

valuation of customer goodwill may insure against irresponsible detentions, and the statute further restrains breaches of community standards by providing for a jury determination of probable cause and reasonableness.

### CONCLUSION

Shoplifting and its concomitant social and economic effects upon the State of Indiana demand legislative treatment.<sup>100</sup> The scope of the change must afford room for differential treatment that can meet the heterogeneous nature of the offenders. A private privilege to detain could be utilized to advantage by providing a means by which property can be protected and the processes of the law can be brought to bear on the problem. Innocence can still be adequately protected through the judicial and community standard of reason; but must not be to the stultifying extent that it is presently. The suggested statute provides a workable solution by eliminating tort liability for reasonable detaining action taken by a merchant better enabling both him and the community to reduce the causes and effects of this crime.

## WATER RIGHTS IN INDIANA

Endowed with abundant rainfall and ample flowing water supply, Indiana has never faced a general water shortage.<sup>1</sup> In fact, the great

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100. In construing IND. ANN. STAT. § 17-832 (Burns 1940) (limited damages recoverable from certain officials for false arrest), it was said, "Within the limits necessary for the preservation of our form of federal and state governments and the basic principles upon which they rest, the Constitutions of both state and nation must be construed to the end that public progress and development will not be stifled and that public problems, with their ever increasing complexity, may be met and solved to the best interests of the public generally." *Scoopmire v. Taflinger*, 114 Ind. App. 419, 428, 52 N.E.2d 728, 731 (1943).

1. "Being located in the more humid part of the midwest, Indiana is not faced with a problem of insufficient total quantity of water being available, but one of having the right amount available in the right place at the right time. Of the water that falls on Indiana as rain or snow, only about 30 per cent is available for use by man. The remainder is evaporated back into the atmosphere. Only a portion of the 30 per cent can be put to practical use, because unequal distribution throughout the year produces excessive quantities during some periods and deficient amounts during others. Nature attempts in a limited way to equalize the availability of water by storing great quantities in the ground during the periods of plenty and releasing them gradually throughout the year. However, the natural underground reservoirs are not uniformly distributed throughout the state, with the result that some areas are not as plentifully supplied as others. Increases in population, expansion of industry, and intensification of agriculture are continually placing a greater and greater demand on available water supplies. In the areas of inadequate natural storage, continued growth and development are being hampered and even stopped." INDIANA FLOOD CONTROL AND WATER RESOURCES COM-

bulk of Indiana water law has been developed to meet the problems of "too much" rather than problems of too little.<sup>2</sup> However, rapidly expanding urban populations and increasing industrial and agricultural uses pose new problems of supply and conservation for Indiana.<sup>3</sup> The prospect of an ever-increasing demand for water prompts a study of existing water law in light of future needs.

To meet the problem, Indiana and other states have appointed study

MISSION BULLETIN No. 1, INDIANA'S WATER RESOURCES viii (1951). The average precipitation is approximately 40 inches, ranging from 35 inches in the north to nearly 50 inches in the south central part of the state. The total usually fluctuates within a range of 35 inches to 45 inches but there have been extremes of 29.7 inches in both 1930 and 1934 and 51.8 inches in 1883. *Id.* at 18. These figures are more significant when compared with the semi-arid western states, e.g. the average annual precipitation of New Mexico is approximately 15 inches.

2. (Drains and Levees) IND. ANN. STAT. §§ 27-101-to-1123 (Burns 1954 Replacement). (Flood Prevention) IND. ANN. STAT. §§ 48-4601-to-5111 (Burns 1950 Replacement).

3. "It appears likely that the trend in the demand for water in Indiana would continue on an increasing curve to 1970 even without the anticipated increase in population and the rise expected in the level of economic activity. Domestic use of water per capita shows every sign of increasing, especially because of the expanding use of water-using conveniences and comforts. While per capita use of water fluctuates with the level of economic activity, it appears safe to predict that the future holds more widespread use of such devices as air-conditioning units, automatic washing machines, and electric dishwashers and that there will be more bathroom facilities per family. In other words, Indiana's per capita water requirement can be expected to increase steadily, even if the standard of living rises no faster than it has in the past few years. When the trend toward greater per capita demand for water is coupled with the projected increase in population and in the level of economic activity for Indiana citizens, it is very likely that the demand for water for domestic use will have increased very materially by 1970.

"The foreseeable increases in the demand for water by industry are almost confounding. Industry is already by far the state's greatest user of water. Merely to imagine an increase in industrial production of 75 per cent provides a glimpse of the magnitude of the future industrial demand for water, yet even this fails to tell the complete story. As our industrial production increases, we must turn more and more to lower grade materials, which require relatively more water to prepare and process than did the materials, which they replace. As technologies of production are improved, larger amounts of water are required in the process. As we turn from natural to synthetic materials, more water is required because, almost without exception, synthetic products require much more water than the natural products they replace. We visualize a greatly increased demand for secondary energy forms, especially electrical energy; and great quantities of water are required for their production. In short, the further the industrial economy of the state expands, the more it is dependent upon assured supplies of water.

"Based upon present trends and upon the increased water requirements as they appear to be forming, *an increase in demand for water in Indiana of 70 to 85 per cent over present consumption is predicted for 1970.* BUREAU OF BUSINESS RESEARCH, SCHOOL OF BUSINESS, INDIANA UNIVERSITY, INDIANA'S ECONOMIC RESOURCES AND POTENTIAL, SECTION 4, 105-106. In addition supplemental irrigation by farmers of crop and pasture land since 1950 has expanded considerably. At the present time, there are no studies completed as to the number of farmers in Indiana who irrigate, the number of acres irrigated, or the gallonage user per acre. The School of Agriculture, Purdue University is currently surveying farmers to find the answers to these questions.

committees to prepare recommendations for legislation.<sup>4</sup> This is no easy task: within the boundaries of Indiana natural conditions vary so widely that an acceptable solution in one area may be inapplicable in another. The northern third of the state, an area of lakes and a relatively abundant underground supply, has highly permeable soil unsuited for reservoirs.<sup>5</sup> The middle third of the state is supplied amply by rivers and streams; but its underground supply, although generally adequate for existing needs, varies in location and capacity.<sup>6</sup> In the southern part of the state, underground supplies are spotty, at great depths, and often not potable. River-flow is rapid; however, the rocky nature of the subsoil makes reservoirs feasible in many sites.<sup>7</sup> A good water policy must comprehend the interrelated surficial<sup>8</sup> and subterranean supply and be based on geological and hydrological fact.

