that the allocation plan can be amended by regulations or statutes after a permit has been issued. All new permit holders would be secure from reductions only if the permits only allocated the most dependable aquifer yields and stream flows. But this would waste much of the water that is available. As the administrator issues permits for water exceeding the most dependable flow, probability of a shortage declaration increases. Maximum use of water would in theory exist in a state of near-permanent shortage.

Trelease contends that granting new permits strictly on the basis of temporal priority would give each new permittee a clear understanding of the physical uncertainties under which the permit is taken. This information provides a degree of certainty on which to make investment decisions. Under this framework even highly variable supplies could be allocated and used productively without detriment to earlier permittees when the supply is low.
Temporal priority is harshest on the most junior permittees in time of shortage. The harshness can be somewhat mitigated by allowing short-term leases of water use between permit holders during times of shortage to make up the deficits in quantities allocated to those users. A similar approach is followed in New Mexico. N.M. STAT. ANN. §72-6-3 (Michie 1978), discussed in id. at 222.
E. PROPOSED HAWAII CODE AND TAKING QUESTIONS PRESENTED

To answer the taking question some assumptions about the nature of the Hawaii Code must be drawn from the regulatory options discussed above. A proposal from the 1980 legislature provides a good starting point. H.B. 1792-80 proposed a slightly modified version of the Model Water Code. It is an appropriate regulatory vehicle to scrutinize here because it contains strong administrative controls. This tests the constitutional acceptability of the most severe restrictions on private property.

The provisions in the proposed code which restrict property rights and frame the taking questions can be summarized as follows:

(a) "Reasonable beneficial use" is the single standard on which all rights to use surface water and groundwater are based.

(b) All existing legal uses in Hawaii are issued permits to continue that portion of the total use which meets the reasonable beneficial standard. "Existing legal" uses include uses immediately prior to the date of the McBryde decisions. This means that "konohiki" uses may receive permits, but any existing use will be diminished if it fails to meet the new standard.

(c) Permits for new uses will be issued to any individual whose proposed use is reasonably beneficial and meets the other statutory requirements.

(d) All permits issued to existing and new users are limited to a 15-year term (30 to a governmental body) renewable at the discretion of the agency.

(e) Permits are not transferable, and major modifications in use require administrative approval.

(f) Minor uses for domestic purposes only also require a permit.

The controls above define the water use rights individuals will hold after regulation. As section II.B. supra noted, the preregulation water rights will be assumed here as those existing prior to McBryde. A comparison of preregulation rights and post regulation rights raises three major takings questions for examination in part IV infra:

1. Acceptability of Restricting on Inchoate Rights. Individual holders of each of the traditional Hawai'i water rights may be able to start uses in the future or increase their present consumption. Some can sell unused rights. The Proposed Code will replace these inchoate rights with the mere opportunity to apply for a permit.

2. Acceptability of Restricting Existing Uses. Traditional Hawai'i rights are not now subject to the reasonable beneficial use standard. Permits will issue under the Proposed Code only for existing uses that meet that standard. The remaining existing
uses will be terminated.

3. Acceptability of Limited Term Permits. Hawai'i use rights are indefinite. Under the Proposed Code existing uses will receive only 15-year permits. Nonrenewal means currently existing uses could be fully terminated in 15 years.

III.E. NOTES


2. Id. § 15(1); MODEL WATER CODE, supra note III.C.2 at §2.02.

3. H.B. 1792-80, H.D.1, 10th Hawaii Leg. 2d Sess. § 16 (1980); MODEL WATER CODE, supra note III.C.2, at §2.03.

4. Section 16 of the Proposed Code does not explicitly include legal uses prior to McBryde among those that qualify for a permit. It retains the language of the Model Water code which refers to "existing uses allowable under the common law of this state". In view of the confusion surrounding the McBryde decision, the assumption is made here that the intention is to include pre-McBryde rights, such as konohiki rights.

5. H.B. 1792-80, H.D.1, 10th Hawaii Leg., 2d Sess. §§ 14, (1980); MODEL WATER CODE, supra note III.C.2, at §§2.01, .02.


7. H.B. 1792-80, H.D.1, 10th Hawaii Leg., 2d Sess. §§ 24, -25 (1980); MODEL WATER CODE, supra note III.C.2, at §§2.07, .08.

8. Section §2.01(1) of the Model Water Code exempts domestic consumption by individuals from the permit requirement. Section 14(1) of the Proposed Code deletes this exemption.
IV. TAKING ISSUES UNDER THE PROPOSED HAWAII CODE

A. PROPERTY INTEREST IN HAWAI'I WATER RIGHTS

Asking whether a water regulation amounts to a taking first requires identifying the property interest in water rights. The Constitution protects from over-regulation only those rights or expectations in water use that rise to the level of property. It is well settled that some dimensions of water rights are not sufficiently bound up with the reasonable expectations of the claimant to constitute property. Their loss raises no constitutional issue even though accompanied by great economic loss. The Hawaii Supreme Court has never addressed the scope of the property interest; its decisions have adopted or elaborated upon the dimensions of water rights, usually in the context of resolving conflicting claims to use water. Hence, it remains an open question as to what dimensions of each water right in Hawaii are property and what dimensions are merely legal rules established to conveniently and justly resolve conflicts over water use.

Language in case law in other jurisdictions is unilluminating on the issue. For example, case law is available to support conflicting positions with respect to property interests in the common law water rights. Although most cases find a property interest in the water right, a few have concluded there is no property interest in riparian or correlative groundwater rights, and others have concluded there is no property interest in common law rights not presently being used. Review of judicial statements about the riparian right shows that courts generally do not carefully treat the property issue, instead offering broad statements and data and failing to elaborate upon the bare concept of use as a property right. Commentators agree there is no authority as to whether the particularized rules of the riparian doctrine all constitute property.

The most thorough contemporary analysis of common law water rights as property is Theodore Lauer's study of the riparian right. Other major commentators have adopted his conclusions. Lauer draws four principal conclusions with respect to riparianism.

First, the property in the riparian right is a right to a flow of water and the right to use that flow. The common thread of the riparian doctrine in all jurisdictions where it has not been legislatively modified is that each riparian owner has the right to use and the right to have the watercourse continue to flow to him. To argue that this usufructuary right is not entitled to constitutional protection as property would be to ignore the right as a positive incident of ownership of land would be inconsistent with traditional understanding of the nature of property.

Second, if the right to use water is property, then neither the validity of the right nor its status as property depends on whether it is presently being exercised. The riparian right to use is not lost by nonuse. The inchoate right, the right to use in the future, is no less property than an existing use.

Third, the elaborate set of legal rules that govern the enjoyment of
the right of use do not constitute property. All Anglo-American systems of water use intend putting water to its maximum beneficial use and protecting each right holder's equal enjoyment of his use right. In a system where each riparian has an unlimited right to use, from a common source, specific rules and limitations are necessary to avoid conflicts and resolve disputes that do arise among users. Courts have adopted such rules in the form of the natural flow doctrine, the reasonable use doctrine, and particular means for determining reasonableness, among others. The rules in existence at any given time are the adopted guides for ascertaining the extent of each person's right to use. They are not property but merely means of safeguarding each riparian's property in the right to use.\(^{12}\)

Fourth, the rules governing use may be freely amended as long as the changes protect the equality of distribution among right holders. Examples of changes that would not affect the equality of distributions are a change from the natural flow to the reasonable use doctrine, a shift in criteria for determining what use is reasonable, or a change to reflect better understanding of hydrological phenomena. Changes in distribution rules that disturb the equality of distribution among right holders would impinge on the right to use, the property right, thus raising a constitutional taking question.\(^{13}\) An example would be making riparian waters available to the general public under the Model Water Code. Access by non-riparians would erode the use of right formerly unique to riparians.

Lauer's analysis is helpful in identifying the property interest in Hawai'i's pre-McBryde common law water rights. The ancient Hawaiian water rights show stronger characteristics of property.

**Property in Pre-McBryde Riparian Rights:** Lauer's conclusions would adequately define pre-McBryde riparian property rights in Hawai'i, with the additional qualification of riparian access to limited categories of water. The riparian's property is the right to the flow and to the use of freshet and storm surplus waters. The Hawaiian Court's statements of how the rights may be exercised, such as the relative priorities of upper versus lower riparians and domestic versus artificial uses, are not property but merely the current rules for ensuring equitable exercise of the use right.

**Property in Correlative Groundwater Rights:** Lauer's conclusions are equally applicable to correlative groundwater rights, which apply the same common law principles to a different body of water. An owner of land which overlies groundwater has property in his right to use the groundwater. There is no property in the legal rules that govern the equitable exercise of the right, such as rules for determining beneficial uses and limitations in transfer to nonoverlying lands.

**Property in Appurtenant Rights:** A greater property interest should be recognized in appurtenant right holders, but some dimensions of this right should not be property. As with common law right holders, their rights to a flow of water and to the use of water should be considered property. But at least two other dimensions of the appurtenant water right should qualify as property: their right to a specific quantity of water either adjudicated or determinable, and their priority over all non-appurtenant right holders with respect to this quantity. Quantity and priority should be property because they have traditionally been absolute and unqualified rights.
It is less certain that other dimensions of the appurtenant right should be considered property. Specific conditions on the use right, such as place and time of diversion and proportional cutbacks in times of shortage, are merely rules for ensuring fair distribution among equal right holders in a specific quantity of water. As with riparians, all of the appurtenant right holders on a watercourse must divide a specific quantity of water, which is the aggregate of their specific use rights. The specific rules of distribution among appurtenant users might as necessary to resolve conflicts among appurtenant users and ensure equitable distribution among them. As with the analogous rules of riparianism there should be no property in the rules themselves.

The right to divert water to non-appurtenant land, either in the same or a different watershed, should not be considered property. With respect to diversion to lands in a different watershed there is no pre-McBryde authority clearly establishing this as a dimension of the appurtenant right. Hence, there is little basis for considering whether as a part of the right it should also be raised to the level of property. The right to divert to non-appurtenant lands in the same watershed clearly was a part of the pre-McBryde law and remains so even after McBryde. But diversion is not an absolute dimension of the appurtenant right. It is linked to the right of others. The right to divert at any time is contingent on non-injury to other appurtenant users. This makes the diversion right one of the reciprocal rules that govern use by all appurtenant right holders in a common flow. Like a riparian's right to divert water to non-riparian land contingent upon noninjury to others or a groundwater user's comparable right to divert to nonoverlying land, the rule is best viewed as a means to ensure equitable and beneficial use of water by all appurtenant right holders. The right should not rise to the level of property.

Property in the Konohiki Water Right: The konohiki right to use is the least qualified of pre-McBryde water rights. It is qualified only by the higher priority of appurtenant claims in the normal flow and riparian rights in the storm and freshet surplus flow. As to the normal surplus flow, the konohiki right holder is in the unique position among Hawai‘i right holders of having to make no accommodation of other claims on the same water. The konohiki right holder has unlimited use of the normal surplus flow. The absolute character of this use right should mean that the entire right constitutes property.

Several conclusions are thus possible about property rights in water. Initially, to the extent that the McBryde court rearranged water rights that were not property, critics of the decision have no constitutional grounds for complaint. Second, some aspects of the correlative, riparian and appurtenant water rights in Hawai‘i are not property. These can be legislatively or judicially changed in ways that continue equitable distribution among the holders of these respective rights without a taking challenge. Some aspects of the above water rights and all aspects of the konohiki right are property. Included as property in all of these rights is the inchoate right to make future use of water not now being used. The Proposed Code, which will restrict both existing and inchoate rights to use and extend the right to use to the public at large, will affect the property of each category of right holders. Hence, the taking question is appropriately raised for each category of right holders.
IV.A. NOTES

1. The hydrologically sound view of water rights as use rights rather than rights in tangible corpus of water itself, see Section II.C. supra, has no bearing on a scope of a protected property interest. The Constitution protects both tangible and intangible property interests. See Board of Regents v. Roth, 408 U.S. 564 (1972).

2. E.g., United States v. Willow River Power Co., 324 U.S. 499 (1945) (riparian interest in high-water level of river for runoff for tail waters to maintain powerhead is not property); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913) (no property interest can exist in navigable waters).

3. Cf. Perry v. Sindermann, 408 U.S. 593 (1972) (it is the nature of the interest at stake not its weight that determines whether there is property and a due process requirement).


12. Id. at 208-11; O'Connell, supra note II.C.2, at 164-15.


14. 54 Hawaii at 191, 504 P2d at 1341. See notes II.B.29, 33 supra and accompanying text.

15. Under this view the change to natural flow rules would not affect the property of riparians. The restriction of appurtenant uses to appurtenant lands would not affect the property of right holders.
This introductory section examines primarily principles of taking law that have emerged in land regulation rather than water regulation. The amount of water regulation case law is negligible by comparison. Also, water regulation cases show minimal analysis of the taking issue, tending instead to make general analogies to land regulation case law. Furthermore, much of the water regulation case law is now dated and does not reflect the courts' trend toward expansive regulation under the police power.

The fifth amendment to the Constitution prohibits the taking of private property for public use without the payment of just compensation. The requirement is an essential element of due process of law, and therefore it applies to the states through the 14th Amendment. Government has always been able to regulate property through the police power without compensating for private losses. But the constitutional question arises when the loss from regulation is virtually indistinguishable from government actions taken through eminent domain or condemnation proceedings with just compensation paid. Then the regulation has become a "taking".

Supreme Court jurisprudence on takings by regulation is a difficult area in which to draw easily applicable principles. This is because Court rulings are infrequent, the opinions rarely elaborate on the nebulous standard laid down in the leading case of Pennsylvania Coal Co. v. Mahon, and the results of cases subsequent to Mahon suggest the Court's operative standard is more tolerant of severely restrictive regulations than Mahon's holding and tenor would suggest. The following discussion first examines takings law prior to and including Mahon; then it examines how the Mahon standard has been elaborated and applied in subsequent cases.

1. Taking Theory Prior to and Including Mahon

Early cases considered any use of the police power to promote health or safety, develop resources, or add to public wealth or prosperity to be different in kind from taking through eminent domain. Resulting private losses were not a taking but merely incidental to use of police power. The view of the relationship between the police power and eminent domain was discussed in Mugler v. Kansas. There the Court upheld a Kansas statute prohibiting the manufacture and sale of intoxicating beverages, and thereby substantially reducing the value of a brewery. In the view of the Mugler Court, a taking by eminent domain required some encroachment on property. This encroachment may be a direct appropriation for public use or it may be a physical invasion. Pumphelly v. Green Bay Co., the Court's first treatment of the taking issue, demonstrates the physical invasion principle. There a public dam raised the water level causing flooding of Plaintiff's land, and the Court found a taking. Under the Mugler principle and until the time of Mahon the Court was able to support very substantial losses under the police power.

But with its landmark decision in Mahon the Supreme Court made it clear that the difference between private loss through police power regulation and
eminent domain was not a difference in kind but one of degree. Mahon stands for the proposition that a police power regulation whose economic impact is too severe will be struck down as a taking under the fifth amendment. Mahon gave rise to what is commonly referred to as the "diminution in value" test, which finds a taking where the regulation causes too great a decrease in the market value of property. In Mahon the regulation, which prohibited subsurface mining in certain areas, had gone "too far" because the Plaintiff's property was mining rights, and the regulation effectively destroyed those rights. Lower courts frequently use the diminution in value test as a major, if not exclusive, consideration and have upheld very significant decreases in market value.

2. Takings Cases Subsequent to Mahon

Since Mahon the Court has repeatedly reaffirmed the principle that the degree of severity of impact is the criterion distinguishing valid use of the police power from taking by eminent domain. The Mahon principle reflects the Court's view that the fifth amendment's guarantee protects some people from bearing public burdens which, in all fairness and justice, should be carried by the public at large. Since fairness and justice is the underlying standard, the Court has also consistently refused to set a formula for when a regulation becomes a taking. It looks in an ad hoc fashion to the particular facts of each case.

The post-Mahon cases show the Court's disinclination to apply the economic impact test in the protectionist manner suggested by Mahon. Mahon remains the only case in which the Court has invalidated a land-use regulation because the economic impact was too severe. In those several instances where the Court has found a regulatory taking, it has found physical invasion and so disposed of the cases under principles consistent with the Mugler/Pumpelly theory.

Since Mahon the Court has upheld regulations causing very severe economic loss while making very cryptic or no reference to the Mahon standard. Village of Euclid v. Ambler Realty Co. upheld a challenge to an enactment of a zoning ordinance which diminished property value by about 75% and made no reference to Mahon. Miller upheld against a due process claim a Virginia statute requiring the uncompensated destruction of a cedar plantation. The cedar trees harbored a disease fatal to apple trees. Relying on the pre-Mahon cases of Mugler and Hadacheck, the Court found the act an acceptable legislative choice, guided by considerations of the public interest, between conflicting property interest. United States v. Central Eureka Mining Co. found no taking under the Mahon standard when goldminers were closed by a wartime order aimed at conserving machinery and manpower. Goldblatt v. Town of Hempstead is a recent example. There a city safety ordinance restricted excavations below the waterline in a water-filled quarry operating in town thereby effectively prohibiting the long standing and most beneficial use of the property. Since the record was devoid of evidence as to loss of value, the Court assumed reasonable use of the property was possible and upheld the ordinance under the Mahon standard.

