

The Evolving Nature of Water Rights as Property Rights in the United States

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I. Introduction

This paper involves the law of water allocation in the U.S. People and entities diverting water from streams and groundwater do so on the basis of water rights. The paper treats the nature of the property interest in water rights and the extent to which a state may tamper with existing water rights to promote sustainability, without running afoul of the U.S. Constitution's protection of private property against takings without compensation.

In general, water allocation law in the U.S. is state law, not federal law. The American law of water allocation can be roughly divided into camps—based on geography (eastern and western) and hydrology (surface water and groundwater). I say “roughly” because there are elements of both eastern and western water law creeping into the other, and in the case of alluvial groundwater, there is an interconnection between the groundwater and the surface water in streams.

The paper first provides a general overview of U.S. water allocation law. Next, the paper attempts to show how the law in the U.S. treats water and water rights as property rights, and how this law has evolved and continues to do so. Discussed is the underlying protection of property rights against “takings” by the government without compensation under the 5th Amendment to the U.S. Constitution. The interplay between this protection and the notion of water rights as property rights makes it difficult for legislators and water resources management officials to promote sustainability of the water resource, especially groundwater, and to protect it for future generations. Overall, the focus is on the law of western states and on groundwater. The state of Kansas is used throughout the paper as an example. Kansas lies at the border between the water-rich East and arid West, has large groundwater reserves, has witnessed great changes in water law doctrines since statehood, and faces challenges in conserving its depleting

groundwater resources.

II. Overview of U.S. Water Allocation Law

A. Surface Water

Historically, the eastern states (those states lying east of the tier of states running from North Dakota to Texas) have employed the Riparian Doctrine for rivers and streams, although as discussed in Part III, the doctrine is changing. Greatly oversimplified, the doctrine is as follows: The basis of the water right is ownership of land along a stream. A riparian landowner has a right to make a reasonable use of the water on the owner's riparian land and is protected against unreasonable uses by other users.¹ Riparian rights are not lost for non-use. Conflicts are settled in the courts under notions of sharing the available water supply among the riparian users. The common law Riparian Doctrine has given way in many eastern states to a prior permit system. In some states the systems are limited to certain uses, while in other states the systems are comprehensive.²

The more arid Western States employ the Prior Appropriation Doctrine, based on the principle of "first in time, first in right". Developed first in California and Colorado, the doctrine arose in mining camps as custom, then was recognized by the courts, and finally was codified into a permit system by legislatures. States saw the doctrine as a viable way to allocate a scarce resource that fluctuates greatly by season and to allow at least a few users on a stream to make a beneficial use of water to create economically viable enterprises. Once established and

¹ RESTATEMENT SECOND OF TORTS, §§ 850 & 850A (1979). *See* L. Davies, "East Going West?: The Promise of Assured Supply Laws in Modern Real Estate Development," 43 *The John Marshall Law Review*, 319, 320 (2011), for the observation that the law of the East has "functioned effectively as tort law," while the law of the West has "functioned effectively as property law."

² D. Grant & G. Weber, *CASES AND MATERIALS ON WATER LAW*, n. 3, at 306, and n. 1, at 308-309 (8th ed. 2010) (hereafter "MATERIALS ON WATER LAW").

recognized, the appropriation right must be used or it is lost. Unlike a riparian right, the appropriation right allows water to be used anywhere, not just on riparian land.

B. Groundwater

States have recognized several doctrines for allocating groundwater (sometimes referred to “percolating groundwater”), and the states cannot be so neatly categorized geographically as they can for the two surface water doctrines. The Absolute Ownership Doctrine (a/k/a English Rule or Rule of Capture), recognized in Texas, for example, provides that a landowner owns the water under the surface just as the landowner owns the soil and can make whatever use is desired, either on the surface or in some other place, as long as the use is not malicious or wasteful. A landowner in a Reasonable Use Doctrine state (a/k/a American Rule) has much the same power, but the use must be both reasonable and confined to the land itself. California developed the Correlative Rights Doctrine, which allows landowners overlying a common groundwater source to share the groundwater, in much the same fashion that riparian owners do with streams in the East. The Restatement Second of Torts, published in 1979, attempted to synthesize a new rule that is a kind of combination of reasonable use and correlative rights.³ Legislation in twelve Western States,⁴ including Kansas, employs the same Prior Appropriation Doctrine for groundwater as is used for surface water. Finally, some states recognize a Regulated Riparian Approach to groundwater,⁵ similar to the permit system for streams mentioned above.⁶

³ RESTATEMENT SECOND OF TORTS, *supra* note 1, § 858 (1979). *See State v. Michels Pipeline Construction, Inc.* 63 Wis. 2d 278, 217 N.W.2d 339 (1974) for an example of a case adopting the Restatement section as it existed in its proposed form prior to amendment and adoption in the final version.