Even with Indiana's divergent topography, it was natural that the historical riparian rights doctrine be enmeshed into Indiana water rights law.<sup>9</sup> Based upon a modification of the French Civil Law by Kent and Story,<sup>10</sup> the riparian doctrine generally seeks to insure every proprietor of lands adjacent to a defined watercourse an equal right to use.<sup>11</sup> It is

4. In 1955, the General Assembly of Indiana established a study committee composed of one member from each of the following departments of state government: Flood Control and Water Resources Commission, the Board of Health, the Department of Conservation, the Stream Pollution Control Board, the Public Service Commission, the Economic Council, and three agricultural staff members of Purdue University, two members of the senate, and two members of the house of representatives "for the purpose of conducting a comprehensive survey of water rights and water management laws both surface and ground water. The study committee is directed to make a report of its findings to the Indiana general assembly." IND. ANN. STAT. § 27-1404 (Burns. Supp. 1955). See also *e.g.* KY. REV. STAT. §§ 104.390-440 (1955); ALA. CODE tit. 22, § 140 (3) (Supp. 1955).

5. INDIANA FLOOD CONTROL AND WATER RESOURCES COMMISSION, *op. cit. supra* 6-9, 53.

6. *Id.* at 9-10, 53.

7. *Id.* at 10-13, 54-55.

8. The comprehensive geological term "surficial" is used because it includes all water on the surface of the ground whether in rivers, streams, lakes or vagrant flood waters; it includes all water which is not subterranean. It is preferable to the term "surface water" which by judicial definition is restricted to vagrant waters not lying within definite banks or boundaries.

9. England, every state east of the Mississippi, and the states bordering on the Mississippi on the west have adopted this doctrine. The western states have either rejected the riparian doctrine in favor of appropriation of water rights or have combined the two doctrines.

10. 3 KENT'S COMM. 439; Tyler v. Wilkenson, 24 Fed. Cas. 472, No. 14, 312 (1827). Both of these authors reject the "natural flow" theory as wasteful of water.

11. The owner of riparian land has the right to use water only at the point where the land is adjacent to the water. He can not go upstream for a better source nor can he discharge water he has diverted at any point below his boundary line. See Lowe v. Indiana Hydroelectric Power Co., 197 Ind. 430, 436, 151 N.E.2d 220, 222 (1925); City of Elkhart v. Christiana Hydraulics, 223 Ind. 242, 256, 59 N.E.2d 353, 358 (1945); Larsh v. Test, 48 Ind. 130 (1874).

a private rights doctrine; "He has no property in the water but a simple usufruct while it passes along."<sup>12</sup> Likewise, a non-riparian owner is prevented from using the water without a riparian's permission.<sup>13</sup>

Within the riparian doctrine, however, the existence of two analytically different theories, "reasonable use" and "natural flow," often creates uncertainty in the law.<sup>14</sup> The "reasonable use" theory permits a riparian owner to utilize the water reasonably in light of existing circumstances. No cause of action arises until another riparian owner is materially damaged; then rights are determined in relation to the volume of the water available, the extent of the social benefit for which the defendant is employing the water, and the gravity of the loss to the plaintiff.<sup>15</sup> Rights are indefinite, because changing circumstances may control the right to use.<sup>16</sup> However, the theory fosters maximum use from the resource because one owner can monopolize the entire supply until other riparian owners find a need.

Under the "natural flow" theory, each riparian owner is entitled to have the natural flow maintained regardless of his use for it. A cause of action arises when there is any material change in the flow irrespective of damage; moreover, the injured party must sue promptly to prevent the interfering party from acquiring prescriptive rights.<sup>17</sup> The right to natural flowage away from one's property has been raised most often by drainage disputes, which may also involve the distinction between watercourses, to which riparian rights attach, and surface water, which is a "common enemy."<sup>18</sup> The natural flow theory clearly defines water

12. 3 KENT'S COMM. 439; *Dilling v. Murray*, 6 Ind. 324 (1855).

13. A non-riparian would be subject to an action of trespass because he could not obtain access to the water without crossing riparian lands.

14. "Most courts, either not realizing that there are two distinct theories or not fully grasping their fundamental differences, attempt to apply both theories, with results that are not only illogical but wondrously inconsistent at times." RESTATEMENT, TORTS, Introductory Note §§ 850-857 (1939).

15. *Ibid.* See also *City of Logansport v. Uhl*, 99 Ind. 531, 538 (1885).

16. *Ibid.* See also *Valparaiso City Water Co. v. Dickover*, 17 Ind. App. 233, 46 N.E. 591 (1897).

17. RESTATEMENT, TORTS, Introductory Note §§ 850-857 (1939); *Guynn v. Wabash Water & Light Co.*, 181 Ind. 486, 104 N.E. 849 (1914).

18. Surface water is water temporarily diffused over the surface of the land as a result of a hard rain or a melting snow. These waters may be consumed by the proprietor of the lands on which they arise or to which they flow without regard to accustomed usage by others; they may be avoided to the detriment of another by creating an obstruction or changing a grade, but they may not be collected in a channel and discharged on the lands of another to his injury. When, however, there is a regular channel with defined banks through which water flows in a certain direction, not necessarily continually but from time immemorial for a substantial period of each year, the flowing water constitutes a watercourse. Whether a watercourse is constituted in a question of fact for the jury. The question is often difficult, *e.g.* the waters flowing outside the banks of a river which periodically floods. See *Zollman v. Baltimore & O.S.W.R.*, 70 Ind. App. 395, 121 N.E. 135 (1918). Recently the Supreme Court of

rights but may prevent a maximum use because at some date a future riparian owner may demand the natural flow be maintained. To determine the extent to which riparian rights restrict the maximum use of water resources, an examination of Indiana's position becomes pertinent. Unfortunately, the Indiana riparian doctrine is uncertain.

The Supreme Court of Indiana, in 1854, approved an instruction to the jury that an obstruction of flow for only one hour was sufficient for an upper millowner to recover damages against a lower millowner who had dammed the stream (natural flow).<sup>19</sup> In 1855, the same court announced that the law did not concern itself with trifles and granted relief to a lower owner only because the upper owner's obstruction was clearly unreasonable and inflicted material damage on the plaintiff (reasonable use).<sup>20</sup> The Indiana courts have continued but have never reconciled the two theories. An examination of the facts, however, discloses that the natural flow theory has been applied to obstructions causing backflow on upper owners, while the reasonable use theory has been applied to unreasonable detentions, pollutions, and consumptive uses which damage lower riparian owners.<sup>21</sup> The apparent explanation of this dichotomy is that where ample water exists but natural drainage is critically insufficient, the common law imposed a strict liability for obstructing the flow away from land but not to the land.

The law further differentiates between domestic and artificial uses.<sup>22</sup>

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Indiana affirmed a finding that a watercourse did not lose its identity even though for a half-century it had been underlain with tile, covered with dirt, cultivated, and water ran in the "channel" only after periods of heavy rainfall. *Gwinn v. Myers*, 129 N.E.2d 225 (Ind. 1955).

19. *Cory v. Silcox*, 6 Ind. 39 (1854) rev'd on other grounds.

20. *Dilling v. Murray*, 6 Ind. 324 (1855). As the injunctive relief of the lower court was affirmed, requirement of material injury was technically dictum.