In its most recent decisions the Supreme Court indicates that it examines two factors in scrutinizing any land regulation. It looks at the
economic impact of the regulation on the individual, and it looks at the character of the regulation. In *Penn Central Transportation Co. v. City of New York* the Court provided its fullest discussion to date of how the Mahon standard is to be applied. There the Court upheld application of a historic landmark ordinance to Grand Central Station. Under the ordinance the city had twice denied Penn Central a permit to redevelop its low-rise site under the existing zoning, thus precluding two million dollars in prospective added annual revenues. *Penn Central* treated the economic impact question in terms of "the extent to which the regulation has interfered with distinct investment backed expectations". Two factors were critical in the Court's analysis of the economic impact. First, the law did not interfere with Penn Central's primary expectation for use of the parcel, which the Court considered to be continued use for railroad, office space, and concession purposes. Second, Penn Central was able "not only to profit from the Terminal but obtain a 'reasonable return' on its investment". With respect to the character of the regulation, the Court was satisfied that historic district preservation was "an entirely permissible governmental goal".

The Court's discussion in *Penn Central* and subsequent cases shows its willingness to use several analytical devices which make the Mahon standard for acceptability easier to meet. First, the Court examines economic impact by looking at what uses and value remain after the regulation rather than how much the regulation diminishes value. Shifting the focus from what value and uses are lost by regulation to what uses the regulation permits, leads to the Court's now often repeated principle that loss of value standing alone will never be enough to establish a taking. A taking requires some additional dimension to economic impact beyond mere loss of value. Several cases conclude that a taking occurs when a regulation prevents all reasonable uses of property.

In keeping with its refusal to state a formula and its ad hoc approach to inquiry, the Court has not addressed what residuum of economic utility is necessary to sustain a regulation. *Penn Central* does not make the two economic facts present there (noninterference with existing uses and a reasonable return on investment) minimum criteria for avoiding a taking. Rather, these facts were merely sufficient to satisfy the Court in this particular ad hoc inquiry into economic impact. Indeed, as Goldblatt, Miller, and Hadacheck show, the Court has not hesitated in the past to uphold regulations terminating specific uses of land.

*Penn Central* gives little guidance on the meaning of "reasonable return" because the railroad's ability to earn a reasonable return form existing uses was not at issue in the case. The reasonable return standard has been applied in lower court cases but the *Penn Central* opinion and the Court's later discussion of that opinion suggest it may be sufficient if an enterprise merely remains economically "viable" even though profits do not rise to the level of a reasonable return. Moreover, there is lower federal authority following *Penn Central* that rejects even economic viability as a minimum criterion. In *William C. Haas & Co. v. City and County of San Francisco* the Ninth Circuit sustained a downzoning that precluded recovery of the investment in land purchase. The Court treated inability to make an economically viable use of the land as just another way of describing diminution in value and "disappointed expectations".
Using return on investment as an indicator of economic impact poses other questions with uncertain answers. First, what is the scope of the property on which economic return is to be calculated? As the scope of the property considered to be affected expands, the economic impact of a particular regulation on the owner decreases.\(^4\) Second, what is the amount of the investment on which return is to be calculated. For example, using the owner's original investment, rather than the current market value, as the base for calculating return on investment means a particular regulation will appear less damaging. There is lower court precedent for using less than market value of property,\(^5\) but this may have nonregulatory implications as well.\(^6\)

A second contribution of recent cases has been to describe in more detail how the character of a regulation fits into the taking analysis. The Court has (1) dispelled some theories popular in commentary and lower courts that resolve the taking question primarily by looking at the character of the regulation, and (2) indicated that the character of the regulation, particularly the degree of the public interest served and how the benefits and burdens are distributed, relates to the acceptable level of economic impact.

The Court in *Penn Central* was satisfied that the historic building preservation was an entirely permissible governmental goal. In adopting this seemingly low threshold the Court rejected several theories that find a taking where an enactment restricts uses that are not noxious, or is directed at creating a public benefit rather than preventing a harm, or enriches the community as a whole rather than merely arbitrating between property owners.

Lower courts typically have been more inclined to uphold a regulation when the regulated activities can be described as a noxious use\(^7\) or when the regulation is intended to relieve some actual or prospective public harm from property uses rather than to secure a public benefit.\(^8\) Allowing uncompensated regulation of noxious or harmful uses is sensitive to the degree of fault on the part of landowners.\(^9\) These formulations call for a dichotomization that is hard to apply in close cases, and they are thus susceptible to expansive or narrow application depending on the subjective judgments and policy preferences of courts and legislatures.\(^10\) The explanatory power of these characterizations was substantially undermined by the Supreme Court's treatment of the noxious use theory in the *Penn Central* opinion. In response to the landowner's assertion that the proposed 50-story Manhattan tower was a beneficial rather than a noxious use, the Court noted that land uses are not inherently noxious but rather are innocent uses that inevitably conflict, thus requiring legislative resolution.\(^11\)

Another traditional theory for identifying acceptable regulations by their character distinguishes between regulations that resolve conflicts between individuals (arbitral regulations) and those that improve the government's position or add to its resources at the expense of individuals (enterprise regulations).\(^12\) Arbitral regulations take no value for the government and are not compensable. Enterprise regulations diminish property value in favor of the government and are a compensable thing.\(^13\) But the Court in *Penn Central* undermined the rationale of this test when it said that the landmark designation was not an enterprise regulation because it was not being used for city purposes or in a government entrepreneurial
operation.\textsuperscript{50} This clearly indicates that characterizing a regulation as furthering the collective interest to the detriment of the individual interest is insufficient for a taking.\textsuperscript{51}

Although \textit{Penn Central} discounted popular theories for evaluating a regulation solely upon its character, the nature of a regulation remains relevant to the acceptable level of impact on the individual. Supreme Court cases following \textit{Penn Central} show that the level of public interest in the regulatory objective and the distribution of benefits and burdens under the regulation are important in this respect. Some lower courts evaluate regulations using a balancing test that weighs the degree of public interest or public benefit in a regulation against the severity of the regulatory impact on the individual and finds no taking where the former is more weighty.\textsuperscript{52} This test has its genesis in the \textit{Mahon} decision where it can be viewed as an alternative theory for the outcome.\textsuperscript{53} Since \textit{Mahon}, Supreme Court decisions routinely cite the importance of the public interest in particular regulations,\textsuperscript{54} but only in the recent case of \textit{Agins v. City of Tiburon}\textsuperscript{55} does it directly address how public interest enters into the takings calculus. In upholding a land use regulation that radically reduced the developable density of land the Court in \textit{Agins} said the taking "question necessarily requires a weighing of private and public interests".\textsuperscript{56} The implication of this weighing approach is that where public interest in regulation is very keen, then, very substantial economic impacts will be acceptable.\textsuperscript{57} Future decisions by the Court must address how this balancing is to be applied when regulation reduces a property use to minimal economic viability.

How the benefits and burdens associated with a regulation are distributed among property owners also affects the acceptable degree of loss to an individual. Courts have traditionally justified land use regulations that apply over a broad cross section of land as securing "an average reciprocity of advantage", that is a sharing in the benefits and burdens flowing from the regulation.\textsuperscript{58} The Court in \textit{Penn Central}, in upholding the landmark ordinance that applied to individual sites, dismissed the notion of average reciprocity as a requirement for validity of an enactment.\textsuperscript{59} But sharing in the benefits and burdens of a regulation remains important in any takings analysis. In \textit{Agins} the Court noted that where a landowner shares in both the benefits and burdens flowing from a regulation, the benefits will be considered along with the diminution in market value that is suffered.\textsuperscript{60} Although the Court has only outlined this relationship, the clear implication is that as an individual shares more directly in the benefits of a regulation, a greater individual loss from the regulation will be acceptable.

The third major recent development with respect to economic impact analysis is the Court's recognition in \textit{Penn Central} that the transferable development rights (TDR) accompanying the building height restrictions mitigated the economic effects on the landowner and were to be considered in determining whether the regulatory impact was too severe.\textsuperscript{61} The underlying theory is simple enough. Use of the police power allows some private loss in furtherance of the public benefit. Under the \textit{Penn Central} rationale, when considering whether private loss is too severe, the measure of the private loss may be the net impact of the restrictions imposed and the valuable but nonmonetary rights granted.\textsuperscript{62}

The use of TDR as a means of mitigating regulatory impacts has been
treated in lower courts and by commentators at length. But lower courts have applied essentially the same principle by other means as well. The use of amortization periods in the phased removal of nonconforming land uses, particularly the removal of billboards, is a notable example. With respect to billboards and signs, some courts upholding removal measures under the police power explicitly recognize that while amortization periods do not constitute just compensation they do mitigate damages. In the area of community growth controls, Golden v. Planning Board (Ramapo) exemplifies judicial recognition of how an 18-year development freeze can be brought within the bounds of the police power by including mitigating considerations within the regulatory scheme. The Court recognized that specific concessions to affected landowners mitigated the otherwise draconian impact, thus permitting a return on the land that was a reasonable beneficial use. And the Ninth Circuit displayed similar reasoning in an early decision upholding Oregon's comprehensive water code by recognizing the mitigating effects of special features of the regulatory scheme.

IV.B. NOTES

1. See section IV.C.1 infra.
2. Id.
3. See note IV.D.19 infra and accompanying text.
5. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 395 (1922). Authorities diverge on the proper remedy for a property owner subject to a regulation that amounts to a taking. Some courts view the regulatory restriction as a taking of property under the Fifth Amendment which requires payment of compensation. Such property owners have an action for "inverse condemnation". See generally Note, Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance, 26 STAN. L. REV. 1439 (1974). Other courts maintain a theoretical distinction between exercise of the police power and eminent domain power exercised under the Fifth Amendment. These courts will strike down the regulation as an invalid exercise of police power amounting to a deprivation of property without due process of law under the 14th Amendment. E.g. Fred F. French Inv. Co. v. City of New York, 39 N.Y. 2d 587, 595, 350 N.E.2d 381, 386, 385 N.Y. 2d 5, 9-10, appeal dismissed, 429 U.S. 990 (1976). Hawai'i follows the latter approach. Allen v. City and County of Honolulu, 58 Hawaii 432, 571 P2d 328 (1977). The Supreme Court has not squarely addressed the issue, but its recent discussion in San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) suggests that, barring a change in the court's makeup, it will approve the inverse condemnation remedy when it does. In San Diego Gas the landowner appealed the state court's rejection of availability of the inverse condemnation remedy. By a 5-4 majority the Court concluded its jurisdiction in the appeal was improper because the state court deci-
sion was not final. It therefore left the inverse condemnation issue undecided. A four member dissent, in an opinion by Justice Brennan, would have found jurisdiction and concluded the Fifth Amendment's just compensation provision is self-executing. The right to compensation arises as soon as a taking is established. Id. at 648-9. Hence the Constitution requires the inverse condemnation remedy. Justice Rehnquist, in a concurring opinion, making the 5 member majority, id. at 633, sided with the majority on the jurisdiction question but generally agreed with the dissent on the availability of the remedy.

8. Id. at 668-69:
   A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to...the community, cannot, in any just sense, be deemed a taking of property...the exercise of the police power...is very different from taking property for public use....
9. Id. at 668.
10. 80 U.S. (13 Wall.) 166 (1871).
11. The taking clause of the Fifth Amendment derives from the Magna Carta. For an historical analysis of the clause, which concludes it was intended to apply to public appropriation of land but not police power regulations even when they preclude any economic use, see D. ROSELIN, D. CALLIES & J. BANIA, THE TAKING ISSUE (1973).
12. E.g., Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding a Los Angeles ordinance prohibiting continued operation of a brickyard causing a health and safety hazard with loss of value from $800,000 to $60,000).
13.Mahon involved a challenge to a state statute prohibiting mining in areas where mine subsidence was a hazard to homes, even though mining rights and damage claims had been bargained away by most home owners. The mining company owned only the mineral rights. Viewing the company's right to the coal as the right to mine it, the Court said that since the law made it commercially impractical to mine any coal, the law had the effect of appropriating or destroying the property. While recognizing that the state could regulate property under its police power, it said that if "regulation goes too far it will be recognized as a taking". 260 U.S. at 415. Here it held that the effective destruction of the property had gone "too far".
15. E.g., William C. Haas v. City & County of San Francisco, 605 F.2d 1117 (9th Cir. 1979) (decrease in value from $2,000,000 to $100,000);
Gardner v. Downer, 61 Misc.2d 131, 305 N.Y.S.2d 252, (Sup. Ct. 1969), aff'd, 35 A.D.2d 1080, 317 N.Y.S.2d 1013 (1970) (decrease from $1,500,000 to $275,000); Consolidated Rock Prod. Co. v. Los Angeles, 57 Cal.2d 515, 20 Cal. Rptr. 638, 370 P2d 342, appeal dismissed, 371 U.S. 36 (1962). But the holdings are disparate, and smaller diminutions have been struck down, which indicates that the standard is too vague or that factors other than diminution are at work in the court's analysis. See, e.g., Pearce v. Village of Edina, 363 Minn. 533, 118 N.W.2d 659 (1962) (taking where decrease in value is from $350,000 to $100,000).


18. 438 U.S. at 124.

19. Finding a taking where there is actual physical invasion of property protects a central core of property interests. See, United States v. Causby, 328 U.S. 256 (1946) (taking where flight path of public airport over farm destroyed existing commercial use of chicken farm); Griggs v. Alleghany County, 369 U.S. 84 (1962) (taking where flight path to municipal airport made property uninhabitable for residential purposes); Kaiser Aetna v. United States, 444 U.S. 164 (1980) (commerce clause case; taking occurred here a formerly private pond opened to the sea by private investment was subject to navigational servitude because the right to exclude others—an "essential stick" in the bundle of property rights—was lost).


21. Euclid was a facial challenge to the zoning ordinance as enacted. Plaintiff did not argue and the court did not address whether the enactment was too severe as applied to the plaintiff property owner.

22. 276 U.S. 272 (1928).

23. Id. at 280-80:

When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the and where and where the public interest is involved preference of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of...the police power....

26. Id. at 595-96.
29. The city ordinance required that individual sites designated as landmarks, like Grand Central Station, receive discretionary permits before making any exterior alterations under the existing zoning. Owners of designated lots were allowed to transfer unused development rights (the difference between actual uses and uses permitted within the existing zoning) to other lots in the vicinity. Penn Central entered into a lease agreement with a developer. Permits were denied for two separate redevelopment proposals that were within the existing zoning. The owner challenged the ordinance rather than making a third application. 438 U.S. at 107-19.
30. Id. at 124.
30.1. Id. at 136. The court cited two additional factors as mitigating the severity of the economic impact. Penn Central had the continued opportunity to seek a permit for some future enhancement of the property. And, under the terms of the ordinance, it could transfer some of the unused development rights to its other parcels in the vicinity. Id. at 136-37. See notes IV.B.61-62 infra and accompanying text.
31. Id. at 124.
34. Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908) (dicta; private property prevails over public interest if height restriction makes property wholly useless); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (taking where statute effectively destroyed all the property); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (no taking because ordinance did not prevent reasonable use).
37. Agins v. City of Tiburon, 100 S. Ct. 2138, 2141 (1980), discusses
Penn Central Court emphasized its holding was based on the owner's "present ability to use the terminal for its intended purposes and in a gainful fashion". 438 U.S. at 138 n. 36.

38. 605 F.2d 1117 (9th cir. 1979).

39. Id. at 1120-21.

40. Compare the scope of the affected property in Mahon, 260 U.S. at 414-75 (over dissent of Justice Brandes, majority defined the affected property to be only mining rights which were completely destroyed and held taking) with Penn Central, 438 U.S. at 130-31 (majority rejected owner's theory that property affected was only the undeveloped air rights, broadly defined the property as the entire parcel, and held no taking). Compare State v. Johnson, 265 A.2d 711, 713 (1970) (in striking wetlands regulation on diminution of value theory court looked at impact only on regulated portion of parcel and ignored highly developed portion of parcel) with Commissioner of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 112, 206 N.E.2d 666, 671-72 (1965) (court calculated profitability based on regulated and unregulated portions of property).

41. The decision of the New York court of appeals in the Penn Central litigation is an innovative recent example. There the Court employed a sophisticated rationale for lowering the calculated value of the terminal site and increased the calculated revenues to the site, thus permitting the conclusion that a reasonable return was possible. In calculating the value of the property the Court did not include value created by the public through government monopolies and subsidies. It imputed some of the return on surrounding Penn Central Properties to the terminal site itself. And it considered the present value of the transferable development rights as part of the return on the site. Penn Central Trans. Co. v. City of New York, 42 N.Y.2d 324, 332-36, 366 N.E.2d 1271, 1275-78, 397 N.Y.S.2d 914, 919-21 (1977), aff'd 438 U.S. 104 (1978).

Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972), illustrates a more drastic pro-regulatory approach. There, in upholding a wetlands regulation applied to a parcel that precluded any residential uses, the court considered the value to be the value of the parcel in its natural use as a marsh, rather than the market value.