⁴ MATERIALS ON WATER LAW, *supra* note 2, at 347 (2010).

⁵ 1 WATERS AND WATER RIGHTS, cpt. 9, 3d ed. (2010).

⁶ *See* text at note 2, *supra*.

C. Example State: Kansas

Lying in the very center of the U.S. is the state of Kansas, which can be seen as a kind of microcosm of the country for water law. Kansas rainfall ranges from 40 inches of annual precipitation in the southeast to 16 inches in the northwest. The state is roughly 400 miles east and west by 200 miles north and south (ranking 14th in geographic size), and runs topographically uphill from about 700 feet in the east to 4,000 feet in the west. Portions of western Kansas overlie part of the High-Plains Aquifer, one of the largest aquifers in the world. Agriculture—grain and beef production based on irrigation primarily from groundwater—partners with aircraft manufacturing and oil & gas production as the economic base. Kansas, especially western Kansas, is sparsely populated, ranking 34th.

After Kansas achieved statehood in 1861, immigration from eastern states helped populate the state slowly, moving from the state-line border with Missouri in the east toward Colorado to the west. With Kansas lying at the frontier of the Great Plains and the West, with eastern Kansas being wet, and with settlement moving at first into eastern Kansas, the adoption of the common law Riparian Doctrine for streams seems appropriate in retrospect.⁷ Courts also applied the common law Absolute Ownership Doctrine for groundwater.⁸ The legislature even enacted laws in 1886 that made confusing references to prior appropriation, but the common law continued to guide courts when actual disputes arose.⁹

All this changed abruptly in 1945, however. Following recommendations in a 1944 governor's task force report,¹⁰ in one fell swoop the legislature dedicated "all water in the State

⁷ Kan. Stat. Ann. § 77-109; *Shamleffer v. Council Grove Peerless Mill Co.*, 18 Kan. 24 (1877).

⁸ *State ex rel. Peterson v. State Board of Agriculture*, 158 Kan. 603, 149 P. 2d 604 (1944).

⁹ E. Shurtz, REPORT ON THE LAWS OF KANSAS PERTAINING TO THE BENEFICIAL USE OF WATER, Bull. No. 3, at 35 (Ks. Water Resources Bd. 1956) (hereafter "Shurtz").

¹⁰ THE APPROPRIATION OF WATER FOR BENEFICIAL PURPOSES, A REPORT TO THE GOVERNOR ON HISTORIC, PHYSICAL AND LEGAL ASPECTS OF THE PROBLEM IN KANSAS (Dec.

to the use of the public”¹¹ and adopted the Prior Appropriation Doctrine for both groundwater and surface water.¹² The Water Appropriation Act expressly protected landowners holding riparian rights on streams or groundwater rights under their lands with “vested rights,”¹³ but only if they were in fact actively using their water on the effective date of the Act. Other such landowners not using their water simply lost their water rights. New appropriation rights could be obtained only by successfully seeking approval of a permit application from the Chief Engineer of the Division of Water Resources. An amendment to the Act in 1957 defined a water right as a “real property right, appurtenant to and severable from the land on or in connection with which the water is used,”¹⁴ but the Act stated that “such appropriation shall not constitute ownership of such water.”¹⁵

III. Water and Water Rights as Property Rights

A. Some History

1. *Riparian Rights.* Courts and early commentators¹⁶ on water law stated that certain things like air, running water, the sea, and the shores of the sea are “common to all”¹⁷

1944).

¹¹ Kan. Stat. Ann. 82a-702.

¹² *Id.*, -707.

¹³ *Id.*, -701 (d), -704a, -706b, & -707 (b).

¹⁴ *Id.*, -701(g).

¹⁵ *Id.*, -707 (a).