21. Natural flow theory applied to back flow: *Cory v. Silcox*, 6 Ind. 39 (1854); *Gynn v. Wabash Water & Light Co.*, 181 Ind. 486, 104 N.E. 849 (1914); when there is no actual back flow but the lower owner has erected an obstruction that would cause back flow in times of high water, the prescriptive right can be gained in the absence of injury. *Sherlock v. Louisville, New Albany, & Chicago Ry.*, 115 Ind. 22, 35 (1888). And the upper land owner may enjoy the construction because of threatened damage. *Lake Erie & Western RR. v. Young*, 135 Ind. 426 (1893). He can not sue for damages, however, until there is injury. *New York, Chicago & St. Louis RR. v. Hamlet Hay Co.*, 149 Ind. 344, 47 N.E. 1060 (1897). Reasonable use theory applied to detention, pollution, and consumptive uses: (Detention for generation of power.) *City of Logansport v. Uhl*, 99 Ind. 531, 538 (1885); *Dilling v. Murray*, 6 Ind. 324 (1855). (Pollution) *Barnard v. Sherley*, 135 Ind. 547, 34 N.E. 600 (1893); *Penn American Plate Glass Co. v. Schwinn*, 177 Ind. 645, 98 N.E. 715 (1912); *Muncie Pulp Co. v. Koontz*, 33 Ind. App. 532, 70 N.E. 999 (1904). (Consumptive use) *Valparaiso City Water Co. v. Dickover*, 17 Ind. App. 233, 46 N.E. 591 (1897).

22. There is no explicit differentiation in Indiana common law. For the generally recognized common law classification, see 93 C.J.S., *Waters* § 12. The Alabama Supreme Court gives a good summary of the common law right to use: "It is the settled law of this state: (1) That a riparian owner has the right to use the stream and water that flows through his land for ordinary purposes and the gratification of the natural needs,

The former includes natural wants such as bathing, drinking, other household uses and watering of animals; the latter includes manufacturing, power generation, and commercial sale off the land.<sup>23</sup> Domestic use is reasonable even if it interferes with the domestic use of a lower owner.<sup>24</sup> An artificial use may not deprive another of his domestic use.<sup>25</sup> Where artificial uses conflict, a jury must determine who should prevail on a question of reasonableness.<sup>26</sup> Municipal water companies may be riparian owners, and although the people supplied by the company may use the water for domestic purposes, the use by the company is artificial since it involves selling water off the riparian land.<sup>27</sup> Therefore, a city must exercise eminent domain to preserve its supply if its use damages lower riparian owners.<sup>28</sup>

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even though the stream be consumed in such use; that such ordinary use or natural use extends 'to the use of the water *ad lavandum et potandum*, both by himself and all living things in his legitimate employment.' (2) Such proprietor has the right to the extraordinary or artificial use of the stream and its waters, provided that by the use of such water it is not forced back or unreasonably or improperly precipitated on the lands of adjacent proprietors, and after its use it is restored to its natural channel without unreasonable or material diminution before it leaves the land of persons diverting it or subjecting it to artificial uses, and provided, further, it is not so polluted as to unreasonably, injuriously, or materially affect its ordinary and extraordinary use by the proprietor of the land into which the unused waters flow by its accustomed channel." *Jones v. Tennessee Coal, Iron & R. Co.*, 202 Ala. 381, 382, 80 So. 463, 464 (1918). Indiana does recognize the distinction between domestic and artificial use in recent legislation: "The owner of land contiguous to or encompassing a public water course shall at all times have the right to the use of water therefrom in the quantity necessary to satisfy his needs for domestic purposes, which shall include, but not be limited to, water for household purposes, drinking water for livestock, poultry, and domestic animals. The use of water for domestic purposes shall have priority and be superior to any and all other uses." IND. ANN. STAT. § 27-1403 (Burns Supp. 1955).

23. Sale of water by a riparian water company to the people of the municipality is an artificial use regardless of the domestic use by the vendees. *City of Elkhart v. Christian Hydraulics*, 223 Ind. 242, 59 N.E.2d 353 (1945); *Valparaiso City Water Co. v. Dickover*, 17 Ind. App. 233, 46 N.E. 591 (1897). Irrigation is probably an artificial use although there is no judicial determination of the question in Indiana because it is only recently that farmers in the humid area have developed an interest in supplemental irrigation during the dry spells in the growing season. There are old decisions in western states, decided before these jurisdictions abrogated or modifies the riparian doctrine, which indicate that a riparian has a right to use water for irrigation on his riparian land but this right is limited by a similar right of others to irrigate. 67 C.J., *Waters* § 850. This amounts to no more than the right to use for any beneficial, artificial purpose.

24. See note 22 *supra*.

25. *Ibid*.

26. "What is ordinary and reasonable use is a question of fact." *Penn American Plate Glass Co. v. Schwinn*, 177 Ind. 645, 657, 98 N.E. 715, 719 (1912). Reasonableness must be determined in relation to the size of the stream and the reasonable needs of other riparian owners and not in relation to the necessities of one riparian's business.

27. "While a riparian owner may have a right to divert and use a reasonable amount of water from a bordering stream for some purposes, a water company does not have a right as a riparian owner to divert water from a stream in order to make a merchandise of it and distribute it to all the residents of a city." *City of Elkhart v. Christiana Hydraulics*, 223 Ind. 242, 258, 59 N.E.2d 353, 359 (1945).

28. IND. ANN. STAT. §§ 3-1701 to -1715 (Burns 1946 Replacement); *Matlock v. Bloomington Water Co.*, 196 Ind. 271, 146 N.E. 852 (1925); *Reuter v. Milan Water*

Pollution, formerly a question of reasonableness, is now largely governed by statute.<sup>29</sup> Liability was determined after considering the amount of pollution in relation to the quantity of the flowing water and the materiality of the damage;<sup>30</sup> often, however, the courts utilized a "natural flow" dictum that an owner was entitled to have the water flow to him unimpaired in quality as well as quantity.<sup>31</sup> Due care to prevent pollution is no defense, because the right of the lower owner to have pure water is a property right which attaches to the riparian land.<sup>32</sup> A statute declaring pollution a public nuisance has also given the public a right to pure water.<sup>33</sup> Therefore, no prescriptive right to pollute can be obtained; continued usage never converts an illegal act into a legal act.<sup>34</sup> The Stream Pollution Control Board of Indiana is authorized to enjoin pollution and force municipalities to provide adequate sewage reduction even if special bonding provisions are necessary.<sup>35</sup> As the state becomes

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Co., 209 Ind. 240, 198 N.E. 442 (1935); Indianapolis Water Co. v. Lux, 224 Ind. 125, 64 N.E.2d 790 (1946). For the power of a city to prevent upstream pollution, see IND. ANN. STAT. § 48-5401 (Burns 1950 Replacement).