42. Professor Berger suggests that using less than market value will encourage individuals to transfer their property to protect the appreciation they have realized from being consumed by future regulations. Berger, The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis, 76 COLUM. L. REV. 799, 818-19 (1976) [hereinafter cited as Berger, The Accommodation Power].
43. The noxious use theory is an outgrowth of the common law regulation of land uses through control nuisances. See THE TAKING ISSUE, supra notes IV.B.11, at 197–98. It distinguishes loss due to abatement of a public nuisance on the one hand from the taking of unoffending property from an innocent landowner on the other hand. The classic illustration of this theory is Hadacheck v. Sebastian, 239 U.S. 394 (1915) where the Court upheld prohibition of a preexisting brickyard. Other cases offered as illustrative of noxious use theory are Consolidated Rock v. City of Los Angeles, 57 Cal.2d 515, 20 Cal. Rptr. 368, 370 P.2d 342, appeal dismissed, 371 U.S. 36 (1962) (termination of gravel pit, which was the only use for which the property was suited); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (regulation terminating pre-existing quarry in town area).

44. The benefit/harm formulation was suggested by Professor Dunham. See Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 SUP. CT. REV. 63 (1962).

45. But like all tests that can turn solely on the character of the regulation, the noxious use and benefit/harm tests are insensitive to the degree of impact on the individual. A property owner must fully absorb all the costs associated when even a nominally noxious use is terminated by regulation.

46. Few would dispute classifying a quarry in a residential area as a noxious or harmful use subject to regulation or that a building height/limit adjacent in an airport approach creates a public benefit. But in the close cases where the taking question is most difficult these dichotomies are of little help. Does preserving an historic building prevent a harm or create a benefit? In the context of water regulation, does cutting back an existing legal use to meet a "reasonable beneficial" standard prevent a harm (inefficient use of a limited resource) or create a public benefit (make water available for more productive uses)?

47. The Court, specifically citing the Hadacheck, Miller and Goldblatt decisions as examples, said that the noxious use line of cases is better understood as involving restrictions reasonably related to implementing public policy producing broad public benefit and applicable to all property similarly situated. 438 U.S. at 133–34 n. 30.

48. This explanatory theory is the creation of Professor Joseph Sax. See Sax, TAKINGS AND THE POLICE POWER, 74 YALE L.J. 36 (1964).

49. Miller v. Schoene, 276 U.S. 272 (1928), illustrates a noncompensable regulation that arbitrates the conflict between owners of cedar trees and apple trees. Professor Sax's arbitral/enterprise distinction was based on United States v. Causby, 328 U.S. 256 (1946). The placement of an aircraft approach area over a farm which destroyed its usefulness as a farm and was found to be a taking can be viewed as enhancing the Government's entrepreneurial activity in operating the airport and thus taking under the Sax formulation.

50. 438 U.S. at 135.
This shows that the Court narrowly construes the Sax notion of entrepreneurial regulations. It would include among entrepreneurial regulations only those that directly add to a government operation, such as height restriction adjacent to the airport in Causby. It would not include regulations that further the collective interest to the detriment to individual interest but which do not arbitrate actual conflicts among individuals. The Sax rationale would find a taking in the latter interest.

E.g., Western Int'l Hotels v. Tahoe Regional Planning Agency, 387 F. Supp. 429, 436 (D. Nev. 1975) (Whether private loss is too great requires "balancing of public benefits secured by the regulation against private detriment suffered thereby"); Barret v. Hamby, 235 Ga. 262, 266, 219 S.E.2d 399, 402 (1975) (Regulation is void if it "results in relatively little gain or benefit to the public while inflicting serious injury or loss on the owner." Based on his extensive survey of takings cases, Professor Alstyne concludes that balancing of private loss and public gains is the operative standard courts apply, even though they may explicitly treat only the economic loss to the individual. See Alstyne, Taking or Damaging by the Police Power: The Search for Inverse condemnation Criteria, 44 S. CAL. L. REV., 1, 37 (1971).

Justice Holmes observed that if the mining regulation were upheld, the coal company would lose much more than the public would gain. He balanced the saving of a single house against the complete destruction of property rights. 260 U.S. at 413-14.

See, e.g., Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1960). Cf. Kaiser-Aetna v. United States, 444 U.S. 164, 175 (1980) ("The navigational servitude is an expression of the notion that the determination whether a taking has occurred must take into consideration the important public interest in the flow of interstate waters... capable of supporting navigation.").

100 S.Ct. 2138 (1980).

Id. at 2141. Agins involved a challenge to an ordinance that downzoned property to a district that would allow from one to five units on the subject five acre parcel, provided a development plan was submitted and approved. Since the owner had not yet sought development approval, the court considered whether the mere enactment of the ordinance was a taking and concluded it was not. The balancing test is also recently evident in the minority opinion in Kaiser-Aetna v. United States, 444 U.S. 164, 180 (1979) (Blackman, Brennan, and Marshall, J., dissenting). Kaiser-Aetna involved a taking challenge where the United States asserted a right of public access under the navigational servitude where a private pond had been open to navigable waters through private investment. The majority and minority disagreed over the scope of the navigable servitude, not over what taking test was appropriate. The minority found the navigational servitude applicable and balanced public interest against private interest to find no taking, the majority held that the right of public access to these waters was beyond the scope of the naviga-
tional servitude, and any assertion of public access would be resolvable simply under the physical invasion test.

57. Balancing public interest or public gains against private loss protects the individual property owner from suffering devastating loss when relatively minor public gains are at stake. It poses difficulties, however, in requiring comparison between very specific harms to individuals and benefits to the public which may be elusive and difficult to quantify. The general prohibition against regulation that "goes too far" is an open-ended standard which requires consideration of some other factor, such as the degree of public interest or benefit, to set the bounds in any particular situation. As one commentator notes, unless it is assumed that courts implicitly give weight to the degree of public interest, there is no way to reconcile the divergent lower court conclusions where comparable loss of value is involved. See Plater, The Takings Issue in a Natural Setting: Floodlines and the Police Power, 52 TEX. L. REV. 201, 230-31 (1974).

58. Under this theory the restriction on a property owner (and the loss of value) is partially offset by the benefits flowing to him from similar restrictions on surrounding properties. The phrase "average reciprocity of advantage" derives from Justice Holmes discussion in Mahon, 260 U.S. at 415.

59. 438 U.S. at 132-34. The court noted that valid land use regulations frequently affect some property owners far more severely than others and sometimes affect uniquely individual property owners. Id.

60. 100 S.Ct at 2142. Unlike Penn Central, where the landmark designation applied to individual sites, the downzoning in Agins applied on a district basis. Hence, unlike the owner in Penn Central, the property owner in Agins received benefits from the restrictions on surrounding property owners. While the benefits arising from shared benefits and burdens may be conceptually identified, practically speaking any such benefits would simply be reflected in the actual diminution in value.

61. 438 U.S. at 136-37.

62. By application of this principle, important regulatory objectives, which would otherwise have very severe individual impacts, can be brought within the reach of the police power because courts can consider the mitigating effects of value conferred on an owner as part of the regulatory scheme. In the past, courts reviewing very important regulatory schemes that impose extraordinary hardships have had to choose between upholding the scheme and its attendant severe individual hardships on the one hand, and striking the scheme as a taking on the other hand, which effectively compromises the regulatory objectives because limited public funds preclude large-scale acquisition through condemnation. The divergent holdings in wetlands regulation cases exemplify these hard choices. See McCraw, State and Local Wetlands Regulation in the Courts: Constitutional Problems on the Wane, 1 HARV. ENV'L L. REV. 496 (1976).


68. Selected mitigating factors in the freeze, which extended to 18 years for some parcels, were the right to build a single-family house on a parcel, interim reduction of taxes, an option to accelerate the development timetable by paying for infrastructure, and linking the future right to develop to a definite timetable, among others.

C. RESTRICTIONS OF INCHOATE RIGHTS TO USE WATER

The first taking question involves restricting inchoate water rights. All holders of common law water rights in Hawai‘i have rights to use in the future water that is not being used now. The Code will terminate the inchoate rights, replacing them with the mere opportunity to apply for a permit to make a particular use. A former common law right holder will feel the full impact of the Code when his application is denied.

This section examines this restriction in light of the takings principles above. Correlative groundwater and riparian rights are considered together because of their similar characteristics as property. Konohiki and appurtenant rights are considered together for the same reason. The discussion begins with a survey of mainland cases that have considered restriction of inchoate rights.

1. Case Law from Other States

The Supreme Court has remained largely silent on the constitutional limits to water rights regulation by states. A notable exception is Hudson County Water Co. v. McCarter in which the Court upheld as a valid exercise of the police power a New Jersey statute prohibiting transport of water out of that state. The case is outstanding for the magnitude of the public interest the Court recognized in state regulation of water. But the opinion by Justice Holmes is a transition case between Mugler and the fully developed Holmes standard in Mahon. Without offering a standard, the Hudson opinion suggests, by analogy to land regulations, that even a water regulation may be too restrictive. Hudson has been followed by other cases emphasizing in dicta a state's freedom to change its water laws as it may deem wise. The magnitude of the public interest recognized in Hudson and the subsequent expressions of state discretion in amending water rights suggest the Supreme Court will be most solicitous of water regulating schemes under the police power.

With the exception of California, the use of permit systems to restrict inchoate riparian and groundwater use rights has been upheld as a constitutional regulation of property rights under the police power. The regulatory systems tested have been similar in major respects. But in contrast to the extensive body of takings law generated by land-use controversies, the amount of takings law generated by challenges to these regulatory schemes is minimal due to the small number of challenges and to the tendency of the state courts to engage in limited, and sometimes cursory, analysis of the taking issue. The principal state cases can be grouped into four general categories according to the theories (or lack of theory) that apply to the taking question.

The first category finds no taking under the diminution of value standard announced in Mahon. Only the Oregon permit system has been validated by explicit application of this standard. This analysis arose in a Ninth Circuit Court of Appeals decision, California-Oregon Power Co. v. Beaver-Portland Cement Co., which followed earlier Oregon decisions, also upholding the permit system. The Oregon Code was a comprehensive law based on
permits and prior appropriation principles. Since the Code explicitly pre-
erved only "vested rights" and defined those rights to include only actual beneficia
t uses prior to the enactment, inchoate riparian and correlative rights were effectively terminated. The power company, a riparian owner, in
response to a change in the flow of a river caused by Defendant, claimed that its riparian right to the natural flow had vested independently of the Water Code, and any deprivation of that right was unconstitutional. In up-
holding the Code, the Court noted that police power regulation of the ripa-
rian right, which was a use right, was no more objectionable than forbidding certain uses of land." It then focused on the degree of impact, concluding that "the modification of riparian rights...is not so drastic a change as to amount to taking of property without due process of law". The Court elab-
orated on several factors in the operation of the law which apparently went into its conclusion that restriction did not go too far. First, the common law riparian right was not absolute. Second, the statute did not destroy the use right since "natural" and "domestic" uses remained uncontrolled. Third, the Court recognized that the Code subordinated to prior appropriation law the riparian's former unrestricted right to make reason-
able use of a fair share of all water. But the Court cited, apparently as a mitigating factor, that the riparian's "fair share" no longer limited his beneficial use of water. Finally, the Court rejected construing the Code as taking property from one and giving it to another, even though in this specific case the privilege of use would be so transferred. This final remark appears grounded on the Court's earlier definition of the riparian property interest in water as a use right rather than physical ownership.

The explicit consideration of the individual impact in California Oregon Power contrasts with a second category of cases that focus on the character of the regulation, emphasizing the degree of public interest in regulation and the inevitable choice among conflicting interests in water use. Southwest Engineering Co. v. Ernst upheld a "critical groundwater areas" statute which prohibited new wells in the designated area but allowed maximum pumpage in current wells. The Arizona Court relied on the lan-
guage in Miller v. Scheone that where the choice between two conflicting classes of property is unavoidable, the preponderant public interest in the preservation of one, even to the destruction of the other, is a valid exer-
cise of the police power. Whether or not the outcome was correct, the Court appears to have misapplied the Miller test. First, unlike Miller, an absolu-
t choice of preserving one and destroying another was not an inevitable outcome under these facts. More importantly, the choice in Ernst was not between conflicting uses but between existing uses and potential uses. Given a limited supply of water for irrigation, the Court typified the sit-
uation as posing an unavoidable choice between "the preservation of lands in cultivation as against lands potentially reclaimable [by new wells and irri-
gation]." Positing the choice as one based upon a threat to a potential use rather than existing uses, thus, fell outside the factual parameters of Miller and the arbitral/enterprise test that is based on the Miller ratio-
nale.

A second theory is evident in Ernst, apparently justifying the regula-
tion solely on the magnitude of the public interest. The Court recognized a conflict between the landowner who is denied a drilling permit and "the state by reason of the interest of the public in the preservation from
destruction of a resource essential to the sustenance of life". It con­
cluded that the magnitude of the public interest involved brought this case
among those which have upheld property destruction under the police power
during times of war, fire, and related disasters. This reasoning is
in effect an application of the balancing test, finding the benefits out­
weighing the individual harm, even though the Court's reliance on the
disaster cases implies an overstatement of the degree and immediacy of
public emergency posed by a recognized need to regulate groundwater with­
drawals.

The South Dakota Court relied heavily on Ernst in its approval of a
legislative shift to a permit system in that state. The 1955 legislation
asserted public ownership of all waters and made water available through
permits under prior appropriation rules. The leading case, Knight v.
Grimes, involved a challenge by a groundwater user seeking to increase his
usage. The Court treated as a single issue whether the legislature could
abolish under the police power the former "absolute ownership" doctrine and
substitute the permit system therefor.

The Knight Court relied on that theory in Ernst that validated the
regulation on the basis of the magnitude of the public interest at stake
rather than on the theory, also evident in Ernst, of unavoidable choice
between conflicting property interests. Knight cited approvingly the
Ernst language finding a predominant public interest in preservation of a
resource essential to life and the Ernst reliance on the natural disaster
cases. The public interest theory on which Ernst relied was bolstered by
reliance on the Supreme Court's expansive language in Hudson regarding the
need for and scope of the police power in regulating water resources.

The Court's summary holding upheld the application of the statute as a
not unreasonable or arbitrary regulation found by the legislature to be
necessary for the public welfare. The opinion avoided any treatment of the
modern notion that valid regulation is also a matter of degree of restric­
tion on the individual. On the contrary, it drew categorical distinctions
between the eminent domain and police powers, recognizing the former as
taking property because it is useful to the public and the latter as impair­
ing rights to prevent detriment to the public interest. This treatment
places this case within the Mugler line of cases which recognize the police
power as different in kind, rather than degree, from eminent domain.

A third category includes cases upholding state permit systems appli­
cable to groundwater but treating the taking question only by implication or
by brief analogy to the validity of land use regulation. Very recent liti­
gation involved the Florida enactment of the Model Water Code. In Village
of Tequesta v. Jupiter Inlet Corp., the Florida Court, with a general
analogy to Euclid v. Ambler Realty Co., held that a landowner's common law
right to start groundwater use was validly terminated by the enactment.

The most recent caselaw in Kansas, Williams v. City of Wichita, followed earlier decisions by that Court upholding the state's enactment in 1945 of legislation modeled after the Oregon Water Code against
challenges by former groundwater and riparian rightholders. The Plaintiff
in Williams claimed the act was unconstitutional and claimed that nearby
pumping by the city under permit had decreased his property value. The
Court viewed the Plaintiff's common law groundwater right as a use right and, citing Euclid, said legislative regulation of the right was no more objectionable than land use regulation. The Court recognized, however, that the right to use water was an element of land value, and "it to take that right might be tantamount in semiarid country to confiscation".

A provision in the Kansas legislation, not found in its Oregon model, enables a riparian owner injured by an appropriator's use of water under the act to claim damages for any "property taken". The Williams Court noted that the landowner could use the Act's damages provision if he could demonstrate actual injury to his land from the city's drilling and extraction of water. This provision in the act and the qualification by the Court clouds somewhat the utility of the Kansas cases in supporting a termination of inchoate rights as a non-taking. North Dakota and Iowa cases treat similar taking questions only by implication. The North Dakota Supreme Court, in Baeth v. Hoisveen, held that a property owner not beneficially using water at the time a 1955 statute made all groundwater subject to appropriation had no compensable "vested rights". The implication is that inchoate rights of landowners under the previous statute had been validly abrogated. The Idaho Supreme Court did not directly treat the taking question in Baker v. Ore-Ida Foods, Inc. But by saying that the Plaintiff's asserted correlative rights were repugnant to the constitutionally mandated prior appropriation system and implementing legislation, the Court effectively held that any common law rights that might have existed had been abrogated by the statute.

California, comprising a fourth category, offers the significant precedent that makes termination of inchoate rights outside the scope of regulation. Nineteenth century case law established the riparian natural flow doctrine as a vested right that could not, without compensation, be infringed upon by legislatively authorized appropriation. The 1913 California Water Code attempted to terminate inchoate rights by declaring waters not already put to or reasonably needed for a useful and beneficial purpose as available for appropriation and to statutorily define the amount of water useful and beneficial for irrigation in terms of quantities per acre. Subsequent litigation invalidated sections of the Code as an unconstitutional legislative attempt to determine the useful and beneficial purposes to which the riparian property right could be put. A state constitutional amendment followed and limited riparian rights to water reasonably required for the beneficial use to be served. This limitation was upheld as a valid police power regulation even of "vested" riparian rights. But by its terms and by its construction the amendment did not terminate inchoate riparian rights to make reasonable use.