¹⁶ See, e.g., W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, v. II (1766) (hereafter “Blackstone”); J. Kent, COMMENTARIES ON AMERICAN LAW, v. III (1828) (hereafter “Kent”); J. Angell, LAW OF WATERCOURSES (1869), S. Weil, WATER RIGHTS IN THE WESTERN STATES, 3d ed. (1911) (hereafter “Weil”); and W. Hutchins, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES, (single volume, 1942; revised as a sequel in three volumes, 1972) (hereafter “Hutchins”).

¹⁷ Weil, *supra* note 16, at § 2; see also Blackstone, *supra* note 16, at 8.

and are the property of no one.¹⁸ But if a portion of water was removed from a watercourse and was taken out and reduced to possession, it was the taker's private property.¹⁹ While running water was not subject to private ownership, the law recognized a "very substantial right in its flow and use," said to be a "usufructuary right,"²⁰ "inherent in the property of the land."²¹ This right was a "real property interest . . . considered . . . as one of the inherent property rights incident to land ownership . . . [and] passed with a conveyance with the land."²²

This notion of a riparian owner's enjoying only a usufructuary right and not the corpus of the running water conformed nicely with the prevalent "Natural Flow Theory" employed by courts to handle riparian disputes. Before the Industrial Revolution, the riparian owners were permitted to use the water as it passed, typically for water mills, but after its use it was supposed to flow on without diminution, to be enjoyed in like fashion by downstream riparian owners.²³ Small quantities of water could be consumed, however, for domestic use.²⁴ The Industrial Revolution created the need for more water for irrigating lands and powering machinery, and thus the need arose for uses of running water that were not just "pass through" uses. The Natural Flow Theory thus gave way to the "Reasonable Use Theory," under which courts permitted more consumption of the water. This theory allowed riparian users making "reasonable uses of water" protection against other riparian uses that were "unreasonable." But no longer was reasonableness gaged just by the lack of consumption of the water.²⁵

¹⁸ Weil, *supra* note 16, at § 691; Hutchins, *supra* note 16, 1972 ed., v. 1, at 137.

¹⁹ Weil, *supra* note 16, at § 1.

²⁰ *Id.*, at § 15, and generally at cpt. 2; Kent, *supra* note 16, at 353.

²¹ Angell, *supra* note 16, at § 90.

²² Shurtz, *supra* note 9, at 24-25.

²³ *Id.*

²⁴ *Id.*

²⁵ For an excellent synthesis of the factors used by courts, see RESTATEMENT SECOND OF TORTS, *supra* note 1, Cpt. 41, "Interference with the Use of Water ('Riparian Rights'), Introductory Note on the Nature of Riparian Rights and Legal Theories for Determination of the Rights" (1979).

2. *Appropriation Rights.* Similarly, western States adopting prior appropriation for streams assert property principles for appropriation rights. Constitutions and statutes in some western states reserve ownership or trusteeship or control of water in the state.²⁶ Courts and commentators state that a water right is “only usufructuary” with “no property in the water itself” and only “the *flow and use*” of the stream.²⁷ Likewise, “the stream water itself is . . . the property of no one . . . or ‘belongs to the public’ or to the ‘State in trust for the people.’”²⁸ In stark contrast with the Riparian Rights, however, was the rule that permitted appropriators to use the water off the riparian land and indeed to transport the water into an entirely different watershed,²⁹ meaning that completely consumptive uses were permitted relative to other downstream users.

3. *Groundwater.* The distinction between “usufructuary” rights and “ownership of the corpus” was not always clearly made in cases involving the Absolute Ownership Doctrine or the Reasonable Use Doctrine. Some commentators and courts stated that the right to percolating groundwater was not just a usufruct. The land included not only the “face of the earth” but also “everything under it”³⁰ and to be “regarded as part of the land itself . .

²⁶ Some state constitutions expressly dedicate stream water to “the use of the people” (*e.g.*, Colorado, Art. XVI § 5), or provide that waters are the “property of the state” (*e.g.*, Montana, Art. IX, § 3 (3); North Dakota, Art. XI Gen. Prov. Sect. 3; Wyoming, Art. 8 Sect. 1). In other states, statutes make similar declarations (*e.g.*, Ida. Stat. 42-101—waters are “property of the state”; Neb. Stat. 46-202—stream water is “property of the public”; S. Dak. Stat. 46-1-3--water is the “property of the people of the state”; Tex. Water Code § 2.B.11.B.11.021—flowing water is the “property of the state”; and Wyo. Stat. 41-3-1-1--water is “always the property of the state.” *See also* Frank J. Trelease, “Government Ownership and Trustee of Water, 45 Cal. L. Rev. 638, 642 (1957) (hereafter “Government Ownership”); and the state water law summaries found in 4 WATERS AND WATER RIGHTS, *supra* note 5, Subpart B.