29. IND. ANN. STAT. § 10-2502 (Burns 1956 Replacement) makes the obstruction of any navigable stream a misdemeanor. § 10-2503 declares it a misdemeanor to befool underground water or a stream. § 10-2605 declares it a misdemeanor to dump foreign matter into a stream. §§ 68-517 to -538 (Burns 1951 Replacement) created the Stream Pollution Control Board of the State of Indiana with the administrative power to order any legal entity to cease pollution and take necessary steps to prevent pollution with the further "power to bring any appropriate action in law or in equity in the name of the state of Indiana." §§ 35-2901 to -2913 (Burns 1949 Replacement) forbids the introduction of any harmful substance into waters of the state and authorizes suits in abatement. § 35-213 grants the State Board of Health administrative jurisdiction over pollution of water supply wherever the Stream Pollution Control Board has not been given jurisdiction.

30. *Barnard v. Sherley*, 135 Ind. 547, 34 N.E. 600 (1893); *Muncie Pulp Co. v. Koontz*, 33 Ind. App. 532; 70 N.E. 999 (1904).

31. *E.g.* *Tichenor v. Witherspoon*, 87 Ind. App. 79, 158 N.E. 514 (1927).

32. An action to enjoin pollution or for damages caused thereby is based on nuisance, not negligence. *Muncie Pulp Co. v. Koontz*, 33 Ind. App. 532, 70 N.E. 999 (1904). *Cf.* *Niagara Oil Co. v. Jackson*, 48 Ind. App. 238, 91 N.E. 825 (1910).

33. See note 29 *supra*.

34. 93 C.J.S. *Waters* § 50.

35. IND. ANN. STAT. § 68-528 (Burns 1951 Replacement). This legislation represents a reversal of the original Indiana common law position. In 1899, the Indiana Supreme Court held that a city, which was authorized by statute to build a sewage system, could release its untreated sewage into a stream and the riparians who were subject to unhealthy water and noxious odors were without remedy. *City of Valparaiso v. Hagen*, 153 Ind. 337 (1899). This viewpoint was well summarized, although condemned, by the Appellate Court in 1911: "Such watercourses are in the nature of natural sewers to carry off accumulated waters and deleterious substances, and riparian owners take their position on the banks of watercourses with notice that such position is superior to those below them and inferior to those above them, that farms, cities, and villages may gather along the banks, and that impurities, incident to population, trades and agriculture, that fall upon the surface, will in some way be cast into the stream, and said owner's enjoyment of it thus modified." *Niagara Oil Co. v. Jackson*, 48 Ind. App. 238, 243, 91 N.E. 825, 827 (1910) (dictum). The Appellate Court refused to extend this view of the right of a city to pollute and in 1928, held that pollution of a stream by a city pouring unpurified sewage therein constitutes a nuisance for which a lower

more densely populated, the abatement of pollution becomes increasingly important for health, recreation, and conservation purposes.

The riparian rights to a navigable body of water are the same as to non-navigable except that use cannot impair the navigability.<sup>36</sup> Navigability of rivers and lakes is a question of fact which must be determined according to federal law;<sup>37</sup> a legislative declaration that a body of water is navigable does not change the fact.<sup>38</sup> While restricted as to navigable waters,<sup>39</sup> a riparian may exercise full dominion over the surface of the water<sup>40</sup> as he owns the bed to midpoint<sup>41</sup> or, if a lake, to the extent of his boundary line.<sup>42</sup>

Since a riparian owner has the rights to store water and control its use, tort liability may accompany exercise of these rights. As large users prepare for their needs by constructing reservoirs, the question of tort liability will become more important. Indiana has adopted the rule of *Rylands v. Fletcher*,<sup>43</sup> at least in respect to polluted water, imposing liability without fault for injuries sustained by an escape of water from storage.<sup>44</sup> As to liability to outsiders who enter upon the water, Indiana has adopted the rule that a duplication of natural conditions is not the

riparian owner can recover his damages. *Frankfort v. Slipher*, 88 Ind. App. 356, 162 N.E. 241 (1928).

36. IND. ANN. STAT. § 10-2502 (Burns 1956 Replacement).

37. For a good discussion of the federal law on navigability and its relation to Indiana law, see State *ex. rel.* *Indiana Department of Conservation v. Kivett*, 228 Ind. 623, 95 N.E.2d 145 (1950).

38. "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. (10 Wall) 557, 563 (1870).

39. "It is the settled law in this country that lands underlying navigable waters within a State belong to the State in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purpose of navigation in commerce among the States and with foreign nations. . . ." *United States v. Hold State Bank*, 270 U.S. 49, 54 (1925). The riparian owner on a stream that was not navigable at the time the original patent to adjoining land was issued by the United States, holds title of the bed to the thread of the stream, but if the river was navigable as of the date of the original patent the riparian owner holds title to the low mark of the stream. 1933 OP. ATTY. GEN. 538 (Ind.).

40. This includes the right to restrict boating and fishing. *Batton Park v. Pollak*, 115 Ind. App. 32, 55 N.E.2d 328 (1944).

41. *Ross v. Faust*, 54 Ind. 471 (1876).

42. *Sanders, Jr. v. De Rose*, 207 Ind. 90, 191 N.E. 331 (1934).

43. L.R. 3 H.L. 330 (1868).

44. In developing an oil field, defendant pumped up and stored in tanks oil and salt water which escaped and flowed with the surface water down to plaintiff's land damaging the soil and vegetation. *Niagara Oil Co. v. Jackson*, 48 Ind. App. 238, 91 N.E. 825 (1910). A lake formed in an abandoned strip mine shaft. The water escaped into a ditch which overflowed plaintiff's land. *Central Indiana Coal Co. v. Goodman*, 111 Ind. App. 480, 39 N.E. 2d 484 (1942).



creation of an "attractive nuisance."<sup>45</sup> Therefore, injuries sustained even by children as the result of sudden drop-offs or other conditions which one would expect to find in natural bodies of water are not actionable,<sup>46</sup> and an owner can thus safely permit the public to enjoy recreational facilities on his property.<sup>47</sup>

The Indiana law of underground water is unsettled. In 1860, the Indiana Supreme Court adopted the English rule that controversy involving underground water "is not to be governed by the law which applies to rivers and flowing streams but . . . it rather falls within the principle which gives the owner of the soil all that lies beneath his surface. . . ."<sup>48</sup> The Court stated that if an owner by digging on his land drained his neighbor's water in the process, the inconvenience is *damnum absque iniuria*. The Court affirmed the principle of separate rules for underground and surficial water in 1864 because of the uncertainty of underground flowage.<sup>49</sup> In 1894 the Court limited any absolute property right in underground water when it upheld the constitutionality of an ordinance requiring the capping of a flowing well against the charge that this was a taking of property without just compensation.<sup>50</sup> Ten years later, the older view was all but abrogated by *Gagnon v. French Lick Springs Hotel Company*.<sup>51</sup> There, the plaintiff successfully enjoined defendants from pumping underground mineral water with the malicious intent of ruining the plaintiff's hotel and spa business by ma-

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45. *Plotzki v. Standard Oil Co.*, 228 Ind. 518, 92 N.E.2d 632 (1950); *Lockridge v. Standard Oil Co.*, 124 Ind. App. 257, 114 N.E.2d 807 (1953); *Anderson v. Reith-Riley Construction Co.*, 112 Ind. App. 170, 44 N.E.2d 184 (1942).