IV.C.1. NOTES

1. In contrast, it has often treated the question of what elements of the riparian right are "property" and hence, compensable in connection with takings for improvements related to navigable waters. See, e.g., United States v. Willow River Power Co., 324 U.S. 499 (1945).
2. 209 U.S. 349 (1908).

3. The enactment was either a valid regulation of property or the riparian's affected interests were not property. *Id.* at 356:

Whether it be said that such an interest [in preserving water in rivers of the state] justifies the cutting down by statute, without compensation, in the exercise of the police power, of what would otherwise be private rights of property, or that, apart from the statute, those interests do not go to the height of what the defendant seeks to do, the result is the same.

*Id.* at 355-56:

But it is recognized that the state as quasi-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned.... The private right to appropriate is subject not only to the right of the lower owners out to the initial limitation that it may not substantially diminish one of the great foundations or public welfare and health.

4. *Id.* at 356:

Flew public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially diminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows.

5. See *id.* at 355-57.

6. See, e.g., Connecticut v. Massachusetts, 282 U.S. 660 (1931) ("[E]very State is free to change its laws governing riparian ownership and to permit the appropriation of flowing waters for such purposes as it may deem wise.")

7. 73 F.2d 555 (9th Cir. 1934), aff'd, 295 U.S. 142 (1935). (The Supreme Court did not reach the issue of the constitutionality of the regulation in affirming.)

8. *In re* Hood River, 112 Or. 119, 227 P. 1065 (1924); *In re* Willow Creek, 74 Or. 592, 144 P. 505 (1914).

9. 73 F.2d at 567 (citing Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), as an example).

10. *Id.* at 568.

11. *Id.* at 568-69.
12. See discussion at II.A. supra.

13. The riparian restricted under the Code was not guaranteed water use under the appropriation principles of the Code. Rather, to the extent that the owner could make beneficial use under the Code, the quantity was not restricted by the fair share rules of riparianism.

14. Id. at 567.


16. Arizona groundwater law is the common law rule of correlative rights. See Bristor v. Cheatham, 75 Ariz. 227, 255 P2d 173 (1953). The Groundwater Code of 1948 (codified at ARIZ. REV. STAT. ANN. §§45-301 to 326 (1956)), supplanted the common law with a comprehensive permit system in the certain designated areas. The plaintiff owner in a designated area brought suit after it drilled a well but was denied a permit to pump from it. For more recent proposals to bring all Arizona water resources under a comprehensive code see Clark, A Proposed Water Resources Code or Statute: Arizona Water Resources Management Act of 1977, 19 ARIZ. L. REV. 719 (1977).

17. 276 u.s. 272 (1928).

18. Since the objective of the statute as a conservation measure was to control the total draw on an aquifer, apportionment between competing users was an alternative to protecting some uses and destroying others.

19. 79 Ariz. at __, 291 P2d at 769.

20. See notes IV.B.48 to 51 supra and accompanying text. There is a danger inherent in blanket extension of the Miller rationale to bring all choices between existing and potential uses within the scope of the police power since so many property restrictions can be easily typified in this manner.

21. 79 Ariz. at __, 291 P2d at 768.

22. Respublica v. Sparhawk, 1 Dall. 357 (Sup. Ct. Pa., 1788) (owner of provisions confiscated to prevent their falling into enemy hands was not due compensation due solely to wartime situation).

23. Bowditch v. City of Boston, 101 U.S. 16 (1879) (destroying a house in order to stop a conflagration not compensable). Justice Holmes cited Bowditch in Mahon as an exception to the rule announced there that a regulation that goes too far is a taking. He suggested, in addition, that the validity of such noted exceptions may stand more on tradition than on principle. 260 u.s. at 415-16.

24. 79 Ariz. at __, 291 P2d at 768: "Where the public interest is thus significantly involved, the preemption of that interest over the property interest of the individual even to the extent of its destruction is a distinguishing characteristic of the exercise of the
police power."

25. See notes IV.C.1.22 to 23 supra.

26. South Dakota water law is codified at S.D. COMP. L. tit. 46 (1967); public ownership is asserted id. at 46-1-3.

27. 80 S.D. 517, 127 N.W.2d 708 (1964). The Plaintiff landowner was an existing user who sought to increase his pumpage. His claim was not based on denial of a permit. Rather, he claimed the taking of a vested right in the requirement that he seek a permit, which would make his use right junior to prior appropriators, in contrast to his "reasonable use" right under the common law.

28. In Belle Fourche Irr. Dist. v. Smiley, 84 S.D. 70, 176 N.W.2d 239 (1970), the South Dakota court ruled that the Knight decision was equally applicable to riparian rights in surface water.

29. The court might have addressed two separate issues: first, the abandonment of "absolute ownership" in favor of a property interest in the "right to use"; and second, the validity of restricting inchoate rights to use under the statute.

30. 80 S.D. at __, 127 N.W.2d at 711-12.

31. Id. at __, 127 N.W.2d at 711.

32. Despite its heavy reliance on Hudson, the court did not cite the Hudson caveat that even a water regulation may be too restrictive.

33. 80 S.D. at __, 127 N.W.2d at 713.

34. 371 So. 2d 663 (Fla. 1979).

35. The case was not a direct challenge to the constitutionality of the Code as applied, but rather an action in inverse condemnation. The village held a permit under the Code to operate a well field tapping the shallow aquifer. Plaintiff, a nearby landowner, was denied a permit to tap the same shallow aquifer because the proposed withdrawal would endanger the aquifer, already threatened by the heavy pumping by the Village. Plaintiff sued in inverse condemnation claiming the pumping by the Village deprived it of beneficial use of its property. Court's treatment of the Code was only one of three theories in the opinion for disposing of the claim. (1) Under Florida law, the pumping by village produced only "consequential damages" which did not deny the Plaintiff beneficial use of its land, but only required it to go the deep aquifer for water at a much higher cost. (2) Common law rights to use groundwater not perfected through actual use are not constitutionally protected property rights. (3) The Code had terminated unexercised common law rights so there was no property right requiring compensation.

These are, in effect, alternate theories for resolving the inverse condemnation claim. If theory (2) is accepted, denying a property
right in unused common law groundwater rights, then the court's analogy to valid regulation of land use in theory (3) is unnecessary because the Code, in terminating the unused common law rights, would be restricting private interests that do not rise to the level of property.


38. The Kansas Legislation is codified at KANS. STAT. ANN. ch. 82a (1977).

39. 190 Kan. at __, 374 P2d at 594.

40. KANS. STAT. ANN. §82a-716 (1977).

41. 190 Kan. at __, 374 P2d at 595.

42. The provisions allowing damages for "property taken" would appear to apply to the loss of unused rights if damages could be proven, and weakens the Kansas precedent for other states that make no similar provision for compensation. See O'Connell, Iowa's New Water Statute - The Constitutionality of Regulating Existing Uses of Water 47 IOWA L. REV. 549 (1962). The Kansas court has not explicitly addressed the relationship between the provision and the validity of the termination of inchoate rights. But a number of cases suggest any such right would be infinitesimal. See id. at 601, n. 317.

43. 157 N.W.2d 728 (N.D. 1968).

44. The North Dakota Legislation is codified at N.D. CENT. CODE ANN. ch. 61 (1960).

45. The Baeth decision skipped an analytical step. Concluding there is no "absolute ownership" of water not being applied to a beneficial purpose, it held there was therefore no "vested right" to unused groundwater, citing the Kansas and South Dakota cases. Although the court discarded the notion of absolute ownership, it failed to consider the property interest in a use right as being validly restricted under the statute. The South Dakota and Kansas cases Baeth relied upon did analyze the impact on the right to use.

46. 95 Idaho 575, 513 P2d 627 (1973).

47. Lux v. Haggin, 69 Cal. 255, 10 P. 674 (1886).


49. CAL. CONST. art. XIV, §3.
50. Chow v. City of Santa Barbara, 217 Cal. 673, 22 P2d 5 (1933) (denying injunction to downstream riparian asserting right to undiminished flow as against upstream non-riparian city seeking to dam and impound only the storm flow of river).

51. See Peabody v. City of Vallejo, 2 cal.2d 351, 40 P2d 416 (1935).

52. The effect of the amendment as construed is to give riparian rights priority over appropriation rights. While the former are subject to the reasonable beneficial use standard, a riparian or holder of groundwater rights can increase his use of water at the expense of an appropriator if the facts show the increased use is reasonable and beneficial. See id. at __, 40 P2d at 491-94.

2. Restriction of Inchoate Correlative and Riparian Rights

Restriction of the inchoate correlative and riparian rights poses the easiest of the taking questions in imposing the Code on Hawai‘i water rights. As shown in part IV.B.1. supra, there is ample precedent for supporting such restrictions within the police power. Neither has the question given leading commentators much pause.¹

Under the Proposed Code, correlative and riparian right holders lose their right to initiate or increase a reasonable use of water. Their right under the Code to make greater use of water is the same as any other individual: the opportunity to seek a discretionary use permit. It becomes possible under the Code for a person not holding a common law right to make use of water to the exclusion of a former common law right holder.

This shift effectively terminates a portion of the common law water right that is incident to land ownership. The inchoate rights have some value, particularly the correlative rights in Hawai‘i, and to this extent the market value of the property affected may be diminished. Mere diminution of value, of course, is not determinative.²

The objectives of the entire regulatory scheme, of which restriction of inchoate rights is an essential part, are unquestionably proper purposes for use of the police power. The Supreme Court’s language in McCarter is persuasive.³

Some commentators have looked to the character of these regulations to justify them as noncompensable. This rationale views the common law right holders continued monopoly of the use right as a public harm in view of changing circumstances which make broader public access to water a critical societal need. No compensation is necessary because regulation allocates a public harm rather than create a positive public benefit.⁴ But applying the benefit/harm dichotomy to water regulation illustrates well the difficulty with using categorical tests based on character of the regulation to dispose of the taking question.⁵ And the utility of such characterizations was dismissed by Penn Central.⁶

Under the Penn Central mode of inquiry, the remaining value and uses of the land will determine the acceptability of the economic loss. With mere
termination of inchoate rights both economic impact criteria applied in Penn Central should be easily met. The "primary investment-backed expectations", which are present uses of water under the Penn Central rationale, would not be impaired. Similarly, mere termination of inchoate rights should not impair the ability to earn a "reasonable return" on investment where commercial activities are involved because existing water uses, and therefore existing dependent land uses, would be unaffected.

The regulatory impact becomes too severe when all uses for which property is reasonably suited are precluded. With respect to use of water, a taking becomes probable when a former common law right holder's inability to use water is the linchpin in precluding all reasonable uses of his land. This is unlikely to happen under the Model Water Code. The Model Code exempts minor domestic uses from the permit requirement. Hence, a property owner can always tap a source of water in which he formerly had common law rights, in an amount sufficient to support a minimal residential use. The Proposed Hawaii Code is more problematic. It requires a permit for even minimal residential uses. Thus, it is at least possible that under the Hawai'i scheme a permit could be denied under circumstances that precluded all reasonable land uses and raise a strong probability of a taking.

Although the acceptability of restricting inchoate rights should not be resolved solely on the character of the regulation, the character of the regulatory action should increase the degree of security of impacts that are acceptable. The magnitude of the public interest at stake should make greater private losses acceptable. The state has a fundamental interest in controlling its water resources, and in terminating inchoate common law rights is an essential prerequisite to comprehensive regulation. Allowing continuation of the common law right to initiate or expand use in the future completely at private initiative would substantially negate the regulatory purpose of assuring preservation and maximum beneficial use of water resources. Common law right holders would be especially burdened through loss of their inchoate rights. While suffering the direct loss they would be sharing only incidentally, with the community at large, in the economic benefits flowing from the more productive use of water.

The special burden of common law right holders is mitigated by the benefits they also receive under the Code. These benefits mitigate the economic impact on them and improve the acceptability of the restrictions. First, as a class they are uniquely benefited by the greater certainty the Code gives to their rights in existing water uses. Their existing reasonable beneficial uses would be quantified under permit and protected from encroachment. This would substantially diminish the present common law uncertainty associated with the duty to reduce uses to accommodate other right holders; the duty to take a pro rata cutback in times of shortage; and the burden of seeking judicial declaratory relief whenever rights are in question. Second, under the Code the common law right would no longer limit an individual's right to use water. Instead, the Code gives the former common law right holder the new opportunity to put greater amounts of water to productive use under a permit.

Thus far, restriction of inchoate common law rights compares very favorably with analogous permissible land regulations upheld in Penn Central. Existing reasonable beneficial uses and associated economic acti-
vities remain unimpaired; the purposes served and public interest at stake are more compelling than for analogous land regulations; and those affected most are also substantively benefitted by the scheme as a whole. In addition to these factors, restriction of inchoate common law water rights should be more acceptable than comparable restrictions of rights in land because those water rights are a considerably less certain form of property. Even without any regulation, an individual's inchoate rights can be reduced to little or no value by the actions of other right holders. This uncertainty lowers the individual's expectations, and a public restriction of those rights causes less frustration of his expectations.

IV.C.2. NOTES

1. See MODEL WATER CODE, supra note III.C.2, Commentary at 162; Ausness, supra note II.A.1, at 252-56.

2. See note IV.B.33 supra and accompanying text.

3. See notes IV.C.1.2 to 5, supra and accompanying text; See also Chicago B. & Q. R.R. v. city of Chicago, 166 U.S. 226, 239 (1897).


5. See notes IV.B.43 to 46 supra and accompanying text.

6. See note IV.B.47 to 51 supra and accompanying text.

7. See note IV.B.34 supra and accompanying text.

8. Hypothetical circumstances might be as follows: A parcel of property has inchoate groundwater or riparian rights but no actual uses when the Code is enacted; the parcel has no potential use other than for a residence, which is an otherwise allowable use; a water permit to support a residential use is denied; there is no other reasonably available source of water; hence the only suitable use of the property is precluded.

The prospect of a taking under these or similarly remote circumstances does not argue for following the Model Water Code and exempting minimal residential uses. Requiring permits for all uses, even minimal residential uses, may serve independent regulatory purposes even if requests for minimal residential use permits are routinely approved. For example, bringing all uses under permits facilitates water use planning.

9. See notes IV.B.52 to 57, supra and accompanying text.

11. See notes III.D.1 to 18 supra and accompanying text.

12. The court has recognized even more tenuous benefits accruing to a regulated landowner. See Penn Central Trans. Co. v. City of New York, 438 U.S. 104, 134-35 (1978) (recognizing that landmark designation benefitted city as a whole and therefore benefitted owners of the landmark site).

13. See notes IV.B.61 to 69 supra and accompanying text.


15. Compare, for example, analogous restrictions of inchoate land and water rights. The property owner in Penn Central had an unqualified right to further develop its site within the existing zoning until the city diminished that right through the landmark designation. A groundwater user in Hawaii has a right to increase its use in the future. But that right is qualified by the similar right of other groundwater users. Restricting his inchoate rights by public regulation comes as less of a shock than to the owner in Penn Central because the water right holder already anticipates the probability of similar results through the acts of other correlative right holders.

3. Restriction of Inchoate Konohiki and Appurtenant Rights

Restricting inchoate rights will affect konohiki and appurtenant right holders more severely than the common law right holders. The former will lose more simply, because they possess more valuable property prior to regulation. Their rights are more valuable because they are definite rights in quantities of water rather than coequal rights shared with others. Furthermore, the konohiki and appurtenant rights have traditionally been severable from the land. There is a market for the buying and selling of water rights separate from the land on which the rights originally arose, a market that has flourished in the past but would be extinguished under the Code.

There is no directly applicable precedent for restricting konohiki and appurtenant rights. These rights are unique as property interests to the extent that they include inchoate rights to use that are exclusive to the right holder and severable from the land. States recognizing appropriation rights in actual uses, which are severable from the land, would offer the closest analogies, but those states have not enacted regulations that destroy or seriously impair severability.

The mere fact that konohiki and appurtenant right holders might suffer a greater loss in the market value of their land would not necessarily change the analysis or outcome of the taking inquiry from that discussed for common law right holders supra.

As with the common law right holders, appurtenant and konohiki users could continue their existing productive uses of water, presumably earning a reasonable return thereon. But the severability and the exclusive use
attributes of these rights are significant new variables raising additional issues relevant to the acceptability of the impact.

The severability of the water right raises the question of how broadly to define the scope of the affected property when evaluating the economic impact restricting inchoate rights. Since the water right can be separated from the land, should the affected property be narrowly defined to include only the water rights, including actual and inchoate uses? Or should it be broadly defined as including all property rights in the water and the land to which those rights presently attach? Narrowly defining the affected property as water rights alone means that restrictions of inchoate rights will have a proportionately much more devastating impact on the property, thus increasing the likelihood that a taking will be found. For example, an appurtenant right holder not presently using water would lose his entire water right and receive in exchange only the opportunity to apply for a permit.

Limiting the scope of the affected property to water rights alone seems logical. The water use right is a commodity that is severable from the land, and it is the water use right, not land use rights, that the Code restricts. Hence, the taking analysis should focus on the water use right as it existed before the regulation and after the regulation.