²⁷ Weil, *supra* note 16, at § 276 (emphasis in original).

²⁸ *Id.*

²⁹ Weil, *supra* note 16, at § 283; *Coffin v. Left Hand Ditch Co.*, 6 Colo. 643 (1882).

³⁰ Blackstone, *supra* note 16, at 18.

. [making] the law governing the use of running streams . . . inapplicable.”³¹ “The *corpus* of the

. . . water was held to be the subject of private ownership and real property as a part of the soil; whereas the *corpus*

But other courts stated that “there can be no ownership in . . . percolating waters in the absolute sense, because of their . . . migratory character, unless and until they are reduced to the actual possession and control.”³³ The reason was that even percolating water, like stream water, is moving, albeit very slowly. Moreover, under the Correlative Rights Doctrine, particularly as adopted in California, groundwater was viewed just as surface water—belonging to the community, usufructuary only, and capable of becoming private property “only when some individual actually takes a portion of it into possession by a well or other similar artificial structure.”³⁴ Finally, some western state constitutions and statutes include groundwater in their reservations of ownership in the state.³⁵

4. *Kansas*. To summarize Kansas law, as an example, on the issue of water rights as property: From statehood in 1861 to 1945, stream water was viewed as incapable of private ownership. Groundwater, though subject to the Absolute Ownership Doctrine, was subject only to a usufructuary claim by the land owner.³⁶ In 1945, the legislature declared “all water” to be dedicated to the use of the public and enabled the obtaining of appropriation rights, which the legislature then defined in 1957 as “real property rights.” But such appropriations do not constitute ownership of the water.

5. *Summary*. In short, the early law viewed stream water to be held in common (or by no one), incapable of private ownership unless the molecules were reduced to possession, and allowing only a usufructuary right. Under some early common law cases

³¹ Angell, *supra* note 16, at 177; Weil, *supra* note 16, at § 1039.

³² Weil, *supra* note 16, at § 1039.

³³ 93 C.J.S. Waters § 195, at 453 (2001).

³⁴ *Id.*, at §§ 1100, citing esp. *Katz v. Walkinshaw*, 141 Cal. 116, 70 P. 663 (1903).

³⁵ Mont. Cont. Art. IX, § 3 (3) “All . . . underground . . . waters are the property of the state”; So. Dak. Stat. 46-1-3 “all water . . . is the property of the people of the state.”

³⁶ *Williams v. City of Wichita*, 190 Kan. 317, 329-330, 374 P.2d 578 (1962).

employing Absolute Ownership or Reasonable Use Doctrines, courts viewed groundwater as part and parcel of the land itself, and thereby capable of private ownership. Later judges applying those same doctrines, and California judges employing the Correlative Rights Doctrine, began to view groundwater rights as usufructuary as well and to view groundwater itself as being incapable of private ownership until reduced to possession. Some western state constitutions and statutes reserved ownership of water in the state. Kansas permits the obtaining of appropriation rights that are defined as real property rights, but that do not amount to ownership of the water.

B. Some Developments over the Last Few Decades in Notions of Water Rights as Property Rights.

Many innovations have occurred over the last few years in the way water rights are permitted and regulated, resulting in more state control. A few examples follow. These modifications, along with the notion that appropriation rights must be used or they are lost, show some ways that water rights differ from rights to land.

In the western states, courts have determined that water rights may not be wasteful and may be cut back to prevent waste.³⁷ Some states have adopted stringent regulations on waste.³⁸ Some states have enabled the establishment of special districts to manage groundwater actively, by creating systems for limiting new permits and regulating “changes” more stringently.³⁹ Some states have even given courts and regulators in seriously over-appropriated areas super powers to

³⁷ See, e.g., *Imperial Irrigation Dist. v. State Water Res. Control Bd.*, 225 Cal. App. 3d 548, 275 Cal. Rptr. 250 (1990).