46. "Appellant takes the position that sharp drops and deep holes in an artificially constructed pool constitute traps and hidden or latent dangers. With this we cannot agree. Such conditions are also found in natural ponds, pools, lakes, streams, and other bodies of water, are common to nature and are not foreign to natural ponds, pools, lakes, streams, and other bodies of water, and are not considered as traps or hidden dangers." *Plotzki v. Standard Oil Co.*, 228 Ind. 518, 521, 92 N.E.2d 632, 634 (1950).

47. *Caveat*: Although the Indiana Appellate Court assumed the law was settled in their decision of the *Lockridge* case (see note 45 *supra*), the Indiana Supreme Court decision in the *Plotzki* case was three to two and the two dissents were exceptionally vigorous. As the personnel of the Indiana courts changes relatively rapidly, a future court could easily reverse this decision.

48. *New Albany and Salem R.R. v. Peterson*, 14 Ind. 112, 114 (1860). The case arose when the defendant railroad, in the course of developing their roadbed, made an excavation which caused the neighboring land owner's spring to go dry.

49. The plaintiff alleged that if the city located a cemetery next to him the subsurface flow of water would contaminate his spring. The Court explained that it could not deny the city its right to use its land on mere conjecture as the course and existence of underground flowage was often unknown and "the geologist has no knowledge which enables him to trace their channels." *City of Greencastle v. Hazelett*, 23 Ind. 186 (1864).

50. *Skaggs v. City of Martinsville*, 140 Ind. 476, 39 N.E. 241 (1894).

51. 163 Ind. 687, 72 N.E. 849 (1904).

terially diminishing the spring flow to plaintiff's land.<sup>52</sup> Holding that malicious, wasteful diversion of underground water is enjoicable, the Court ruled that "if the water flows in a definite channel underground, the same rules [*i.e.*, reasonable use] apply to it as apply to surface streams, and the land owner cannot use or destroy it at his pleasure."<sup>53</sup> The test for an underground channel was objective: did the defendant diminish the plaintiff's supply.<sup>54</sup> Indiana has no further cases on this subject.<sup>55</sup> If proof of the inter-relationship of the underground water level on plaintiff's and defendant's lands is sufficient to make riparian rules of reasonable use apply, then no separate rule exists in Indiana for underground water. Modern geological techniques which determine the underground flow of water can destroy the legal distinctions developed in the early nineteenth century.<sup>56</sup>

In seeking to prevent the supply of water—no longer an unlimited

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52. Gagnon and others sunk deep wells on their respective tracts in the valley and with powerful force pumps withdrew millions of gallons of mineral water which they wasted. As a result the springs of the hotel dried up and the hotel company was threatened with the loss of substantial business.

53. It is not clear from the language of the Court whether this statement is holding or dictum. Narrowly interpreting the case, the holding would be only that malicious, wasteful diversion of underground water is enjoicable.

54. The only test as to what constitutes an underground channel is this statement: "It appears, also, from the evidence that the connection between the springs on appellee's land and the subterranean waters on the land of the appellants is intimate and unmis-takable, and that it has been demonstrated by actual experience that an excessive flow of the waters on the land of the latter, induced by artificial and unlawful means, exhausts the water and entirely stops the flow of the springs on the land of the appellee." *Gagnon v. French Lick Springs Hotel Co.*, 163 Ind. 687, 698, 72 N.E. 849, 852 (1904).

55. The French Lick Springs case has been followed and developed by New York. In a case which arose from very similar facts, the New York Court of Appeals held that the use of underground water by one landowner must be reasonable in relation to the needs of surrounding owners. *Hathorn v. Natural Carbonic Gas Co.*, 194 N.Y. 326, 87 N.E. 504 (1909). See also *People v. The New York Carbonic Gas Co.*, 196 N.Y. 421, 90 N.E. 441 (1909). Wisconsin has held the contrary. A statute which required the capping of artesian wells to prevent wastage and consequential loss to neighboring land owners was declared unconstitutional as a taking of private property for private use without compensation. *Huber v. Merkel*, 117 Wis. 355, 94 N.W. 354 (1903) criticized in 1953 *Wisc. L. Rev.* 491.

56. "It is also contended that there is a distinction between condemning land for the purpose of procuring the use of a supply of water in a surface lake or reservoir, or stream running upon the surface, upon the one hand, and for the use of a supply of water in a subterranean body or stream, upon the other. No authority is cited to sustain the contention, and we can see no distinction." *Reuter v. Milan Water Co.*, 209 Ind. 240, 244, 198 N.E. 442, 444 (1935). "It was indeed unfortunate that the law of underground water began its development before modern engineering science gained knowledge of its movements. This accident developed legal concepts which no longer adequately reflect our scientific knowledge and ought to be dropped." 1953 *Wisc. L.R.* 491, 514. "The physical laws governing the movement of ground water are well established, and relatively simple engineering investigation will determine the direction of ground water motion. . . ." *Id.* at 514 n. 112. "[N]early all groundwater is moving to maintain the flow of surface streams." Coates, *Present and Proposed Legal Control of Water Resources in Wisconsin*, 1953 *Wisc. L. Rev.* 256, 262 & n.20.

resource—from limiting agricultural, industrial, and urban expansion, the adequacy of the riparian doctrine should be re-examined. The obvious defect with the riparian doctrine is that the non-riparian owner has no right even if he could make beneficial use of water which might otherwise be wasted.<sup>57</sup> The natural flow theory of riparian rights has no place in modern America; it leads to absurd results because it prevents any owner from making a material use which will change the stream flow from the condition which existed when Indiana was wilderness.<sup>58</sup> The reasonable use theory is adaptable to changing conditions; however, the industry which makes a large investment in plant facilities or the farmer buying irrigation equipment has no legal assurance that the use he intends to make of the water will continue to be “reasonable” throughout the life of the equipment.<sup>59</sup>

Western states, where water is a scarce natural resource, illustrate one approach to this problem. Confronted with large mining and irrigation requirements, the Western States by necessity developed the doctrine of prior appropriation, a “first come, first served” approach, if the use

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57. To some observers this is a serious social loss; however if the non-riparian needs the water he has the right to buy and the riparian has the right to sell reasonable quantities.

