



Winter 1968

A Decade of Exercise under the Iowa Water Permit System - Part Two

N. William Hines

Recommended Citation

N. W. Hines, *A Decade of Exercise under the Iowa Water Permit System - Part Two*, 8 NAT. RES. J. 23 (1968).

Available at: <https://digitalrepository.unm.edu/nrj/vol8/iss1/4>

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact disc@unm.edu.

A DECADE OF EXPERIENCE UNDER THE IOWA WATER PERMIT SYSTEM—Part Two*

N. WILLIAM HINEST†

B. Procedure For Processing Original Applications

1. The Application

As befalls any new regulatory agency created to perform a licensing-type function, the first few years are primarily devoted to processing the flood of original applications. During the first year and a half of operation (the agency was created in mid-1957) permit applications were received from 762 users, excluding highway applications. Almost exactly half of the applications during this initial rush involved irrigation uses. Over time the volume of irrigation applications slowed down to an average of about 16 per year between 1960 and 1965 while the numbers of applications from most other types of uses have increased gradually.¹⁸⁴

The most noticeable increase over time has been in applications to impound water for storage purposes. Although it might be hypo-

* Part One of this article appeared in 7 Natural Resources J. 499-554 (1967).

† Professor of Law, University of Iowa, Iowa City.

184. The following table shows the frequency of original applications over time. The early rush of irrigation permits is the most striking feature of the table. The general increase in storage permits is also noteworthy.

TABLE 6
Applications Received

Use	1957*	1958	1959	1960	1961	1962	1963	1964	1965**
Industrial									
Materials Production	22	125	74	39	32	16	18	26	6
Power Production	16	15	0	1	1	0	0	0	0
Food Processing	3	4	5	4	1	3	2	5	1
Manufacturing	3	6	4	3	2	6	5	3	1
Air Conditioning	0	5	2	1	3	0	0	0	0
Irrigation									
Farms	253	135	37	10	10	11	24	20	7
Golf Courses	6	4	1	2	2	2	6	8	1
Specialty Crops	41	24	3	1	5	6	1	10	1
Municipal	13	26	13	10	8	16	11	7	4
Recreation	8	10	5	1	1	5	2	3	0
Storage	2	41	66	51	64	57	97	98	50
Other	0	0	2	2	3	2	2	3	4
Total	367	395	212	125	132	124	168	183	75

* 1957 figures represent approximately one-half year.

** 1965 figures cover only the first six months of the year.

thesized that these applications represent stream irrigators who are endeavoring to assure the availability of water should the flow in their stream source diminish to the protected level, a check of the permits does not bear this out. Most are small impoundments created for soil conservation and livestock watering purposes.

The procedure evolved for processing original applications for diversion, storage, or withdrawal of waters of the state of Iowa are relatively complex. However, a Procedural Guide, published by the Natural Resources Council, which contains sample forms, detailed instructions for filling out applications, and hearing procedures, helps to relieve this situation.¹⁸⁵

The Council has provided five basic forms. The form to be used depends upon the intended use of the water. There are application forms for the particular uses of highway construction, irrigation, storage, and sand, gravel, or rock production. Also, a general form is provided for other users who intend to divert, store, or withdraw water.

The general application form for water use requires an identification of the intended source and the exact location of the point of withdrawal, the intended use of the water, the maximum rate and minimum quantity of water desired, and period of the year that withdrawal is desired. The application must be accompanied by the statutory filing fee of \$15.00 and by a map accurately portraying the points of diversion or withdrawal, use, and discharge of water. The specialized application forms vary from the general one only as their particular use requires.