³⁸ See, e.g., K.A.R. § 5-5-7 (prohibits “waste of water” as defined in § 5-1-1).

³⁹ See, e.g., Kan. Stat. Ann. §§ 82a-1020, *et seq.* (enables establishment of groundwater management districts); and K.A.R. §§ 5-21-1 through 5-25-9 (Kansas groundwater management district regulations on safe yield and depletion); Kan. Stat. Ann. § 708b allows a holder of a water right to change the type of use, place of use, and point of diversion, but only with prior permission of the chief engineer.

order reductions in pumping that do not follow strict temporal priority of right.⁴⁰ Many states have created ways to preserve streamflow.⁴¹ The California Supreme Court has applied the Public Trust Doctrine in a way that places that doctrine on equal status with the Prior Appropriation Doctrine for navigable waters and allows a review of an appropriation right issued decades earlier, based on contemporary notions of the public interest.⁴²

One innovation in the eastern states has been the move to prior permitting of riparian rights. The importance of “priority in time is greatly reduced, permits expire after a specified period or may be canceled administratively, and administrative officials are given greater discretion to allocate water in time of shortage and to reallocate water to new (presumably better) use as needs and values change.”⁴³

C. The Law of “Takings”

The 5th Amendment to the U.S. Constitution reads: “No person shall be . . . deprived of . . . property without due process of law; nor shall private property be taken for public use, without just compensation.”

Detailed description and analysis of the law of takings are beyond the scope of this paper. The following is a short nutshell taken from a recent case. Two classes of cases are said to exist: physical and regulatory takings. “A physical taking occurs when the governments’ action amounts to a physical occupation or invasion of the property”, and these require compensation.⁴⁴ “A regulatory taking, in contrast, arises when the government’s regulation restricts the use to

⁴⁰ See, e.g., Ore. Rev. Stat. 537.730 & -.735; Kan. Stat. Ann. §§ 82a-1036, *et seq.*

⁴¹ See, e.g., Ida. Code § 67-4307 (preserves waters in the Malad Canyon); Kan. Stat. Ann. §§ 82a-703 to -703c (allows establishment of minimum desirable streamflows).

⁴² *Nat. Audubon Soc. v. Sup. Ct.*, 33 Cal. 3d 419, 189 Cal. Rptr. 346, 658 P.2d 709 (1983).

⁴³ MATERIALS ON WATER LAW, *supra* 2, at 309 (2010).

⁴⁴ *Tulare Lake Basin Water Storage Dist. v. U.S.*, 49 Fed. Cl 313, 318 (2001).

which an owner may put his property,” and these require a balancing test.⁴⁵ “Regulations that are found to be too restrictive, however—i.e., those that deprive property of its entire economically beneficial or productive use—are commonly identified as categorical takings and, like physical takings, require no such balancing.”⁴⁶

Because water rights have been viewed as property rights in the West, cases exist that support the view that governmental regulations that adversely affect water rights are unconstitutional. For example, a 1939 Nebraska case suggested that a forced reduction of an irrigator’s annual permitted quantity amounted to an unconstitutional interference if the irrigator’s water use was otherwise reasonable.⁴⁷ More recently, plaintiffs in several cases have filed cases against the U.S. claiming compensation due to loss of water deliveries from U.S. Bureau of Reclamation, which was complying with the Federal Endangered Species Act. In one, a water district acquiring water under contracts with the U.S. successfully sued the U.S. after the federal agency had greatly limited the district’s water use to comply with the federal Endangered Species Act, the court stating that while “the federal government is certainly free to preserve the fish . . . it must simply pay for the water it takes to do so.”⁴⁸

D. Some Observations about the Distinction between Usufructuary Ownership and Ownership of the Corpus of Water.

⁴⁵ *Id.*, citing *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 124-125 (1978).

⁴⁶ *Id.*

⁴⁷ *Enterprise Irrigation Dist. v. Willis*, 284 N.W. 326 (Neb. 1939).