58. This strict view was rejected by Kent when he transposed the French Civil Law of riparian rights into the common law. See note 10 *supra*. Because of its absurd restrictiveness, this theory has been treated sarcastically by judges, particularly in the western states where not even the “reasonable use” theory was adequate for the development of the resources of the country. Busby, *American Water Rights Law*, 5. S.C.L.Q. 106, 117-129 (1952).

59. This problem is becoming acute among the farmers of this state. Since recent experiments have demonstrated that supplemental irrigation is profitable on field crops and pastures in the humid mid-west, many farmers have become interested in buying the necessary pipes, pump, and nozzles, which equipment would cost approximately \$2500.00-\$8000.00 for family farms. This equipment would become useless if the farmers were denied the use of the many small streams running through the state, and it would be equally useless if several neighboring farmers all wished to use water from the same source during a dry period in the summer. To warn the farmer against relying on a source of water when planning such a purchase, the General Assembly included the following language in its Water Rights Act of 1955: “Users of such water who may hereafter institute withdrawal of water for artificial uses from natural streams or lakes, or other natural body of water or who increase any such present use, shall be subject to any regulation on such uses or increased uses which may be enacted into law by the Indiana general assembly.” IND. ANN. STAT. § 27-1405 (Burns Supp. 1955). In addition, the Indiana Department of Conservation, under the authority of the Ground Water Conservation Act of 1951 (see note 71 *infra*) announced a policy to preserve the ground water level even if it means complete restriction or prohibition of the use of underground water for irrigation: “It is the purpose of such notice to discourage the installation of expensive equipment which may become useless as a result of further orders of this Commission in accomplishing the objective herein set forth.” Indiana Department of Conservation, Resolution of July 28, 1955. See also Indiana Department of Conservation, Memo on Irrigation from the Superintendent of Conservation Officers, July 27, 1955.

is beneficial.<sup>60</sup> No individual user would have had sufficient water to develop the resources of the country if the riparian doctrine of equal shares had been adopted as a rigid rule.<sup>61</sup> Following the precedent of the Western states is often suggested as a solution to the water problems of the Eastern states. However, the appropriation doctrine, essentially a system of rationing necessitating detailed government regulation,<sup>62</sup> is unsuited for Indiana with its average annual precipitation of approximately forty inches. Indiana, unlike the Western states, receives enough water to meet the potential demand.<sup>63</sup> Management and storage of excesses to insure an ample water supply in the right place at the right time are the real problems. Obviously, efforts to increase the available supply should be exhausted before a policy of rationing should be instituted.

Legislative recognition of the need for water conservation in Indiana has been comparatively recent. In 1943, the Department of Conservation was authorized to cooperate with the United States Geological Survey to gather information necessary for planning and adjudication of water rights.<sup>64</sup> The Flood Control Act of 1945, recognizing that the diminishing water resources of the state should be accumulated and protected to prevent loss and waste, created a commission to study a comprehensive program of flood control and water conservation.<sup>65</sup> In 1947, the General Assembly passed the omnibus Conservancy Act<sup>66</sup> which provided a procedure by which people in any locality could create and finance a conservancy district for flood prevention, drainage, reclamation, irrigation, storage of water, sewage disposal, or wild life and recreational facilities.<sup>67</sup> This Act recognized the need for preparation for the future, flexible to fit local conditions, and responsive to public interest to achieve the varied goals of water management.<sup>68</sup> The procedural machinery, however, was cumbersome and the specific powers of the district com-

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60. The seventeen states lying west of the tier of states on the western bank of the Mississippi have severely modified the riparian doctrine or renounced it. The average annual rainfall in most of these states is less than 25 inches, ranging from arid to semi-arid. Busby, *American Water Rights Law*, 5 S.C.L.Q. 106 (1952).

61. *Ibid.*

62. *E.g.* water legislation occupies four volumes of Deering's California Code (1954).

63. See note 1 *supra*.

64. IND. ANN. STAT. § 60-739 (Burns 1951 Replacement).

65. IND. ANN. STAT. §§ 27-1101 to -1123 (Burns 1948 Replacement).

66. IND. ANN. STAT. §§ 27-1201 to -1283 (Burns 1948 Replacement).

67. *Id.* at 27-1203.

68. This act could be utilized by predominantly rural areas to store water for irrigation, by predominantly urban areas to secure and store water for domestic and industrial use, by recently heavily settled areas to secure sewage disposal, in general for better drainage, and for other purposes which the local citizenry envisaged were necessary for future development.

mission were uncertain.<sup>69</sup> The problems raised by this statute are academic, because the Indiana Supreme Court in 1956 declared the Act unconstitutional on the grounds of a defective title.<sup>70</sup>

The General Assembly legislated directly on conservation and regulation of use by the Ground Water Conservation Act of 1951<sup>71</sup> and the Water Rights Act of 1955.<sup>72</sup> These acts do not delineate rights as between adverse parties, but declare a public interest in the water resources of the state.<sup>73</sup> By the Act of 1951, the Department of Conservation was empowered to designate certain areas of the state as "restricted" should the Department find the withdrawal of ground water exceeding or threatening to exceed the natural replenishment.<sup>74</sup> When an area is declared restricted, users other than those supplying water to cities, shall not increase their usage more than 100,000 gallons per day without a permit to be granted only if the increase serves a reasonable and beneficial purpose.<sup>75</sup> The 1955 Act created a study commission to recommend legislation necessary for maximum use of surface water resources.<sup>76</sup> Further, it codified the common law right as to priority of a domestic use and the right to pump or divert into a reservoir in periods of excess

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69. The first step necessary in establishing a district was the signature of 500 freeholders or the majority of freeholders in the envisioned district. It is difficult for the most fore-sighted, public spirited people to secure so many signatures when the bulk of the citizenry "doesn't miss the water 'till the well runs dry." The promoters were further obligated to post a bond for all costs if the district were not established. If the district was established, however, the commission was apparently granted broad powers and probably could assess for any allowable purpose even though the petition from which the district was created only called for one objective.

70. There was also a concurring opinion which questioned the wisdom of declaring the act unconstitutional because of the failure of the title to appraise the reader that the act created special courts to establish and administer the districts. As the special courts were only a procedural device to accomplish the substantive change, the concurring opinion stated that they need not be in the title and, further, that the precedent of declaring acts unconstitutional because of title defects placed many more acts in danger and increased the perils of draftsmanship. This opinion concurred on the grounds that making the judges of the circuit courts also the judges of such special courts was not authorized by the Indiana Constitution. *Indiana ex. rel. Pennsylvania R.R. v. Iroquois Conservancy District*, 133 N.E.2d 848 (Ind. 1956).