The highway form contemplates water use in conjunction with a certain road construction project. The irrigation form requires specification of the size and description of the land to be irrigated. Also, the application should indicate not only boundaries and water sources, but also topographical features of the land to be irrigated and man-made structures thereon. The storage form requires, in addition to the normal information, the drainage area of the impoundment and, in cases where the storage area is to be located on a stream, an explanation of the provisions to be made in the impounding structure to assure a continuance of flow. If the water is to be stored for subsequent withdrawal and use, either the general form or the appropriate special form must accompany the storage permit application. The form for use of water in the production of sand,

185. Iowa Natural Resources Council, *Procedural Guide* (1961). [Hereinafter cited as *Procedural Guide*]

gravel, or rock materials additionally requires the applicant to state a division between the water lost by evaporation or hauled away in the product and that which is merely pumped from the pits. The application in each case is to be submitted by the person or persons having legal jurisdiction by ownership, lease, or easement over the area where the water is to be diverted or withdrawn and used.

When the application is received in Des Moines, it is reviewed by the Commissioner. If the application is incomplete or obviously erroneous, the Commissioner may request additional information or a new application. Likewise, if the \$15.00 fee is not enclosed, the application may be held up. Once the application is determined to be correct and complete, a time and a place for a hearing is set. Notice of the hearing is then published once each week for two consecutive weeks in a newspaper within the county in which the permit is sought. The date of the last publication must not be less than ten nor more than thirty days before the hearing. A copy of the notice is sent to interested organizations and officers of the state. Notices are also sent to any person who has requested in writing that he be mailed a copy of the notice of any hearing affecting that area.¹⁸⁶

2. Pre-hearing Investigation

Prior to the actual hearing, the hearing officer may conduct an informal pre-hearing investigation.¹⁸⁷ This occasion is used to ques-

186. Iowa Code §455A.19 (1962). The following is an example of the notice ordinarily distributed by the Commissioner:

NOTICE OF HEARING ON AN APPLICATION
FOR A PERMIT TO STORE WATER
IN WOODBURY COUNTY, IOWA

Notice is hereby given that there is now on file in the Office of the Iowa Natural Resources Council, State House, Des Moines, Iowa an application from Raymond Petersen for a permit to store water for erosion control and recreational use upon his land generally described as the NE ¼ Section 32, T88N, R42W, Woodbury County, Iowa.

Applicant requests a permit to store water in the maximum amount of 33.8 acre-feet at a maximum rate of natural runoff from 199 acres throughout each year.

Notice is further given that a public hearing will be held at 1:30 P.M., DST, on May 16, 1966, Room 526, State Office Building, Des Moines, Iowa, at which time and place or at any adjournment, the Water Commissioner or his Deputy will take evidence by the applicant and any other person either in support of or in opposition to the granting of a permit.

R. G. Bullard
Water Commissioner

187. The statute requires the Council to "cause to be made an investigation of the effect of such (requested) use upon the material flow of such watercourse, the effect of any such use upon the owners of any land which might be affected by such use, and the effect of any such use upon the state comprehensive plan for water resources. . . ."

tion the applicant about any unusual aspects of his application. The effect that various modifications might have on the applicant's operation are discussed. Frequently, the hearing officer will inform the applicant of relevant Council policies pertaining to the applicant's use, and he will ordinarily explain some of the guidelines used by the Commissioner.

When the hearing is held on or reasonably near the location of the proposed beneficial use, an informal inspection of the premises and equipment is usually made by the hearing officer just prior to the hearing. This gives the hearing officer first-hand knowledge of what is actually proposed and enables him to make a more informed determination.

One example of the utility of this informal pre-hearing meeting relates to an irrigator's request for an unreasonable amount of water. The policy of the Council has been to limit irrigation permittees to an annual use of not in excess of 18 acre inches of water in the western part of the state and 15 acre inches in the eastern part.¹⁸⁸ This policy is grounded in scientific data showing that these amounts are the maximum that could be beneficially applied in Iowa. Often the applicant applies for an amount of water not reasonably related to his needs. In such a situation, the Commissioner takes an active role and may attempt to persuade the applicant to decrease, or where appropriate, increase his requests to conform to his needs.