⁴⁸ *Tulare Lake Basin Water Storage Dist. v. U.S.*, *supra* note 44, at 324. *See also Klamath Irrigation Dist. v. U.S.*, 67 Fed. Cl. 504, 538 (2005); *Klamath Irrigation Dist. v. U.S.*, 348 Or. 15, 227 P.3d 1145 (2010) (on certified questions to state supreme court from federal court of appeals); *Klamath Irrigation Dist. v. U.S.*, ___ F.3d ___, 2011 WL 537853 (C.A. Fed., Feb. 17, 2011); *Casitas Municipal Water Dist. V. U.S.*, 76 Fed. Cl. 100 (2007); *see also* various law review articles criticizing the decision, in MATERIALS ON WATER LAW, *supra* note 2, at 622-625.

The above summary of the law and its evolution presents some interesting, but confusing, contradictions. It seems that state courts and legislatures have attempted to create a distinction between land on the one hand and water rights on the other regarding the nature of the underlying property interests in those two resources. Addressing “an easterner seeking a new water law for his state,” Dean Frank Trelease once advised “think land,” and analogize water to land.⁴⁹ True, we treat water rights as land when it comes to transferring water rights, either with a parcel of land or separate from the appurtenant land—using deeds for the conveyances and mortgages for the financing documents, and applying the Statute of Frauds for the contract. Water rights, like land, are protected in eminent domain actions from being taken for public use without compensation.

But the essence of the property interests in each seems to be different. The government gave up its ownership and control of land when it allowed individuals to acquire ownership through the various acts of settlement. But many western states have retained more control over water, with the above-mentioned judicial declarations about “no private ownership in running water”, water rights declared to be usufructuary only, or water right holders’ not owning the corpus of the water. California’s Public Trust Doctrine illustrates perhaps the strongest position of state control over water rights after the rights have vested.

Constitutions and statutes in some western states expressly preserve ownership in the state or the public. Analyzing these declarations in a 1957 article assessing the nature of government ownership of water, Trelease observed that Kansas’ 1945 statutory statement that its water was “dedicated to the use of the public” was both the “newest declaration” and “the weakest of all.”⁵⁰ He noted that the concept of “state ownership” appears in different contexts—interstate relations; cases involving disputes between citizens; and situations when “state interests are aligned against the interests of a . . . water user of the state.”⁵¹ In this latter situation, “[t]he power of the state . . . to issue a permit . . . has been based upon the premise that

⁴⁹ Frank J. Trelease, “The Model Water Code, The Wise Administrator and the Goddam Bureaucrat,” 14 Nat. Res. J., 207, 212 (1974).

⁵⁰ Frank J. Trelease, “Government Ownership,” *supra* note 26, at 642 (1957).

⁵¹ *Id.*, at 643, 644.

the state has such a proprietary interest in the running water of the streams that it may transfer a qualified ownership of the right to use them. The whole permit system of initiating appropriations has been said to be based on a theory of permissive use of state property.”⁵²

The question arises whether this distinction between a usufruct and ownership of the corpus has any practical meaning. A person with fee simple ownership of land can use, enjoy, transfer, mortgage, exclude others, and will away the land. The land owner can remove the soil and sell it separately. A person’s ownership and practical use of the land ceases at death, but can continue in heirs or devisees. A person with a usufructuary right to water, whether running water in a stream or groundwater, can likewise enjoy, transfer, mortgage and will the water right away. The person can use the water and return it to the water source, or can remove it and sell it.

This act of removing and not returning the water to the source—“consuming” the water—is permitted under both riparian and prior appropriation law. The notion of consumption is especially important in prior appropriation states. While the “consumptive use” (often expressed as a percentage of the amount used up versus the total amount diverted) is not typically one of the basic attributes of a water right recorded in the public documents (in Kansas, at least), consumptive use is an extremely important attribute of a water right. When an owner seeks to change a use—either for the owner’s own purposes or as part of a transfer of ownership of the right—a general “rule of thumb” of western water law applies: only the amount consumed by a water right can be changed or transferred, this to protect junior users from changes in the original conditions on which they based their rights.⁵³ Thus, a non-consuming use such as hydro-power cannot be changed to a consuming use, but a totally consuming use (an industrial use using all the water or a diversion totally out of a basin) could be changed or transferred. The change or transfer of a partially consuming use like irrigation would be limited to the amount of water consumed.

If a water user can consume the water, can sell the water or water rights, can mortgage it, and will it away, and if the water rights are protected against takings without compensation in eminent domain actions, then is there any difference between water rights and land, in terms of

⁵² *Id.* (citing cases).