This initially attractive approach is unsatisfactory. Water use rights cannot be analytically separated from land-use rights when the value of the water rights is in issue. The value of water arises from the consumptive uses to which it can be put, regardless of whether the use right is restricted to certain land or severable and usable on any land. These consumptive uses may be for agricultural, residential, manufacturing, or other purposes, including maintaining minimum stream flows. Where water rights are not severable from land, as with correlative and riparian rights, it is the potential uses on the land in question that determines the value of this water right. This value is reflected in the market value of the land. Where the water right is severable from the land and can be put to use on other land, the potential for use on other lands is reflected in the market value of the water right. Severability increases the value of the water right by expanding the potential locations for its consumptive use in connection with land. Having a separate market does not change the basis for the value of water. Its value remains anchored to land uses.

Where inchoate severable rights are extinguished existing use rights remain. These existing water use rights have value, but that value is in connection with use on particular land. A court that applies the Penn Central type of analysis must examine the adequacy of the water rights remaining after regulation. The examination must necessarily inquire into what can be done with the remaining water right on the land on which it may still be used. This amounts to viewing the property affected by regulation broadly as consisting of both water rights and land rights.

In view of the marketability of konohiki and appurtenant rights, restriction of inchoate uses will have a greater economic impact on these right holders than on common law right holders. Even among konohiki and appurtenant right holders the economic impact will vary dramatically. The impact will be lesser on those individuals who acquired their rights through
ancient land grants or purchases. These persons, who have little actual financial investment in inchoate water rights, will lose only the potential to use or sell rights at a future time. In contrast, those who have recently purchased water rights that remain inchoate or which have become inchoate after a period of use will lose the value of their cash investment. These seeming inequities should be no more objectionable in water regulation than is downzoning in land regulation. Impacts need not fall equally upon those affected. It is not objectionable to downzone even where the owner has purchased in reliance upon and at a price that reflects the prior zoning. Such an owner loses the value of his actual investment to the extent that the land was developable or salable with the prior zoning. By analogy it should be no more objectionable to restrict inchoate water rights even where those rights were acquired by actual expenditures and could have been developed or resold prior to regulation. In both instances the taking question will turn instead on the reasonableness of the remaining uses.

A second major issue deals with the intrusiveness of the regulations. Since regulation of konohiki and appurtenant water rights will terminate the exclusive right to use water and make those waters available for use by others. It may also appropriately be asked whether the character of the regulation is too intrusive with respect to these kinds of rights. This theory has been suggested by some commentators with respect to regulation of riparian and prior appropriation rights. If the theory holds up for riparian and appropriation rights, it should also hold for the traditional Hawaiian rights; they are more definite forms of property and should tolerate less intrusion.

One commentator reviewing unenacted Colorado proposals to regulate appropriation rights suggests that regulations impinging on an appropria- tor's exclusive right to use may fail by analogy to the physical invasion test. Under this theory the policies behind the physical invasion test would justify a "use invasion test", which would recognize the exclusive use right as an "essential stick" that cannot be destroyed by the police power. Another commentator analogizes destruction of riparians' exclusive right to use water (as against all non-riparians) to cases in which low flying aircraft flight paths deprived landowners of the beneficial use of their property. The landowners' right to be free from intrusion of aircraft is comparable to a riparian's right to exclude non-riparians from use.

Both commentators seek the same theoretical hook—extending the Supreme Court's dislike for physical invasion or encroachment through land regulations to include any water regulation that expands the right to use or control water beyond the group or individuals who traditionally have exclusive control. But the analogy is inappropriate. A physical invasion test or use invasion test in water law lacks the theoretical underpinnings of the physical invasion test in land law. The physical invasion test protects landowners from direct or systematic interference with ownership or possession. It recognizes the conceptual importance of physical possession to the owner. The concepts of physical ownership and possession are foreign to water rights which are only incorporeal rights to use. Konohiki and appur-tenant exclusive use rights do not confer rights of ownership or physical possession, but merely define how the use rules apply to particular classes of right holders. The exclusive use right, then, is more appropriately treated as just another dimension adding value to the water use right rather
than a special dimension of the right that should be treated as an "essential stick" in the bundle of sticks that are property.

IV.C.3. NOTES

1. See section IV.A. supra.

2. If the right to divert water for use on non-appurtenant lands is not part of the property interest in the appurtenant use right, see note IV.A.15 supra and accompanying text, then neither would the severability right be part of the property interest.

3. A challenger may attempt to narrow the scope of the property affected even further to include only the inchoate water rights, which would be completely destroyed. Analogous arguments regarding land use rights have failed. Cf. Penn Central Trans. Co. v. City of New York, 438 U.S. 104, 130 (1978) (court considered affected property to be entire parcel, including existing uses and unused rights under existing zoning.


5. 438 U.S. at 233-34.

6. See William C. Haas & Co. v. City & County of San Francisco, 605 F.2d 1117, 1120 (9th Cir. 1979), discussed at notes IV.B.1.38, 39 supra and accompanying text; HFH, Ltd. v. Superior Court, 15 Cal.3d 508, 521, 125 Cal. Rptr. 365, 374, 542 P2d 237, 246 (1975), cert. denied, 425 U.S. 904 (1976): "The long settled state of zoning law renders the possibility of change in zoning clearly foreseeable to land-speculators and other purchasers of property, who discount their estimate of its value by the probability of such change."

7. Comment, Water Use Regulation in Colorado: The Constitutional Limitations, 49 N. COLO. L. REV. 493 (1978). In reviewing proposed limitations on prior appropriation rights, the Comment argues that the incorporeal nature of water property right makes the physical invasion test inapplicable, an analogous "use invasion test" would serve the same underlying policy.

8. Note, supra note IV.D.21; the airplane taking cases relied upon for analogy are summarized at note IV.B.19 supra.

9. Cf. Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663, 670 (Fla. 1979) (taking of airspace above the land not comparable to the
taking of water in the ground in absence of trespass on land itself).

D. RESTRICTION OF EXISTING USES

Implementing the Proposed Code in Hawai‘i would mean cutting back some existing uses of water. Under the Code, permits would be issued only for existing uses that meet the "reasonable beneficial" use standard. This presents the second major taking question. An existing legal user who is cut back is likely to contend his situation is analogous to a high-rise building owner who is told to knock off several stories from the top of an existing structure. There is no clear precedent applicable to such diminishment of existing water uses. In view of the permissive nature of some Hawai‘i water rights as compared with the stringency of the reasonable beneficial standard, it is likely that a taking may result in some individual situations. But there may also be ways to minimize the number of instances in which the individual impact is so severe as to be a taking.

1. Impact of Reasonable Beneficial Use Standard on Existing Uses in Hawai‘i

The likelihood and potential magnitude of cutbacks under the Code becomes apparent when the present Hawai‘i standards for use are compared with those under the Code. With respect to appurtenant and konohiki users, there are no effective requirements for reasonableness as to the purpose or quantity of water use. The common law rule of reasonableness applies to groundwater rights, and riparian rights are limited by either the natural flow doctrine or reasonableness use rule of the common law. The Code's standard of reasonable beneficial use is a term of art, which combines aspects of the eastern states' reasonable use standard and the western states' beneficial use standard. Thus, while it will have much in common with the common law reasonable use standards now applicable in Hawai‘i, it could bring some dramatic cutbacks in some existing konohiki and appurtenant uses.

Implementing the reasonable beneficial use standard means scrutinizing existing and proposed new uses under five major criteria: (1) the purpose of the use; (2) its economic value; (3) its social value, including the suitability of the watercourse; (4) the extent and amount of harm caused by the use; and (5) the practicality of avoiding the harm through adjusting the amount needed or the method used. The impact of these individual criteria on existing uses in Hawai‘i will be uneven.

(1) Unlike regulatory enactments of some states, the Proposed Code does not spell out or prioritize the purposes for which water may be used. But inherent in both eastern and western common law rules of reasonableness is a preference for domestic or "natural" uses over "artificial" uses. The implication of this preference for existing uses in Hawai‘i will be minimal, however, since there will be sufficient water for continuance of all existing uses. Purpose of use would, however, be significant in choosing among competing proposals for new uses of water.

(2) The economic value of the use inquires into the interrelated standards of (a) economic benefit to the user and to society, and (b) the efficiency or economy of the method of use. (c) The use must be of economic
value to the user and to society. This does not necessitate an evaluative comparison with other purposes to which the quantity of water could be put. Possibly existing uses would be productive and of value to the user and to society; hence the requirement of economic benefit should not be a hurdle for existing users. (Again, however, the comparative economic benefit of a proposed use would be significant in choosing between competing proposals for a new use of a limited supply.)

(d) Finally, water must be used in an economically efficient manner. This requirement may result in diminishing some existing uses. For example, existing quantities might be decreased under a permit to reflect a more efficient, feasible method of irrigation or to reflect the potential for using existing wastewaters to meet some existing non-domestic demands. The extent of the impact this efficiency standard will have on existing uses is unclear. But the fact that efficiency in method of use is now a requirement for major surface water users in Hawai‘i suggests that it will result in diminishment of uses in some instances.

(3) The social value criteria provides explicit consideration of the public interest as a factor in whether a permit should be issued. The public interest is not only part of the reasonable-beneficial use standard, but it is also explicit in the Hawai‘i Constitution's regulatory mandate and in the text of the Proposed Code as well. Using public interest as a distinct criteria means that an existing use that is both efficient and economically productive may be diminished or in some way restricted under a permit if an important public interest would otherwise be compromised. An example might be an existing use of surface water which returns wastewater to the stream, thus polluting the flow to the detriment of significant recreational, aesthetic, or other downstream values. The social value criteria includes consideration of the suitability of a use to the size and character of the watercourse. Maintaining and restoring minimum streamflows for protecting recreational and aesthetic values and in-stream ecosystems is the most obvious result of this factor. The proposed code also explicitly establishes minimum streamflow as an objective of the regulatory scheme. Implementing the minimum streamflow standard may significantly affect some existing users, especially in connection with selected Hawai‘i streams whose flow is now nearly totally used.

(4) Water uses often conflict, although the harm caused by one user to another may vary from slight inconvenience to a total preclusion of use. The reasonable beneficial standard is sensitive to the degree of harm caused to other users, and anticipates adjusting existing uses to resolve conflicts. Specific provisions of the Code preempt the importance of this independent criteria, however. The Model Code conditions issuance of a permit for any use on noninterference with existing permitted uses. Hence, the situation should not arise in which the acceptability of a particular intrusion must be evaluated.

(5) Where a use harms other users, the reasonable beneficial standard applies a fifth and complementary criterion and examines the practicality of avoiding or mitigating the harm by adjusting the quantity of water needed or the method of its application. This criterion is similarly preempted by the Code language which protects existing uses from interference by new uses.

In summary, the review of existing uses for permit issuance will in-
volve only three of the five criteria comprising the reasonable beneficial use standard: purpose of use; the economic value of the use; and its social value, including suitability of the watercourse. Only the latter two criteria hold a significant prospect for ending or diminishing existing uses. Diminishment is most likely to reflect potential improvements in efficiency of use. Diminishment or termination of economically efficient uses may occur in order to establish minimum streamflows or to promote important public interests counterbalancing the diminishment.

2. Case Law on Restricting Existing Legal Uses

The extensive case law upholding the pioneering regulatory schemes of the western states offer little guidance because statutes in those states left existing uses substantially untouched. Those water Codes were intended primarily to quantify and stabilize riparian water rights, rather than to change the standards for water use to increase efficiency and public benefit from consumptive uses. Those enactments brought existing uses within the permitting requirements, but existing uses emerged unscathed by two statutory approaches: (1) some statutes provided that permits would issue for uses legal under the prior law and existing at the time the permits requirements took effect or in some period of time immediately preceding the enactment; or (2) the regulatory scheme merely enacted into law a standard for water use and permit issuance, such as a "beneficial use" standard, which was the equivalent of the preregulation common law standard for water use. The effect of either approach was the same. Existing legal uses weathered the transition to permit regulation substantially unimpaired.

Very broad language in several cases has found regulatory impairment of existing uses to be a taking. But the applicability of these cases to the question here is limited. With some exception they are old cases that do not reflect modern notions of the police power. And they involve factual situations where the regulations would have operated to terminate uses, not merely diminish them by some amount.

Volkman v. City of Crosby is the modern case representing this view. There a 1955 statute declared all groundwater subject to appropriation for beneficial use under a permit. The Plaintiff, a pumper of groundwater, had been making reasonable beneficial use of the water for domestic purposes prior to the permit requirement. The city was issued a permit under the new statute to pump nearby, and its pumping effectively depleted the Plaintiff's water source. Although the same court later upheld the termination of inchoate rights under the permit statute, in Volkman the court held the statute worked a taking on the Plaintiff existing user. The result in Volkman was unquestionably correct. To have upheld the statute as applied to Plaintiff Volkman, the court would have to agree that a statute can completely terminate one property owner's legal use of water for domestic purposes and give the use right to another property owner. A more unfair working of a water regulation is difficult to imagine.

The holding in Volkman, however, was couched in unnecessarily broad language suggesting that any impairment of existing uses would be a taking. Several much older cases have adopted similarly broad and protective language in factual situations where regulations did not merely diminish
uses but instead affected existing users with severity comparable to that in Volkmann. The holdings and protective language in this line of cases have led leading commentators to be very cautious in their advice on diminishing existing uses by regulation.

The protective language in the Volkmann line of cases is balanced somewhat by an Idaho decision, Baker v. Ore-Ida Foods, Inc. Baker upheld an injunction against pumping by junior appropriators under a provision in the groundwater act which limited total pumping from a groundwater basin to the rate of recharge. This injunction was couched in broad language that can easily be read to mean that all users, even those existing at the time the Act became effective, may be cut back if the total pumping exceeds the recharge. But the utility of the Baker decision is limited by its failure to treat the taking issue directly and by the fact that existing users at the time of the enactment were not among those sought to be enjoined. Nevertheless, the language and rationale of the court stands at the polar opposite to Volkmann in its willingness to validate restrictions on existing uses.

3. Acceptability of Restricting Existing Uses

The broad language in early cases protecting all existing uses from any diminishment does agree with modern notions of the police power. Property owners have a greater expectation interest in existing uses. But the police power can be applied to existing as well as prospective uses. There is ample Supreme court precedent for restricting existing land uses. These cases can no longer be distinguished by the peculiar character of the land uses involved. Some lower courts upholding termination of existing land uses decline to make categorical distinctions between exercises of the police power applied retrospectively, noting that any difference is one of degree. Existing uses of water should generally be more amenable to restrictions in view of its less certain character as a form of property. The yet unanswered question is how far can existing uses be diminished before a taking occurs.

In considering this question it is helpful to treat separately the two categories of diminishments that would occur under the Code. These are (1) to reduce consumption to economically efficient levels, and (2) to restrict carrying out other important policies or to free water for other consumptive uses. These two scenarios differ in their probable economic impact and in their character.

Several factors support the acceptability of restrictions to make existing uses economically efficient. First, with respect to economic impact, the user's expectation in the continued application of water for a particular purpose is not frustrated. The productive activity, which should be the owner's primary expectation, continues, albeit at a level or in a manner that consumes less water with greater efficiency.

Second, the use will remain profitable under the restriction. Consideration of profitability of an activity is inherent in applying the standard of economic efficiency to any factual situation. Indeed, the standard is sensitive to trading off some efficiency in water use where significant in-
creases in productivity will result. Profits will nevertheless be lower in some instances and the amount lost will vary from case to case. These losses will result from loss of profit from any production beyond that which is economically efficient; added operating costs associated with new management techniques; and capital outlays associated with new technologies required by permit requirements.

Third, the very keen public interest in making existing uses economically efficient increases the acceptability of diminished profitability. Efficient use of a vital resource is the fundamental objective of the regulatory scheme. Existing users cannot be exempted from the efficiency standard without seriously undermining the statutory purpose and the public interest served thereby.

Restrictions imposed in the second category to meet other important public policies or to make water available for their uses, such as to restore minimum streamflows, are more likely to result in takings. As compared with merely making uses economically efficient, these restrictions portend more extreme economic impacts, and the public interest in some individual decisions arguably weighs less heavily.

Initially, the economic impact of these restrictions will be more severe because they will be added to restrictions already reducing all existing uses to economically efficient levels. Thus, having reduced all uses to economically efficient levels, the regulators will then further restrict selected users in order to further special policies. And the impact on individuals will vary dramatically from case to case. This variance is certain because the degree of the restriction will be governed by many factors, independent of the use itself, such as the need for a greater volume to maintain minimum flows or reduced pumping to maintain sustainable yield. This contrasts with the economic efficiency criteria which examines only factors peculiar to the particular use. Under these circumstances, situations of both nominal and devastating economic impact are likely. At one extreme, a simple change in the location or timing of water diversion may be sufficient to ensure minimum streamflow or to fulfill some other independent policy. Assuming negligible economic impacts, this should pose no taking problem. At the other extreme, a water use might be completely terminated in order to restore a minimum flow or to reduce consumption to recharge levels. Such a restriction could effectively terminate the associated profitable land use.