71. IND. ANN. STAT. §§ 27-1301 to -1313 (Burns Supp. 1955).

72. IND. ANN. STAT. §§ 27-1401 to -1405 (Burns Supp. 1955).

73. "It is hereby declared a public policy of this state in the interest of the economy, health and welfare of the state and its citizens, to conserve and protect the ground water resources of the state and for that purpose to provide reasonable regulation for its most beneficial use and disposition." IND. ANN. STAT. § 27-1302 (Burns Supp. 1955). "Water in any natural stream, natural lake, or other natural body of water in the state of Indiana which may be applied to any useful and beneficial purpose is hereby declared to be a natural resource and public water of the state of Indiana and subject to control and/or regulation for the public welfare. . . ." IND. ANN. STAT. § 27-1402 (Burns Supp. 1955).

74. IND. ANN. STAT. § 27-1303 (Burns Supp. 1955).

75. IND. ANN. STAT. § 27-1305 (Burns Supp. 1955).

76. See note 4 *supra*.

flow.<sup>77</sup> It encouraged private construction by declaring that those who build reservoirs have the exclusive right to use the increased flowage resulting from the downstream release of impounded waters.<sup>78</sup> Artificial users were warned that any new use or increased use made after the passage of the act will be subject to future regulation.<sup>79</sup>

This recent legislation and any future legislation must be carefully examined as to constitutionality. Problems may arise under the Fourteenth Amendment to the Federal Constitution,<sup>80</sup> which prohibits the taking of property without due process, or the Indiana Constitution which prohibits the taking of private property except for public use and only if just compensation is paid.<sup>81</sup> The right of an owner to use water found under the surface and the right to use water from an adjacent body of water are so imbedded in the common law of the Eastern states that they are considered property rights incident to the land.<sup>82</sup> It is common knowledge that land underlain with a good water supply or served by a good flowing body of water commands a higher price than land devoid of water. If by legislation an owner is limited in his use to protect other owners served by the same body of water, either surficial or subterranean, the regulation is subject to scrutiny to determine if it is a reasonable exercise of police power; if an owner is limited so that the water can be given to one not physically connected with the body of

77. IND. ANN. STAT. § 27-1403(2) (Burns Supp. 1955). As to the common law: "The right to erect a dam and to use the water always has been derived from riparian ownership. . . . If the plaintiff in the instant case was seeking or threatening to consume the waters of the Tippecanoe River, or to turn them aside . . . a different question would be presented. . . . But, in this case the dam . . . will merely retard the flow of the water in the river to the extent of filling the pond it creates, after which the water will flow over and past the dam and down the channel of the river as before. . . ." *Lowe v. Indiana Hydro-electric Power Co.*, 197 Ind. 430,437, 151 N.E. 220, 222 (1926).

78. IND. ANN. STAT. § 27-1403 (3) (Burns Supp. 1955). This is an important provision to protect those who pay the cost of reservoirs. *e.g.* The Indianapolis Water Company's Geist Reservoir is located in the northeast corner of Marion County several miles up Fall Creek from the purification plant of Keystone Ave. in Indianapolis. Water is not piped from the reservoir but is released in periods of low flow and comes down the regular channel to the intake station. Without such legislation, the city of Lawrence or individuals located below the reservoir might be permitted to avail themselves of the increased flowage without contributing to the cost, thus, depriving the Water Company of the fruits of their planning and expense.

79. See note 59 *supra*.

80. U.S. Const. Amend. XIV, § 1.

81. Ind. Const. art. 1 § 21. IND. ANN. STAT. §§ 3-1701 to -1726 (Burns 1946 Replacement).

82. The right of a riparian proprietor to have the water in the stream flow to him is an absolute and inseparable incident to the land. *City of Logansport v. Uhl*, 99 Ind. 531, 537 (1885). "So far as water was diverted from its natural course, or from the uses to which the riparian owner would otherwise have been entitled to devote it, such owner is undoubtedly entitled to compensation." *Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co.*, 142 U.S. 254, 276 (1891).

water, the legislation is vulnerable.<sup>83</sup> Although current precedents indicate that the United States Supreme Court will not interfere with a state's regulation of its natural resources,<sup>84</sup> the Indiana Supreme Court remains a vigilant guardian of rights guaranteed by the state constitution. It would appear that the Indiana Court would demand proof that such legislation is a reasonable exercise of the police power. The outcome of litigation could be the same as in Wisconsin, where even the patently reasonable requirement of capping artesian wells to protect other owners over the same basin was declared unconstitutional,<sup>85</sup> or as in California, where a constitutional amendment was necessary to deprive riparian owners of the right to the increased flowage of rivers *in flood stage*.<sup>86</sup> Although radical legislative changes are not necessarily unconstitutional, it is a wiser and safer approach to work within the existing legal doctrine, enacting only such laws as are clearly reasonable for the welfare of the state.

Certainly, the natural flow theory should be legislatively abandoned by codification of the reasonable use theory, therefore denying a riparian proprietor relief until he could show material damage. Within the reasonable use theory interests can be balanced, wasteful practices curtailed, and artificial uses of the greatest benefit can be maximized. Furthermore, the riparian doctrine should be extended explicitly to subterranean water because the hydrological cycle and man's need for water do not conform to the legal distinction between water found upon or under the

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83. "The power of eminent domain may be exercised only for public purposes and not for a private purpose, and the taking of private property for a private use violates the constitutional rights of the owner. . . . The power of eminent domain cannot constitutionally be delegated for an essentially private purpose, even though a public purpose will be incidentally served thereby. On the other hand, a use which is in itself of a public character justifying the exercise of the power of eminent domain does not lose its character as such by the fact that the exercise of the power for such use will incidentally result in a private use or benefit." *Kessler v. City of Indianapolis*, 199 Ind. 420, 427, 157 N.E. 547, 549 (1927). "Whether a particular use is public or private is a judicial question, and must be determined by the courts. A presumption exists in favor of the public character of a use declared by the legislature to be public, but it is not conclusive upon the courts." *Saxauer v. Star Milling Co.*, 173 Ind. 342, 347, 90 N.E. 474, 476 (1910).

84. "With respect to such rights, we have held that the law of the State, as declared by its Supreme Court is controlling as a rule of property." *Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co.*, 142 U.S. 254, 272 (1891). "It is also true that as to every stream within its dominion a State may change this common law rule [Kent's doctrine of riparian rights] and permit the appropriation of the flowing waters and such purposes as it deems wise." *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, 702 (1899). However, a state may not permit such an appropriation of a non-navigable stream flowing into navigable waters as to impair the navigability of the latter.

85. *Huber v. Merkel*, 117 Wis. 355, 94 N.W. 354 (1903).

86. *Herminghaus v. Southern Cal. Edison Co.*, 200 Calif. 81, 252 Pac. 607 (1926).

surface.<sup>87</sup> Two goals must be accomplished by legislation. One is a clear delineation of private rights; the other is the creation of procedures for local organization and a favorable substantive law to encourage storage and other conservation measures. Essential to the success of legislation and administrative regulation is accurate information. To supply this, continuing appropriations would be necessary for geological and hydrological data, stream flow records, and determination of ground water levels.<sup>88</sup> Of invaluable assistance would be a statute requiring all well drillers to submit pertinent data on underground conditions.<sup>89</sup> Also important are specific measures to prevent waste. To this end, a statute should require the capping of artesian wells;<sup>90</sup> another should require meterization by all water companies so that individuals will have an incentive to conserve which is not present when rates are based on a fixed monthly charge.<sup>91</sup> Pollution abatement activity should be mandatorily increased.