⁵³ MATERIALS ON WATER LAW, *supra* note 2, at 80 and at 204.

the nature of the property interest? It is in the context of the regulatory taking that the distinction between a usufruct and corpus ownership manifests itself.

Arguably, based on two principles discussed above, states should be limited in their regulatory powers to reduce pumping by a water right holder: First, under usufructuary right notions, water rights create property interests in water when water is actually reduced to possession. Second, consumptive uses are permitted. So, at least with respect to water rights that involve consumption of water, their consumptive uses should arguably not be subject to forced restrictions without compensation. A counter-argument might be that by a state's expressly retaining control or ownership of the water resource, it may be deemed to have preserved unto itself the power to impose on existing water right holders the restrictions on pumping necessary to sustain and conserve the resource for future generations, without having to compensate under the 5th Amendment. Too, it can be argued that even if one has the power to consume water, the water must first be reduced to possession before it becomes property—i.e., the prospective right to consume is not compensable.

In the past, some states have changed their basic water law doctrines and in doing so have adversely affected existing water rights. For example, in 1980, Arizona enacted a groundwater statute that phased in tighter pumping restrictions over four ten-year periods, and courts have upheld the constitutionality of the act.⁵⁴ New Mexico and Kansas changed groundwater doctrines from absolute ownership to prior appropriation, effectively “taking” water rights without compensation—the water rights being those that had been recognized, but not used prior to the new legislation. Courts in both states upheld these legislative changes.⁵⁵ Regarding the issue of “the basic power of the legislature to modify and change common-law rules with respect to water usage”⁵⁶ the Kansas Supreme Court stated that “flexibility in the common law has been

⁵⁴ See, e.g., *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 638 P.2d 1324 (1981).

⁵⁵ *Yeo v. Tweedy*, 34 N.M. 611, 286 P. 970 (1929); *State ex rel. Bliss v. Dority*, 55 N.M. 12, 225 P.2d 1007 (1950); *Williams v. City of Wichita*, 190 Kan. 317, 329-330, 374 P.2d 578 (1962).

⁵⁶ *Williams v. City of Wichita, Id.*, 374 P.2d at 589.

carefully preserved”⁵⁷ and that “the office of statutes is to remedy defect in the common law as they are

developed and to adapt it to changes of time and circumstances”⁵⁸ and thus “the legislature may change the principle of the common law and abrogate decisions . . . when . . . it is necessary to the public interest.”⁵⁹ On the question whether this change amounted to a compensable “taking”, the court said that “we do not regard a landowner as having a vested right in underground waters underlying his land which he has not appropriated and applied to beneficial use.”⁶⁰ The lone dissenting judge called this a “confiscation of private property” because the statute had decreed “an established property right . . . to be nonexistent.”⁶¹ He feared that “such arbitrary exercise of the police power . . . [would mean that] . . . the formula has been found . . . by which all private property within Kansas may be communized without cost to the state.”⁶²

If legislatures can impose restrictions on a phased-in basis, and if legislatures can legally change water law doctrine in ways that adversely affect vested but unused water rights, the question is whether courts would view a change in water law doctrine that would pose immediate and drastic limitations on vested rights that are currently being used. Whether this would amount to a taking is the essential question involved in governmental attempts to sustain our diminishing groundwater aquifers by curtailing pumping by current water users.

E. The High-Plains Aquifer in Kansas as an Example

Since the effective date of the 1945 Act, Kansas water users have filed applications for over 47,000 permits, predominantly for irrigation. Today, active water rights, both appropriation

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*, at 595.

⁶¹ *Id.*

⁶² *Id.*

rights and vested rights, probably number over 30,000. Most of these water rights are devoted to irrigation use from the High-Plains Aquifer. We are mining the aquifer in general, and in some places less than 25 years of water is left if pumping continues at current rates.