The restrictions in the second category may be imposed to meet a number of different policies. Hence, any taking analysis sensitive to the degree of public interest in a particular decision should scrutinize the character of individual restriction. No attempt can be made here to speculate about the degree of public interest served by the many types of restrictions that will undoubtedly be imposed under the Code. But some important distinctions can be suggested. Those decisions most crucial to the public interest, and therefore admitting of the greatest private economic loss, would be decisions limiting withdrawals to protect water sources. Cutting back uses to levels not exceeding recharge rates is the most obvious example. Protection of water resources is the most fundamental objective of the regulatory scheme. In the long run, it is a prerequisite for putting all water resources to more efficient and productive uses. The keenest public interest
is at stake in these decisions.

A lesser public interest is at stake in restrictions that implement allocative choices between competing uses of water. An example would be a decision that some water presently used in an economically efficient agricultural enterprise must be used instead to supplement streamflow or to create aesthetic or recreational resources. These decisions commit water to a specific use among many possible uses. As between decisions which protect water sources, thus assuring water will be available to allocate, and decisions that choose among possible uses of water, the public interest would seemingly be greater in the former. In the long run, the protective decisions make the allocative decisions possible.

In summary, then, some restrictions of existing uses should be possible within the police power. The fundamental public interest in restrictions protecting water sources should make these restraints acceptable even with the most severe private economic impacts. The lesser, but still very keen public interest in efficient use of water, should bring within the police power reductions to levels of "economic efficiency", especially in view of this standard's sensitivity to the profitability of remaining uses. More likely to result in takings are restrictions placed on existing uses to promote other independent policies. With less public interest at stake, the police power should tolerate less economic loss in individual decisions.

4. Mitigating Losses

The very real losses that some existing users would suffer under the Proposed Code could be mitigated with the addition of some provisions to the Code. It is possible to use provisions in the statutory scheme to mitigate private losses, which would otherwise be a taking, to a level that is acceptable within the police power.

Existing users would be given a specific number of years in which to implement use restrictions. Water uses and methods of application not conforming to the terms of the permit could continue during the phase-out period. Use of such phasing periods would be analogous to municipalities' use of amortization periods to terminate nonconforming signs and land uses. There are differences between the phase in periods suggested here and the amortization technique as it is typically applied. First, amortization techniques are typically applied to property of relatively small value, such as signs, specific land uses like junkyards, and nonconforming structures. In contrast, water regulations will affect activities and land uses covering very large areas and involving substantial investments. Second, amortization techniques typically contemplate termination of the nonconforming activity so that a new use consistent with the zoning designation can emerge. Phasing of permit restrictions, on the other hand, would usually allow particular activity to remain, albeit whittled down or modified to meet the reasonable beneficial standard.

Notwithstanding these differences, phasing of restrictions would involve similar principles mitigating in favor of constitutional acceptability. As with amortization provisions, phasing in water restrictions confers to the owner some benefits which would not arise with immediate implementa-
tion. Notably, water consumption could continue at preregulation levels and profitability. Facilities would remain useful for a longer period, thus allowing greater recovery of investments. Owners could speed up depreciation on investments to conform to the phase out period, thus allowing more recovery of tax benefits from writing off investments. Finally, there is deferral of any new expenditures associated with the permit.

A net loss on the part of the restricted owner is also common to both amortization and the suggested phase in approach. Amortization periods do not amount to full compensation. They only continue for a short period rights that the owner previously had and would have held indefinitely but for the regulatory action. The resulting net loss to the owner is justified as an acceptable use of the police power for the public benefit.

Amortization periods may be made flexible so as to be tailored to the facts of each situation. Lengthening the period further eases the burden on the owner, but very long periods defeat the regulatory purpose. The statutory goal of achieving reasonable beneficial uses is best served by rapid termination. Use of phase in periods for water restrictions is no substitute for compensation where major uses of water are to be terminated. They may at best be viewed as making relatively moderate restrictions on existing uses constitutionally palatable at the expense of short term compromise of regulatory objectives.

5. Policy Choices: How to Deal with Damages

Existing users cut back to the reasonable beneficial standard suffer some damages, the amount varying with the nature of the restriction and how its effect is mitigated if at all. The Model Code and Proposed Code mandate payment for any such damages, a strategy that avoids the taking question. The alternative is to withhold payment and wait for individuals to challenge the constitutionality of the damages sustained on a case-by-case basis.

The latter approach is recommended for Hawai‘i for two reasons. First, paying for all damages would be an unnecessary expenditure of public funds. To the extent that existing legal uses falling short of the code standard may be restricted via the police power, any expenditure for damages would be public expenditure where none is constitutionally required. Such payments would be analogous to a valid police power regulation of land uses resulting in constitutionally acceptable private loss but which is nevertheless accompanied by a gratuitous payment to offset the loss. The second reason involves a prospect more threatening to the statutory objectives. Administrators reviewing existing uses under the code standard are unlikely to have an open appropriation to fund damage claims. The lack of funds for this purpose poses a risk of biasing the very discretionary, fact finding process in favor of continuing existing uses intact as meeting the code standard. To the extent such bias occurs, inefficiencies will exist and the regulatory objectives will be compromised from the beginning.
IV.D. NOTES

1. See sections II.B.2(1) & (2) supra and accompanying text.

2. See section II.B.2(3) & (4), II.B.3 supra and accompanying text.

3. MODEL WATER CODE, supra note II.C.2, commentary at 170-73.

4. These five criteria emerge from an exhaustive study of case law conducted by a contributing author of the Model Water Code. See Maloney, Capehart & Hoofman, Florida's Reasonable Beneficial "Beneficial" Water Use Standard: Have East and West Met?, 31 U. FIA. L. REV., 253, 278 (1979) [hereinafter cited as Maloney]. The authors based their research on the assumption, drawn from the Model Water Code's commentary, that the reasonable beneficial use standard should embody the most desirable qualities of the eastern notion of reasonable use and of the western notion of reasonable use. The thrust of their conclusion is that, although differences exist between these standards, the courts—through decades of case law—have in large measure made these standards functional equivalents. Id. at 270-72.

5. An exception would arise if, for example, existing stream uses must be diminished to maintain a minimum streamflow. See discussion of criteria (4) infra. Then, other criteria being equal, an existing artificial use would be diminished before an existing natural use to meet the increased flow required.

6. Maloney, supra note IV.D.4, at 269-70; MODEL WATER CODE, supra note II.C.2. Commentary at 171. Thus, for example, an agricultural operation need not change from one crop to another having a higher crop value per gallon of water consumed.

7. "Economic efficiency" would not always require the most efficient application of water technically feasible to a particular use. The standard allows a balance to be struck between minimizing total water use and maximizing economic return. For example, if it is technically possible to use 5,000 gallons per day in an operation, but 10,000 gallons per day would greatly reduce costs, higher consumption may be economically efficient. MODEL WATER CODE, supra note II.C.2, commentary at 171. Maloney, supra note IV.D.4, at 269-70.

8. No implication is intended that existing major users of water in Hawai'i are routinely inefficient. On the contrary, examples of innovative efforts to economize water supplies abound in all sectors of the economy. Minimizing water demands through the use of treated sewage effluent to irrigate sugarcane and golf courses are notable examples. So, too, is the sugar industry's incremental shift from open furrow to drip irrigation methods. The assumption here, however, is that greater efficiencies resulting solely from private decisions in the marketplace are not as great or as pervasive as efficiencies that would be imposed from the legal standard under the Code.
10. Id. at 271, 273-74.
11. Id. at 274.
12. MODEL WATER CODE, supra note II.C.2, at §2.02.
13. Id.
14. WATERS & WATER RIGHTS, supra note II.A.2, at 419; Trelease, Coordination, supra note III.D.9, at 24-27.
15. E.g., Oregon (see California-Oregon Power Co. v. Beaver Portland Cement Co., 73 F2d 555 (9th Cir, 1934)); Alaska (see note III.D.25 supra and accompanying text); see WATERS & WATER RIGHTS, supra note II.A.2, at 379.
16. E.g., South Dakota.
19. 120 N.W.2d at 24: "Where a landowner has applied percolating subterranean water to a reasonable beneficial use of his overlying land and has thereby acquired a vested right to that use, the state may not by subsequent legislation authorize its impairment or destruction without compensation."
20. E.g., St. Germain Irr. Co. v. Hawthorne Ditch Co., 32 S.D. 260, 143 N.W. 124 (1913). St. Germain struck down parts of a 1907 statute as violating the due process and eminent domain provisions of the state constitution. In upholding the defendant's demurrer in an action to adjudicate stream rights, the court held that (1) riparians could not be required to pay for a permit to use water they already have the right to use, and (2) the riparian right cannot be lost for nonuse. The court stated broadly:

   The right of a riparian owner to make a reasonable beneficial use of the waters...is a vested property right and is entitled to protection to the same extent as property rights generally.... Vested property rights in waters...could not be taken or confiscated or interfered with by any such act of the Legislature.

   Id. at __, 143 N.W. at 127. See also, Clark v. Cambridge and Arapahoe Irr. & Imp. Co., 45 Neb. 798, 64 N.W. 239 (1895).
21. MODEL WATER CODE, supra note II.C.2, at 169-70, 184-85 (drawing upon the St. Germain and Volkman line of cases as a basis for including, as section 2.03(4) of the Code, a provision for compensation for any actual damages resulting from terminating existing uses in the transition to the Code);
5 WATER & WATER RIGHTS, supra note II.A.2 Commentary at 374-82 (treating the constitutionality of water rights regulation at length but only in the context of inchoate rights to use);

Ausness, supra note II.A.1, at 252 (concluding from the St. Germain and Volkman line of cases that existing uses cannot be abrogated without compensation);

Trelease, Policies for Water Law: Property Rights, Economic forces, and Public Regulation, 5 Nat. Resources L.J. 1, 37 (1965) (arguing that stopping an existing use in favor of the public should be compensated) [hereinafter cited as Trelease, Policies for Water Law];


22. 95 Idaho 575, 513 P2d 627 (1973).

23. The 1951 Act and its 1963 amendment declared all groundwater to be the property of the state and available for appropriation, made permits the sole avenue for appropriation, validated and confirmed all rights to use predating the Act, and prohibited any pumping to fill a water right if the "reasonably anticipated average rate of future natural recharge" would be exceeded. IDAHO CODE §42-226-237 (1977) (sections amended 1980 and 1977, respectively); 95 Idaho at __, 513 P2d at 634.

24. Id. at __, 513 P2d at 636.

25. The junior appropriators sought to be enjoined claimed a right to share pro rata in available water under correlative rights theory to Idaho. With respect to the recharge rate limit on pumping, the court merely concluded that the Act validly abrogated the prior common law which had protected historical pumping levels of senior appropriators. Id. at __, 513 P.2d at 635. While the court did not directly address the taking issue, the implication is that the change is constitutionally acceptable.

26. All of the junior appropriators in Baker whose pumping was enjoined under the recharge provision were pumpers whose use began after the effective date of the act. Therefore, the case did not uphold cutbacks on uses that were existing and legal at the time the act and its recharge rate provision become effective. Id. 513 P.2d at 629 n. 1.

27. See cases cited in notes IV.B.22 to 26 supra and accompanying text.

28. See notes IV.B.43 to 51 supra and accompanying text.

30. Some may contend that the locus for the primary expectation should be in the continued use of a specific volume of water, not in continuation of the productive activity the water supports. Under this view any decrease in quantity frustrates expectations. It is suggested here that any asserted expectation in a volume of water is illusory and certainly less important than the activity it supports. The value of water, and therefore the expectations connected with water rights, arises from the productive uses to which it is put.

31. See note IV.D.7 supra.

32. See notes IV.B.52 to 57 supra and accompanying text. The same cannot be said for the distribution of benefits accruing from making uses economically efficient. Existing users affected directly by the cutbacks benefit only indirectly along with the community at large, from the new uses that are possible with the water saved.

33. Presumably a single decision would be made in connection with an application to continue an existing use. But any one decision would include review of the use under each of the criteria in the reasonable beneficial standard.

34. This category of decisions might be defined more broadly as restrictions to bring the methods and volume of consumption commensurate with the realities of the hydrologic cycle.

35. The lower degree of public interest in these regulatory objectives is supported by cases that typify them as creating public benefits or good rather than preventing public harm. E.g., Morris County Land Improvement Co. v. Town of Parsippany-Troy Hills, 40 N.J. 539, 555-56, 193 A.2d 232, 241-42 (1963); but for cases upholding application of wetland preservation legislation at least in part on the theory that public harms are prevented, see Brecciaroli v. Connecticut Comm'r of Envt'1 Protection, 168 Conn. 349, 362 A.2d 948 (1975); Gibson v. New Hampshire, 115 N.H. 124, 336 A.2d 239 (1975).

36. See notes IV.B.61 to 69 supra and accompanying text.

37. See generally, 1 R. ANDERSON, AMERICAN LAW OF ZONING (2d ed.) §§6.66, 6.69 (1980). The strategy has been used, however, in connection with uses of substantial value. E.g., City of Los Angeles v. Gage, 127 Cal. App.2d 442, 274 P.2d 34 (1954) (approving 5-year amortization of plumbing establishment having gross annual receipts between $125,000 and $350,000).

38. Assuming other factors relevant to the taking question are equal, merely diminishing an existing use should be constitutionally more tolerable than full termination because there is less frustration of expectations.

39. Treas. Reg. §1.167(a)-1(b) (1972) allows change in depreciation when there is a significant change in the useful life. Treas. Reg. §1.167(a)-9 (1960) specifically recognizes hastened obsolescence due to legislative action.
Courts follow different approaches in evaluating the acceptability of losses to the owner due to amortization requirements. Some courts determine the reasonableness and acceptability of the amortization provision by looking solely at the economic impact. These courts will find a taking where a termination, as mitigated by the amortization benefits, still causes a substantial economic loss. E.g., People v. Miller, 304 N.Y. 105, 106 N.E.2d 34 (1952) (taking unless loss is "relatively slight and insubstantial"). Other courts consider both the degree of economic loss or harm and the public benefit flowing from the termination. They will allow significant economic harm where the private harm is balanced by public gain. E.g., City of Los Angeles v. Gage, 127 Cal. App.2d 442, 274 P.2d (1954) ("constitutionality depends on the relative importance to be given to the public gain and to the private loss"). The latter approach is more consistent with the modern trend in the taking law which examines both the economic loss and the character of the regulation.


Tailoring a specific period for each permit would be a great administrative burden. A less burdensome alternative would be to set a standard, phase-in period by regulation with a provision allowing a permit applicant to seek a longer period based on the specific facts of the situation.

MODEL WATER CODE, supra note II.C.2, at §2.03(4). Florida deleted the damages provision from its enactment of the MWC.

An existing user might challenge a restriction thought to be a taking by seeking compensation in an action for inverse condemnation or by asking a court to strike down the regulation as applied to him. See note IV.B.5 supra.
E. LIMITED TERM PERMITS AND NONRENEWAL

The acceptability of issuing to existing users a permit of limited duration merits consideration since this is a policy choice separate from any other restrictions that may be imposed on existing users. An existing user forced to exchange traditional rights for a 15-year permit may claim a taking at two different times: first, when the limited term permit is initially issued; and second, again when his request for renewal of the expired permit is denied.

1. Acceptability of Initial Issuance of Limited Term Permits

An existing user who is issued a 15-year permit is in a worse position and suffers a greater hardship than if a perpetual permit were granted. His position is worse even at the date of issuance. Instead of having an absolute right to continue beyond 15 years, he has only the opportunity to apply for renewal which carries with it an unknown probability that renewal will be granted. What has been lost on the date of issuance is the certainty that the right to use will continue after a date 15 years hence.

If the initial issuance of the limited duration permit is challenged, will a court assume that the permit will not be renewed? Or will it decline to make that assumption on the ground that nonrenewal is a speculative assumption? If the court follows the former course and assumes nonrenewal, it will be deciding at present the acceptability of terminating use at some date in the future. If it follows the latter course, it will consider only the incremental hardship presently imposed by the loss of certainty of continued use 15 years hence. The uncertainty would be considered along with the acceptability of all the other restrictions on the present right to use.

Based on the Supreme Court's treatment of a taking claim in an analogous situation, it is most likely a court would not consider the acceptability of nonrenewal in any taking claim raised upon initial issuance. The analogous precedent is Duke Power Co. v. Carolina Environmental Study Group. In that case residents near a proposed nuclear power plant claimed a taking of their property by operation of a federal statute aimed at encouraging private investment in nuclear energy. The legislation, the Price-Anderson Act, provides in part for exclusive federal jurisdiction over claims arising from nuclear power plant accidents and for a ceiling on total possible recovery from a single accident. Duke Power's nuclear power plants come under the Act's protection. The plaintiff surrounding residents claimed the Act effects an unconstitutional taking because in the event of a major nuclear accident their property would be destroyed without any assurance of just compensation. The Court refused to reach the taking claim, noting that whether a taking claim could be established under the Fifth Amendment was a matter for a future time, not the present.

Water users objecting that a 15-year permit is a taking would seemingly be making the same argument as the plaintiff residents in Duke Power. They would be claiming a present taking because a 15-year permit does not guarantee the right to continue thereafter. The Court's response should be the same—address the question at a future date, presumably when and if renewal
This outcome seems even more compelling in the context of water use rights. First, the value of water and, hence, the primary expectation in the water right lies in the right to use water. A permit guaranteeing the right to use for a long period does not frustrate the exercise of the right to use. Investment and development decisions can still be premised upon a right to use water for the foreseeable future. Second, the economic impact of nonrenewal can only be speculative at the time of issuance. The degree of hardship imposed can only accurately be assessed based on the circumstances existing at the time of renewal.