An inherent difficulty in the reasonable use theory is the uncertainty that attends investment in specialized equipment for maximum exploitation of water because changing economic or physical conditions may change the fact of reasonableness long before the equipment has depreciated. The fear of an injunction or suits for damages may deter a riparian from investments which are desirable for the growth and development of Indiana. This problem could be partially solved by conferring licensing power upon an administrative body to determine upon voluntary application prior to going forward with a project that the proposed use is reasonable. This license would protect an applicant for a reasonable time, as determined by the commission, but necessary flexibility would be destroyed if a licensee were given a vested perpetual interest in his use, or if the license were issued for a long period without periodic reexamination. Clearly, a licensee should be protected from the loss of use of facilities by injunction, but it may be only fair that he reimburse other riparians deprived of an equally beneficial use. He could still reasonably estimate his costs in planning. Although it provides

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87. See note 56 *supra*.

88. This work is currently being done by the Indiana Department of Conservation in collaboration with the United States Geological Survey.

89. Such a bill was introduced in the last legislature. See INDIANA, ENGRSOSSED HOUSE BILL No. 591, 1955.

90. With the precedent of *Skaggs v. City of Martinsville*, 140 Ind. 476, 39 N.E. 241 (1894) and *Gagnon v. French Lick Springs Hotel Co.*, 163 Ind. 687, 72 N.E. 849 (1904) such a statute should be declared constitutional in Indiana.

91. "Meterization in the years 1924-32 and the economic depression of the 1930's so greatly reduced the use of water that water storage did not become necessary until the advent of World War II." Advertisement of the Indianapolis Water Company which appeared in the Indianapolis Newspapers, Aug. 9-10, 1954.



relative certainty, the licensing program would be difficult to administer because of the possibility of many rival claimants and the necessity for judicial review.

Indiana can have an adequate supply of water only if those who need it will prepare for the future by storing water in periods of excess flow so that through the year there will be enough in the right place.<sup>92</sup> Maximum legal protection, compatible with the public interest, should be given to these individuals or groups who prepare for their own needs and make water available which would otherwise pass through the state increasing the possibility of flood damage. Legislation should be enacted which would relieve enterprisers of tort liability, *e.g.*, they should not be responsible for non-negligent escape of the stored water<sup>93</sup> and should be protected explicitly from any liability which results from duplication of natural conditions.<sup>94</sup> Finally, they should be explicitly granted the right to full dominion and control over the water which they have stored in periods of excess flow, including the right to sell it to non-riparian owners.<sup>95</sup>

Major legislative effort should be directed to finding a workable replacement for the invalid Conservance Act of 1947.<sup>96</sup> It should be separate from the statutes affecting the substantive law of water rights, making it clear that the substantive law applies to all and not only to those whose use of water follows from the provisions of such conservancy legislation. A new Conservancy Act must provide a facile procedure by which small individual users, such as farmers and unincorporated villages, can organize and receive authority to dam rivers and construct reservoirs. The old Act placed the organizational burden of overcoming local inertia on the individuals who foresaw a need for special facilities. To correct this, the act should provide for assistance by such a state agency as the Flood Control and Water Resources Commission, which is expert in water management problems.<sup>97</sup>

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92. *E.g.* When the United States Gypsum Co. located a plant near Shoals, Ind. to develop the large gypsum deposits of southern Indiana, water supply was a critical problem. There was no adequate underground supply. In order to make operation in southern Indiana feasible, the company dammed a stream and built a lake adjacent to its factory to provide adequate water supply.

93. A statute which explicitly declares the rule of *Rylands v. Fletcher* inapplicable in Indiana is necessary. There should be liability only for negligent escape of stored water.

94. An explicit statute would prevent judicial reversal of the present Indiana position. See note 47 *supra*.

95. Explicit statutory authority is more reassuring than is interpretation of old cases to those planning to invest their money in long range improvements.

96. See note 70 *supra*.

97. To set up a district under the old Conservancy Act, the petition was filed in a court. Such procedure has the advantage of being traditional. Judges, however, are not

Probably the most expeditious procedure would be for individuals or groups who see the local needs to apply to the state commission for a conservancy district. After determining the nature of the problem and the feasibility of proposed solutions, the commission could formulate, subject to hearings and judicial review, a definite plan and mark off the geographical limits of the district. Such a commission would also be able to coordinate the operations of one district with another, and with municipalities and other governmental agencies concerned with the problems of water management.<sup>98</sup> Maximum use must be made of every district, *e.g.* the prime purpose of a given district may be flood control, but the district administrators should be free to sell the retained water to farmers, towns, and industries, and where possible, make recreational facilities available for public enjoyment.<sup>99</sup>

Provision for adequate financing is most essential. Bonding power, coupled with the power to tax or assess to retire the obligations, are required for the large capital outlays which would be necessary in many of the conservation plans. Since one conservancy act has been declared unconstitutional, a new act must be drafted with great care so that investors will not hesitate to purchase the obligations necessary to finance the projects Indiana needs for its future development.<sup>100</sup>

## INDIANA CHATTEL SECURITY DEVICES v. ARTICLE 9 UNIFORM COMMERCIAL CODE

In 1955 the Indiana Legislature added to the already overburdened area of chattel security statutes by enacting a factor's lien act.<sup>1</sup> In so

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expert in water management either as to recognition of problems or the feasibility of alternative methods of solution. Under this procedure each district became a separate entity without provision for an interchange of ideas and experience with other districts having similar problems.

98. There are many federal agencies involved. *e.g.* The Army Corps of Engineers, The Soil Conservation Service, the United States Geological Survey.

99. The goal of maximum beneficial use must be carefully balanced with the goal of governmental non-interference with the individual. The old Conservancy Act was deficient in this respect because of the wide powers given the district commissioners to pursue objectives of water management not petitioned for and possibly not desired by the people affected.

100. When the Pennsylvania RR. attacked the constitutionality of the Conservancy Act, an *amicus curia* brief was filed by the firm of Ross, McCord, Ice, and Miller calling attention to the fact that there were two issues of bonds outstanding from existing conservancy districts. The Court did not rule on the question of the bonds validity but did call attention to a line of cases which indicated that the obligations of the district, even though unconstitutionally created, were valid. *Indiana ex rel. Pennsylvania RR. v. Iroquois Conservancy District Court*, 133 N.E.2d 848, 855 n.10 (Ind. 1956).

1. IND. ANN. STAT. §§ 43-1201 to -1210 (Burns Supp. 1955).