As stated above, for several decades Kansas has attempted to grapple with this groundwater mining problem. Five groundwater management districts (GMDs) have implemented regulations that have imposed safe yield criteria on applications for new permits and on applications to change existing water rights. Conservation plans are required for many water users. Waste is prohibited. In 1991, the Chief Engineer established an Intensive Groundwater Use Control Area (IGUCA) in a small basin where irrigators from alluvial groundwater in the Walnut Creek Basin were causing streamflows to diminish, to the detriment of large senior water rights from Walnut Creek used to fill the wetlands comprising the Cheyenne Bottoms. In imposing safe yield in the basin, the Chief Engineer reduced pumping on all water rights junior to the state's senior rights, but did it in a kind of "mass allocation" way—not strictly by priority, but by establishing two large classes of water rights, "senior water rights" (senior to October 1, 1960) and "junior water rights" (junior to October 1, 1960). All water rights were reduced somewhat on the basis of waste, but junior users were reduced from their annual permitted quantities of 12-14 inches to only 4-5 inches. This administrative decision was not appealed to the courts, so Kansas was left without a test case in this issue of the extent of the state's power to reduce pumping under the 5th Amendment.⁶³

F. Some Recent Ideas regarding Water Rights as Property Rights

Water professionals continue to grapple with the water right as property right issue and the extent of constitutional protection in takings cases. A session of the 2011 annual meeting of the Association of American Law Schools (AALS) was titled "Changing Conceptions of Water in the Law."⁶⁴ The purpose was to focus on "concepts for the future," and "how these core

⁶³ See J. Peck, "Property Rights in Groundwater: Some Lessons from the Kansas Experience," 12 Kan. J. L. & Pol. 493, 499 (2002-2003).

⁶⁴ A joint program of the Sections on Agricultural Law and Property Law, Jan. 5, 2011,

concepts are shifting in light of water law's increasing integration into other areas of the law, such as indigenous rights, urban planning and design, natural resources and environmental."⁶⁵ Speakers discussed "competing visions" in the law of water (water as a public trust, a commodity, or a human right)⁶⁶; three classes of water (common property–riparian rights; private property–prior appropriation; and public property–regulated riparianism)⁶⁷; utilizing fishing rights as a model for water allocation⁶⁸; and a proposition that water rights are not typical property rights.⁶⁹ The executive director of a Kansas Groundwater Management recently suggested that prior appropriation rights should be retired on the basis of "First in time, First Out the Door."⁷⁰ Another suggestion thrown out recently in Kansas would be immediately changing the perpetual nature of existing appropriation rights into rights, or licenses, with a term of years, say, 25 years, using the Model Water Code as a guide.⁷¹

IV. Conclusion

Except for the California Public Trust case, the Kansas Walnut Creek IGUCA case, and cases involving reductions due to waste, there seems to be scant support for the proposition that

San Francisco, California.

⁶⁵ *Id.*, CORE EDUCATIONAL VALUES, Final Program Booklet, at 3.

⁶⁶ Professor Barton H. Thompson, Stanford Law School.

⁶⁷ Professor Joseph W. Dellapenna, Villanova University School of Law.

⁶⁸ Professor Shelley Ross Saxer, Pepperdine University School of Law.

⁶⁹ Professor Sandra B. Zellmer, University of Nebraska College of Law. For more detailed explanations of Professor Zellmer's views, see S. Zellmer & J. Harder, "Unbundling Property in Water," 59 Ala. L. Rev. 679 (2007-2008).

⁷⁰ Wayne Bossert of NW Kansas GMD No. 4, at a public debate on the issue of whether prior appropriation is the best doctrine for future water management in Kansas, Hays, Kansas, Feb. 22, 2011.

⁷¹ J. Peck, "Is it Time to Revisit and Re-evaluate the Kansas Water Appropriation Act?", Ks. Water Congress Winter Meeting, Topeka, Kansas (Jan. 31, 2011).

states can constitutionally require massive cuts in pumping in the name of “the public interest” just to sustain an aquifer for future generations. Yet the notion lingers that this might be possible because of the concepts of usufruct versus ownership and continued state ownership, trusteeship, and control over the water resource.

Sustaining groundwater resources is a challenge when American states have created a system of water rights based on property rights, because of the constitutional protection given property rights against regulatory takings. Some western states have taken a number of partial steps, but no state has yet simply declared that groundwater mining in the entire state will no longer be tolerated. This reluctance is likely due not only to economic reasons but also to the recognition that despite a state’s claim of continued ownership of its water resource, going too far in limiting pumping could result in the need to compensate the affected water right holders. How this will all shake out remains to be seen. But the world-wide movement and goals to achieve sustainability will hopefully provide an impetus for creative, constitutional proposals and solutions for sustaining groundwater in the U.S.