2. Denial of Permit Renewal Upon Expiration

An existing user may again claim a taking when an appropriation for renewal of an expiring 15-year permit is denied in whole or in part. There is no authority on acceptability of such denials from the several eastern states issuing term permits. But several observations can be made about the factors that might be considered. First, challenges would be made on a case-by-case basis testing the acceptability of denials under particular sets of circumstances.

Second, it is important to recognize the probable in frequency of such denials. A denial would only arise in situations where an existing user proposed to continue a reasonable beneficial use but the water agency decides a competing use better serves the public interest.

Third, arguably, the value of the use of water during the preceding permit period should be weighed as a mitigating factor in the assessment of individual hardship connected with denial. Use during the period covered by the expiring permit is analogous at a larger scale to the amortization periods applied in the termination of nonconforming land uses. The user's expectations at the time of denial reasonably should be lower than were his expectations prior to the initial regulation. At the former date the user anticipated no limits on future use. At the later date the user has already had up to 15 years' notice that the right to use may end. This has afforded him the opportunity to adjust his investment decisions in light of the new uncertainty.

Finally, as with the acceptability of the restrictions accompanying initial permit issuance, the acceptability of nonrenewal, should depend on the reasonableness and value of the remaining uses to which the land can be put without the water in question. Focusing on the remaining utility of the land is clearly appropriate where the former water rights are derived from the correlative or riparian doctrines. These rights were not separable from particular lands, and the value of the water right was the value of the land to which it was appurtenant. If denial of renewal in these instances were to leave a parcel unsuitable for any reasonable use, a taking would likely result. The question is somewhat more complex with respect to nonrenewal of use rights formerly based on appurtenant and konohiki rights, which were traditionally severable from the land. A nonrenewal user could argue that, in view of the severability and marketability of his former right, the scope of the affected property should be narrowly defined as the water right only,
excluding the land on which it is presently used. Nonrenewal means complete destruction of the property and a taking. It has been suggested earlier in connection with restriction of inchoate rights,⁶ that the character of the property interest as a use right requires broadly defining the scope of the affected property as the water and the land on which it is presently used. If a court were to view the property in this manner, then nonrenewal should be treated similarly whether the use right formerly derived from common law, appurtenant law, and appurtenant or konohiki principles.

IV.E. NOTES

3. 438 U.S. at 94 n. 39.
4. A strong argument could be made that issuance of a very short-term permit to an existing use could constitute a taking if, for example, the short term precluded private investment necessary to put any water to productive use. Cf. Berenson v. United States, 548 F.2d 938 (Ct. Cl. 1977) (actions by federal government extending over a period of years so interfered with beneficial use and enjoyment of plaintiff's hotel as to constitute a complete taking of fee interest).
5. Cf. Agains v. City of Tiburon, 100 S. Ct. 2138, 2141 (1980) (Court refused to consider impact of zoning ordinances as applied to owner's property because owner had not submitted a plan to construct).
6. See note IV.C.3.3 supra and accompanying text.
V. CONCLUSIONS AND RECOMMENDATIONS

A number of summary conclusions can be drawn from the discussion in part IV about the acceptability of imposing comprehensive regulation on Hawai'i water rights as they existed prior to the McBrady decision.

1. Least problematic are restrictions of inchoate, common law groundwater and riparian rights. The present right to make any future changes in the use of water shared in common with others is no longer possible and is replaced by the need to apply for a permit under a system which makes all use rights clear and secure. This kind of change has been regularly upheld in other states. A factor in its acceptability is that it does not impair existing productive uses of water. The attendant loss of future use rights should be more acceptable with water than with land.

2. Appurtenant and konohiki users have more valuable inchoate rights and hence, would lose more by regulation. These rights are unique to Hawai'i and there is no mainland precedent for analogous water restrictions. It has been argued here that the Proposed Code would be equally acceptable with these rights as with the common law rights. Although appurtenant and konohiki rights are more certain and more valuable forms of property than the common law rights, they remain rights to use. As with the common law rights, in determining the acceptability of the code a court should inquire into the ability to make a reasonable return from the current productive uses of water. Where such use is possible, the loss of value associated with inchoate rights, such as the right to sever and sell the water right, should be acceptable.

3. A taking could result in those rare situations where denial of a permit to any current right holder prevents a landowner from putting his land to any use for which it is otherwise reasonably suited.

4. Existing uses are not intrinsically beyond the reach of the police power, but restrictions intrude further on investment-backed expectations. Implementing the "reasonable beneficial" use standard would mean cutting back some existing uses. But the amount of the diminishment, and therefore its acceptability, would vary from case to case because the "reasonable beneficial" standard requires an application of several distinct criteria. Diminishments to make a use "economically efficient" should pose the least risk of a taking because this criteria is sensitive to continued profitability of the use.

5. Other criteria in the reasonable beneficial use standard are not sensitive to the viability of the remaining uses and hence pose a greater risk of a taking. In this later category are diminishments to protect the integrity of water sources (such as reducing groundwater pumping to recharge rates) and diminishments which allow water to be put to uses more in the public interest (such as increasing in-stream flows to maintain aesthetic or recreational values). Takings could result in either instance, depending on the severity of the impact on current users. But the keener public interest in restrictions for the former purpose should admit more severe individual impacts within the scope of the police power.
6. The severity of restrictions on existing uses may be cushioned by phasing in the diminishments over several years' time. This is not a substitute for compensation where a taking has occurred. But it may mitigate the impacts in some instances to a level that is acceptable within the police power.

7. Issuing permits of limited, rather than perpetual duration is a further restriction on property rights of existing users. At the time of issuance, the permit holder has a continuing right to productively use water. The taking question associated with nonrenewal (which means full termination of a pre-existing user) should be raised at the time of non-renewal, not upon initial issuance. Whether nonrenewal is a taking would be determined on a case-by-case basis under the particular circumstances at that time.

Several recommendations can also be made regarding the shape of the new Code. These are not comprehensive but derive only from the analysis of the taking issues.

a. Comprehensive regulation should not be delayed pending the outcome of the Robinson litigation. Comprehensive regulation is needed for proper management of the resource, and resource management needs will be the same regardless of the outcome of the litigation. In addition, the analysis here has been premised on pre-McBryde water rights, the strongest possible assertion of property interests in water.

b. Many of the essential elements of the Model Water Code, which follows an administrative discretion model for allocating water, appear appropriate for Hawai'i. Particularly, the issuance of nontransferable permits of limited duration would be the approach most consistent with Hawai'i's present system of land-use controls. The Model Water Code's provisions should, however, be amended to reflect problems created by Hawai'i's unique history of water rights.

c. It would be wise to spell out in the Code the criteria which go into the "reasonable beneficial" use standard. The standard is a hybrid of the best features of eastern common law and western prior appropriation. Hawai'i has little of the former and none of the latter. Legislative incorporation of the essential criteria into the Code will guide those who administer the Code, preempt court initiative in either adopting criteria on its own or reviewing the appropriateness of the criteria adopted by administrators, and generally strengthen the expectations of all those who will be affected by the Code.

d. The Code should allow existing uses to continue under temporary or interim permits pending a determination of what portion meets the reasonable beneficial standard. Determining this would involve extensive and time-consuming fact finding in particular situations. The fact finding process will be more tedious because, as compared with other jurisdictions, a greater disparity exists in Hawai'i between the reasonable beneficial standard and the traditional legal standards for use. Hurried issuance of permits to existing users risks compromising the fact-finding process. Errors in favor of continuing existing uses mean the regulatory goals will be compromised. Errors in favor of diminishing current uses also compromise regulatory goals.
and also increase the probability of success for takings challenges.

e. Hawai‘i should follow Florida’s example and delete from the Code any provisions for public payment for damages or losses sustained from cutting back existing uses to the reasonable beneficial standard. The police power admits of some private losses in connection with regulation. While payment for some losses may be required where restrictions are so severe as to be a taking, paying for all losses would be an unnecessary expenditure of public funds. And the prospect of such gratuitous payments may encourage less than vigorous implementation of the reasonable beneficial standard.

V. NOTES

1. See section IV.C.2 supra.
2. See section IV.C.1 supra.
3. See section IV.C.3 supra.
4. See note IV.C.2.8 supra and accompanying text.
5. See section IV.D.1. supra.
6. See section IV.D.3 supra.
7. See section IV.D.4 supra.
8. See section IV.E. supra.
9. See section III.E. supra.
10. See section III.D.2 supra.
11. See section IV.D.1 supra.
12. Issuance of interim permits would be similar to California’s use of “reservation of jurisdiction” which allows issuance of an interim permit pending studies to determine physical facts on which a final permit and conditions are based. See CAL. WATER CODE §1394 (West 1971).

13. For example, inquiries in a particular situation might be necessary to determine the minimum streamflow needed to preserve aesthetic or ecological values, the technical feasibility of improved methods of diversion or application, or the actual amounts of water currently being consumed, among others.

14. See section IV.D.5 supra.
VI. SUBSEQUENT DEVELOPMENTS: McBRYDE AND REPPUN

Subsequent to the completion of the main body of this report, two important water rights decisions were handed down by the Hawaii Supreme Court. While the full impact of these two decisions cannot be assessed at this time, the authors feel that there should be some discussion of how these decisions will affect the issues raised in this report.

A. ROBINSON V. ARIYOSHI: CERTIFIED QUESTIONS

In late December 1982 the Hawaii Supreme Court handed down its long-awaited answers to the certified questions posed by the Ninth Circuit Court of Appeals. These answers are important in that they not only represent the Hawaii Supreme Court's answer to some of the difficult questions raised by the federal proceedings but also indicate some modification of substantive water rights rules laid down in the 1974 decision. A complete understanding of these answers to the certified questions cannot be gained without a grasp of the procedural trail that has brought the case to this point.

In 1974 the Hawaii Supreme Court issued its decision in McBryde v. Robinson. At trial, the issue in McBryde focused on the extent to which parties along the Hanapépé River owned rights to the use of water. The central contest was between two sugar companies. One alleged that the other had illegally diverted water from the river. The state and other small farmers were also parties to the action. The parties apparently proceeded on the basis that ownership of the lands upon which the stream arose gave rise to ownership of the normal surplus waters of the stream, quantitatively, the most significant water right.

On appeal, the Hawaii Supreme Court apparently surprised the parties by holding that these waters were owned by the state. On the basis of their interpretation of prior Supreme Court precedents, the parties had assumed that it was one or the other sugar company that owned the water. The Supreme Court's determination that the state was the owner of these waters was viewed as a radical and unconstitutional departure from prior law. The second landmark aspect of the decision was the court's statement that water of one watershed could not be transported for use in another watershed. Such a decision, if enforced, would nullify much of the long distance irrigation used to sustain the sugar industry.

Thus, as a result of the decision, the conflict in McBryde shifted from one among the sugar companies to one between the major water users and the state. The sugar companies contended that two grave improprieties were committed by the court. First, the decision holding that the state was the owner of the waters simply constituted an expropriation of property in violation of the fifth amendment of the constitution. Second, since no party argued for these results, none had a chance to fairly brief the court on the negative impacts of these holdings. This failure to be properly heard constituted a denial of the procedural due process guaranteed by the fourteenth amendment.
Viewing the stakes as monumental and perceiving the constitutional violations to be grave, the aggrieved sugar companies sought review of the McBryde decision in the U.S. Supreme Court. The right to appeal is discretionary and the high Court refused to review the case. The sugar companies did not treat this rebuff as an indication that their constitutional claims lacked merit. The limited resources of the U.S. Supreme Court results in the fact that many cases which raise viable constitutional claims must be turned away. Normally, failure to obtain Supreme Court review means that a case is terminated, the judgment is final, and the parties must simply live with the results, no matter how unfair they appear. However, in this case, the parties reasserted their appellate claims in federal district court, asserting that the constitutional violations gave rise to new original actions despite the fact that the constitutional claims essentially arose out of the appellate process.

The originality of this thinking, and its far-reaching jurisprudential ramifications, can be appreciated, perhaps, only by one familiar with the law. Needless to say, however, it constituted a creative and ingenious solution for the failure of the sugar companies to win Supreme Court review. The question remained, however, whether there actually does exist a right to turn a federal trial court to allege that the change in law constitutes a constitutional violation.

Round one was won by the sugar companies. The Federal District Court in Hawaii agreed with them that the decision of the Hawaii Supreme Court violated their constitutional rights. The state was enjoined from enforcing the decision and preventing them from taking advantage of its ownership of water rights awarded in McBryde.

The Federal District Court's decision was appealed by the state to the Ninth Circuit Court of Appeals. There has been no decision yet in round two. The issues raised in the Ninth Circuit focus on the dynamics of change in law. In essence, does a radical change in property rights constitute an uncompensated taking? It is clear that if the state legislature had transferred ownership of the normal surplus waters from private parties to the state, compensation would have been constitutionally required. In a case where such transfer is accomplished by judicial decision, determining what the law has always been, the argument is substantially less clear. Under the commonly held Blackstonian view of the law, the courts do not "make" the law as does the legislature, but rather "finds" the law. Therefore, earlier decisions which are overruled represent false views of "the law" which are to be replaced by the current "correct" view. Of course, the "correct" view of today is subject to the same fate as previous "correct", now false, views; namely, that a subsequent decision will also render it false.

The deeply philosophical nature of these issues presented the Ninth Circuit with a case that was far from ordinary. In a rather unusual move the Court granted counsel for the Chief Justice of the Hawaii Supreme Court to argue these issues before the court as an amicus curiae (friend of the court). Arguments were heard twice. Both times, different panels failed to reach a consensus. The second panel, however, adopted a suggestion made by counsel for the amicus curiae, Chief Justice of the Hawaii Supreme Court, and invited the Hawaii Supreme Court to answer six questions concerning the 1974 decision in McBryde v. Robinson.
The utilization of this procedure itself raised some difficult issues. First, the interpretation of a judicial decision is normally derived simply from the four corners of the opinion itself. Moreover, since the opinion and its issuance was considered to be the act which constitutionally harmed the sugar companies, to invite the Hawaii Supreme Court to reiterate what it really meant was tantamount to ask one accused of libel to reinterpret those earlier libelous remarks. The fear of the injured is that a new, non-harmful gloss will be painted over those words, removing the possibility of recovery for a harm that was real at the time of utterance.

The second difficulty went to the relationship between the federal appellate court and the Hawaii Supreme Court. Undoubtedly, the Hawaii Supreme Court was annoyed, at least in an institutional sense, by the fact that the federal trial court had enjoined and essentially reversed the judgment in McBryde. Normally, the only avenue of appeal from a state civil decision of the state's highest court is to the U.S. Supreme Court. Moreover, that Court had declined to review the McBryde decision when presented with the same arguments that were later successful in the lower federal court. Thus, the fact that the Ninth Circuit, or any federal court for that matter, continued to assert jurisdiction over the case, constituted an affront to the sovereignty of the Hawaii judicial system. Hence, acquiescence to the invitation to answer the questions might have been viewed as acquiescence to federal jurisdiction over the issue—a jurisdiction which counsel for the Chief Justice vigorously urged did not exist.

Moreover, questions arose as to what would be the status of the answers. Would this new opinion constitute a decision of the Hawaii Supreme Court? Would it be definitive even though it did not emanate from a case that arose through the state judicial decision? Should it, in other words, be published in the bound volumes of the Hawaii Reports as "law" or did it constitute an advisory opinion, and thus non-binding and not an expression of law?

Lastly, what would be the obligations of the Ninth Circuit to accept the answers given by the Hawaii Supreme Court? In particular, if the answers were to differ from rules laid down in the original McBryde (and they did eventually differ), which should the Federal Court consider as authoritative? Of course, the Hawaii Supreme Court would not have answered the questions if there was any real possibility that the answers would be ignored—that would have constituted an even graver insult to the sovereignty of the state court. Still, no law compels the Ninth Circuit to accept the answer. Clearly, both judicial systems are proceeding carefully. At the time of this addendum the answers have been written, but not filed with the Ninth Circuit. Thus, it is not clear how that court will treat them.

If this procedure raised so many issues, why was it utilized? In large part the reason lies with the use of the term "ownership" of water in the original McBryde decision. The heart of the constitutional arguments raised by the sugar companies lay with the assertion that the transfer of "ownership" of water to the state consisted of an actual physical transfer of the corpus of the waters. The state joined in this view but denied that it raised any constitutional issues. If such an actual physical transfer was intended, then, the "taking of property" claims were very real and tangible.
On the other hand, counsel for amicus curiae Richardson asserted that much of the air could be taken out of this constitutional argument if one treated the award of ownership of the surplus water to the state not as a grant of physical power over the waters but as the award of "public trust" responsibility over the waters to the state. Thus, there were at least two mutually exclusive interpretations of ownership in conflict. The "public trust" meaning substantially deflated the constitutional claims since it only gave the state power to control and manage and not actual corporeal ownership. The corporeal interpretation did raise a significant constitutional issue since it seemed to give the state the power to deny previous users their right to continue.

Although amicus curiae Richardson (the Chief Justice) appeared through counsel to question the interpretation of "ownership", he did not appear in his capacity as a member of the Court to give a definitive definition to the word ownership. Rather, he appeared as a person obviously interested in the sovereignty of the state judicial system to assert that there was no good reason to assume that "ownership" meant what the state and the sugar companies assumed. Those parties could not stipulate to a meaning that created it constitutional. The Chief Justice argued that if the meaning of ownership was unclear, only the Hawaii Supreme Court could clarify the meaning: either in a subsequent decision or through the state rule allowing the use of certified questions. Thus, the Ninth Circuit was presented with a desire which would allow them to ignore the difficult question of whether courts could "take" property. If the Hawaii Supreme Court were to determine that "ownership" meant "public trust", much of the constitutional claim would evaporate since the imposition of a power to regulate would be no more of a taking than the imposition of generalized zoning controls.

In its answers to the six questions, the Hawaii Supreme Court did indeed choose to interpret "ownership" as public trust (see pp. 40-42, slip opinion).

The McBryde opinion, however, did not supplant the konohikis with the state as the owner of surplus waters in the sense that the state is now free to do as it pleases with the waters of our lands. In McBryde, supra, we indeed held that at the time of the introduction of fee simple ownership of these islands the King reserved the ownership of all surface waters. 54 Hawaii at 187, 504 P.2d at 1339. But we believe that by this reservation, a public trust was imposed upon all the waters of the Kingdom. That is we find the public interest in the waters of the Kingdom was understood to necessitate a retention of authority and the imposition of a concomitant duty to maintain the purity and flow of our waters for future generations.... This is not ownership in the corporeal (emphasis added) sense....

The choice of "public trust" over "corporeal" state ownership will, of course, have great ramifications into the future. The impact of this choice on the federal litigation has already been discussed. In sum, much of the constitutional "taking" concern should be eased since the "public trust" awarded the state in McBryde is not substantially greater than the police power that the state already had. Since not much was given the state by the McBryde decision, not much was taken from the private parties. One signifi-
cant puzzling issue does remain. If McBryde simply reasserted the state's power to regulate and manage, under what rules are the rights between the private parties to be sorted out? Thus, McBryde has the possibility of becoming the "most important case in the history of the state," in terms of delineating the power of the state Supreme Court to reject earlier precedent, but it might fail to resolve the controversy that created this particular historic moment: which sugar company receives what water in the Hanapēpē River.

If the "public trust" notion is not disturbed by the Ninth Circuit, it will set the stage for a new era in water rights in Hawai'i. First and foremost, it signifies an end to private decision-making in water allocation. While it has been possible, in light of groundwater designation, to shift to some government management and regulation of water, the state's power to do so without an obligation to compensate for vested rights has been questioned. The designation of the Pearl Harbor region under Chapter 177 does not easily translate into complete statewide designation. Pearl Harbor could be viewed as a crisis situation allowing the state to interfere with vested rights on a theory of public health and safety. A crisis situation does not exist statewide. Moreover, the imposition of designation under Chapter 177 has traditionally been viewed as temporary.

Hence, the new "public trust" represents a new and solid foundation to build a system of statewide control over water allocation. It is ideal for the establishment of a limited or perpetual duration permit system.

Moreover, the public trust determination in the certified question answers seems to grant the original McBryde decision a good chance of existing interest. If so, prescriptive and konohiki rights would be abolished. This is not to say that the McBryde and Olokele Sugar companies would not be awarded use of waters in the Hanapēpē stream, it is just that such awards would not be premised on so-called vested prescriptive or konohiki rights. Rather, the trial court, upon remand of the case from the Hawaii Supreme Court, is likely to parcel the water according to a reasonable-beneficial standard. Thus, as between the two original contestants in McBryde, the public trust doctrine does not grant the state the power to withhold water from their use, rather the allocation will be based on the reasonable-use doctrine as opposed to konohiki and prescriptive rights.

The Supreme Court's answers to the certified questions were also significant in that it repudiated a widely-held notion to that McBryde firmly held that water could not be transported out of one watershed for use in another. While it is true that original 1974 McBryde opinion almost explicitly stated as much, counsel for Amicus Richardson argued in the Ninth Circuit that the transfer issue was not actually before the Hawaii Supreme Court and as such the court's statement on the issue was dicta and not part of the holding. In jurisprudence, dicta denotes a statement by the court on an issue not actually before it. As such the statement does not have force and effect but may constitute an indication of how the court would act if the issue were brought before it.

In terms of the constitutional claims raised, thus, whether the transfer statement is dicta or part of the holding (force of law) makes a tremendous difference. The sugar companies argued that the transfer statement was
part of the holding and as such "took" their right to transport water in violation of the constitution.

Question number one of the Ninth Circuit's certified questions was explicitly designed to ferret out the Hawaii Supreme Court's present view on the anti-transport statement. The question was worded as follows:

Question: May any Hawaii State official execute on the judgment entered in McBryde Sugar Co. v. Robinson, supra, to enjoin Robinson, McBryde, Olokele or the Small Owners from diverting water from the Hanapepe or Koula watersheds?

In other words, the question asks whether the anti-transportation statement was part of the holding in McBryde implying that the state could use language to prevent diversion out of the watershed.

The answer of the Hawaii Supreme Court was negative. In essence, the court took the position urged by counsel for amicus curiae Richardson that the issue was not raised in McBryde and was therefore not resolved.

We did not say that such transfers are prohibited as a matter of law, for McBryde did not discuss and therefore cannot be understood to be conclusive of the circumstances under which a private party or the state could obtain injunctive relief against unsanctioned transfers.

...McBryde merely established that there was no right on the part of the plaintiffs to benefit from such diversions. But, as was the case in our pre-existing, law governing the transport of water, diversions will be restrained only after a careful assessment of the interest and circumstances involved indicates a need for restraint. A delineation of these interests and circumstances were not before us in McBryde and we did not order the cessation of any diversions. (Emphasis added; footnotes omitted) (Slip opinion at 6 & 7.)

In essence, the court recast its 1974 statement against transportation out of the watershed not to set down a hard and fast rule, but more as a warning that no private party had an "inherent enforceable right" to transfer water out of the watershed. The court's 1982 view on both the anti-transportation statement and the meaning of "ownership" can best be understood not as a desire to prevent private parties from using the water, but as preventing private parties from believing that they have "vested" rights not subject to state regulation. The 1982 answers, like the 1974 opinion, are both fundamentally premised on the court's desire to shift water allocation decisions from private to public institutions. The 1974 decision had the appearance of being much more extreme: ambiguous language implying state ownership of water and nullification of the power to transfer. The 1982 answers indicate the court's realization that neither state corporeal ownership of water, nor hard and fast rules regarding transfer are necessary to guarantee that the public is represented in water allocation decisions. The public's interest can be served by the repudiation of prior cases viewing water rights as "vested" and the adoption of the public trust.
Candidly, the difference between the 1982 answers and the 1974 opinion represents not so much a new clarity about its own intent in 1974, but rather a maturing understanding of the issues involved in water rights jurisprudence. Almost a decade has passed since the 1974 opinion. Much water has passed beneath the proverbial bridge. Discussion of water rights and water-related issues was dearth prior to 1974. Subsequent to McBryde, and largely because of McBryde, discussion on water flowed like a dam bursting. Since McBryde there has been a major drought, the imposition of groundwater controls in the Pearl Harbor area, passage of a constitutional amendment on water, passage of an instream uses statute, and, of course, intensive argument about the meaning, wisdom, and constitutionality of the decision in McBryde.

Not only was the Hawaii Supreme Court in 1982 different in terms of personality, but it was a different court in terms of water rights sophistication as well. For example, in the intervening decade, it became fairly clear that any rule flatly prohibiting transportation of water out of a watershed would work against the public interest. Although not as self-evident, it became accepted in some circles that it was not necessary for the state to own the corpus of the water to effectively control and manage water resources.

In conclusion, it is too early to judge how the Ninth Circuit will respond to the Hawaii Supreme Court's answers to the certified questions. In any event, even if the Ninth Circuit declares McBryde to be unconstitutional, the Hawaii Supreme Court has hinted as to its future direction in water. Ultimately, it will be the Hawaii Supreme Court and not the federal courts which will chart the direction of Hawaii water rights. The 1982 answers contain the beginnings of new direction in water rights: the "public trust" doctrine as the basis for future state management of water rights and the repudiation of "vested" rights to use water under any circumstances.

The body of this paper analyzed the "taking" issue in light of a possible switch to a permit system. The analysis was conducted under a worse-case scenario, namely, the assumption of a pre-McBryde state of affairs. Hence, that analysis is not distributed by the new McBryde opinion (certified questions). If the Ninth Circuit reverses the lower federal court, nullifying the injunction against the 1974 opinion, the 1982 answers will, for all intents and purposes (along with the Reppun decision), constitute the starting point for constitutional analysis.

The 1982 answers strengthen any permit system against constitutional attack on a "takings" ground. Simply put, the new ability of the state to base a permit system on the "public trust" will make it more difficult for any party to question the constitutional validity of such a system. In sum, the 1982 answers provide the basis for a modern and dynamic water management system.
Reppun and McBryde (Certified Questions) were issued within ten days of each other. Both were authored by the then outgoing Chief Justice. Undoubtedly, each decision was written with the other in mind.

In Reppun, downstream taro farmers sought to enjoin groundwater pumping that diminished the flow of the Waihe'e River. The natural flow of the Waihe'e River is said to be 6 to 8 mgd. In 1955 the Honolulu Board of Water Supply (HBWS) began withdrawing water from a dike system feeding the stream. This reduced the stream flow to approximately 4 mgd.

In 1974 and 1976, through the use of new wells, the HBWS increased its pumping from the dike system and the flow of the Waihe'e stream was reduced to 2.0 mgd during the summer. During the summer of 1975 one of the farmers suffered crop losses from fungus caused by the lack of sufficient flowing water in the stream. Suit was initiated in 1976 to enjoin the HBWS's diversion from the stream.

The taro farmers relied on the 1974 McBryde decision which implied that under the "natural flow" version of riparian law, riparian water users such as these farmers were entitled to the undiminished flow of the stream—6 to 8 mgd. The Board of Water Supply raised a variety of defenses. First, the Board contended that, pursuant to a condemnation action, it had purchased all of the water rights in the ahupua'a for $900,000. The taro farmers no longer had these rights because their predecessors in interest had "severed" these rights from the land and sold them to various parties. Eventually, the Board purchased these rights.

Secondly, the Board argued that it drew its water from dike and groundwater sources and not directly from the stream. Lastly, the Board argued that even if it was wrong, the proper remedy for the plaintiff taro farmers was money damages and not an injunction against use. In essence, the "public use" doctrine relied upon by the Board would hold that the domestic customers of a water utility are so important that even if the utility were wrong, water should never be taken from domestic users. Rather, plaintiffs should be compensated in the form of money.

Of the three arguments raised by the Board, the last two were rather easily dismissed. As to the argument that a groundwater diversion cannot be legally connected to a loss of surface streamflow, the court stated that modern hydrology clearly shows that groundwater or dike-water diversions can clearly affect a stream. What is scientifically so must be legally so.

As to the public use doctrine, the court subtly rejected it entirely. The "Public Use" doctrine is not really a defense but rather a limitation on the form of remedy such that if a water utility must lose, it would rather give up money than water. The version of the doctrine urged by the Board was that it should be allowed to keep the water that it diverted up until the point that the plaintiffs filed suit. Since the taro farmers filed suit when the summer levels of the stream had already dropped to a level destructive to the farmers' interest, allowing the Board to keep the water and pay damages to the farmers would have amounted to a form of forced sale. This
version of the doctrine would never be a deterrent to a water utility since it would almost always be willing to trade the capture of water for the payment of damages. This version of the doctrine would also lead to secret preparations for wrongful diversion in order to preempt a suit until the last, belated moment.

In order to avoid favoring the utility under this version of the doctrine, the court applied a version which essentially nullified the doctrine altogether. The Hawaii Supreme Court held that the utility can capture only so much water up until a point when it actually harms another party.

Chronologically, the point where harm occurs will be prior to the point where suit is filed. Thus, any water diverted after the point of harm can be taken back from the utility. But, this version of the doctrine is no benefit to the utility and hence no doctrine at all since the injured party could not sue prior to the point of harm in any event.

The significance of Reppuy for our purposes, lies not in either of the above two points but rather in its treatment of the Board's claim that it had purchased water rights which had previously been severed from the plaintiff taro farmers. The Board's purchases were based on the assumption that pre-McBryde principles (although the Hawaii Supreme Court in the McBryde certified question stated that the pre-McBryde law was not settled), applied, namely, that one could purchase konohiki water rights and acquire riparian rights separate from the land. Indeed, the Board backed up this reliance on its assumption by condemning these rights and expending $900,000 for them.

On appeal the Board urged that the Hawaii Supreme Court repudiate its 1974 McBryde opinion. It was that decision which the lower court relied on in nullifying the Board's purchase of rights. The court, of course, did not repudiate its earlier statements obliterating the concept of konohiki rights, but used even stronger, more convincing arguments to support its prior statements. The concept of konohiki rights, which implied that the ownership of certain lands granted the right to surplus waters, had long been misconceived.

The konohiki right to water was not intended to allow the konohiki to profit from its use. The konohiki's right to water was inextricably tied to his duty to see that all tenants of the ahupua'a benefited from use of the water. The duty of the konohiki was to see to it that the commoner used the water to work the land. Water was not a commodity to be hoarded but rather a resource to be shared among users.

The court focused upon the period of time from 1839 to 1850. The court found in three laws an intent among the sovereign to reserve the waters for the use of the people. The court reaffirmed its 1974 holding that section 7 reserved to the people the "natural flow" of the waters. The closest equivalent to the system of mutual dependence practiced by ahupua'a tenants was the natural flow doctrine of riparianism.

[The principles underlying the doctrine are consistent with those that appear to pervade the native system of water allocation and preexisting civil law inasmuch as "title" to the water was not equated with the right to use; each person's right to use was of a
"correlative" nature; and rights to use were predicated upon benefi­
cial application of the water to the land.

Thus, the Board could not have purchased konohiki rights since prior
cases supporting such a notion were an incorrect statement of law. The
court in Reppun reviewed a number of cases which it found to be misstate­
ments of law.

The court went on to find that the Board's purchase of severed riparian
rights was also void. Riparian rights cannot be severed from the land.
Riparian rights are statutory in origin and are embodied in section 7-1 of
the Hawaii Revised Statutes. The purpose of the statute was to assure the
tenants of the ahupua'a their rights to water to make the land productive.
Thus, as a statutory right, a party could not transfer or waive the right.
A crude analogy might exist between non-waivable constitutional rights and
these statutory rights. Since the public policy behind these rights would
be undermined if transfer were allowed, the court found an implicit legis­
lative intent to forbid severance. The court found supportive analogies to
this principle in Native American (Winters Doctrine) water rights and Native
Hawaiian fishing rights. In both cases transfer would have undermined the
statutory purpose of the statutory reservation of rights.

Appurtenant rights, which are non-statutory, constitute a different
case. Since such rights have a different origin and are essentially real
property interests incident to land, they can be extinguished by a deed.
While the extinguishing of an appurtenant interest is not exactly a trans­
fer, it does allow more water to remain in the stream, allowing some other
party to capture this added volume. Thus, the extinguishment of an appurte­
nant right can be the basis for a crude and legally uncertain form of trans­
fer.

It is not clear why the court drew a line between riparian and appurte­
nant rights. The analysis of appurtenant rights could clearly have tracked
the path of riparian rights, finding them to originate in section 7-1 as
well. In any event the great bulk of purchases by the Board were found to
be void.

C. CONCLUSION

Many of the same constitutional issues that arose in McBryde lurk in
Reppun. However, a discussion of these issues is much too elaborate to be
presented here. Needless to say, Reppun, as a national extension of
McBryde, shows the degree to which change may be sweeping. Indeed, all
prior contracts for the purchase of konohiki and riparian rights now stand
in jeopardy.

Of great significance to the purposes of this report, the "reasonable
and beneficial" riparian rights in Reppun represent a source of uncertainty
to any future permit system. These rights represent the strongest in the
small galaxy of post-McBryde water interests. Can these new riparian rights
be replaced with a linked duration permit. The only area where a signifi­
cant taking question would appear to arise in the new code would be if an
existing beneficial riparian interest were terminated. The new amendment to
the state constitution would also seem to say as much.
But, like McOryde, Reppun frees from any intricate takings analysis a much larger amount of water than it ties up. Konohiki and severed riparian uses represent a greater quantity of water than the type of riparian use made by the plaintiffs in Reppun. As such, the trade is advantageous for a new water code. Moreover, the strength of the new riparian right provides a powerful basis for a judicially imposed notion of minimum streamflow. Given the fact that minimum streamflow requirements would be an obvious long-term objective for state water planning, the decision in Reppun presents a judicial basis to achieve this objective.

In summation, the two December 1982 decision clearly provide the basis for state management of water through a permit system. While neither decision explicitly states as much, the "public trust" doctrine of McOryde and the minimum streamflow concept inherent in Reppun provide the means for the court to step out of water allocation decisions. The implication of these decisions is that the next era of water rights will be administrative as opposed to judicial.