The purpose of this informal investigation by the Commissioner is essentially twofold. It provides the Commissioner with an opportunity to get a good look at the applicant's needs and the possible means of satisfying those needs. At the same time, it affords the applicant an opportunity to learn what will be required of him and perhaps to obtain an assessment of the efficiency and possible improvements of his system. The whole process is very similar to a pre-trial conference where all concerned can iron out any small differences and determine the real issues to be emphasized at the hearing. The hearings on highway and storage applications are usually held in the Commissioner's office in Des Moines. Hearings on applications for other uses generally are held in the county in which the use will be made.¹⁸⁹

188. These limits are not inflexible. If the applicant can demonstrate a need for a greater amount of water owing to exceptional circumstances, the standard amounts may be exceeded. Most commonly such enterprises as orchards or truck farms may receive permits for irrigation applications in excess of the normal maximums.

189. Interview with Deputy Water Commissioner Clifford Peterson in Iowa City, Iowa, November 8, 1965.

3. Hearings

The hearing is held at the time and place designated in the notice, with the Water Commissioner or one of his deputies acting as hearing officer. Ordinarily about 36 days now elapses between the time application is made for a permit and the date of the hearing.¹⁹⁰ This period varies somewhat according to the type of use involved, but in all cases it is considerably less than what it was during the earlier years of administration. During the initial flood of applications the Council decided as a matter of policy to postpone the hearings on applications to withdraw stream water for irrigation.¹⁹¹ The protected minimum flows were not yet set so it would have been difficult, if not impossible to properly appraise the applications. Any serious prejudice from this policy of deferment was seemingly removed in most cases by invoking the statutory authorization to continue the

190. The table below indicates by uses the average lapse of time in days between the date an original application was received by the Commissioner and the date a hearing was held. The number of permits included in each classification is shown at note 202 *infra*. The range in time lapses is substantial. The four recreation permits granted in 1960 spent an average of 494 days in the hands of the Commissioner before a hearing was held. At the other extreme, the ten applications for food processing in 1962 and hydrostatic testing in 1961 and 1965 required an average of only twenty-three days before a hearing was held.

Table 7
Time Lapse Between Application and Hearing

<i>Use</i>	1957*	1958	1959	1960	1961	1962	1963	1964	1965**
Industrial									
Materials Production	NI†	124	183	99	39	31	32	33	28
Power Production	NI	89	337	NI	89	NI	NI	NI	NI
Food Processing	NI	61	171	28	49	23	28	31	28
Manufacturing	NI	85	110	33	62	25	31	33	33
Air Conditioning	NI	32	159	36	25	NI	NI	NI	NI
Irrigation									
Farms	53	177	265	318	185	80	38	46	36
Golf Courses	NI	128	402	271	28	28	34	29	46
Specialty Crops	NI	144	246	266	49	28	NI	28	31
Municipal									
Recreation	NI	96	120	120	24	29	32	293	27
Storage	NI	79	226	494	32	244	60	48	25
Other	NI	58	52	36	30	27	38	30	38
Average for all uses	NI	NI	34	28	23	25	28	29	23
Average for all uses	48	127	212	170	42	42	36	46	36

† NI means no permits were issued in this year for this use.

* 1957 figures represent approximately one-half year.

** 1965 figures represent only the first six months of the year.

191. Interview with Water Commissioner Richard Bullard in Iowa City, Iowa, Oct. 20, 1965.

existing use pending determination on the application. Possibly some applicants for new uses were harmed by the policy, but no evidence of complaints was found.

Under authority of the water statute, the Natural Resources Council has promulgated general rules of procedures for the conduct of hearings.¹⁹² The rules provide that the applicant may either represent himself or be represented by counsel at the hearing. In point of fact, today many applicants do not appear at all, but elect rather to stand on their application.

The hearing is public but other interested persons who wish to offer evidence or enter an appearance at the hearing must sign the register furnished by the hearing officer. Briefs and opening statements are allowed but are not necessary. When a person desires to give an opening statement, he must do so immediately prior to the presentation of his evidence. Stipulation of facts between the parties prior to the hearing is encouraged. However, no stipulation is binding upon the Water Commissioner.

The rules place upon the applicant the burden of proof in establishing the necessity and propriety of a permit. The necessity and propriety are established by showing the following factors:

- (1) That there is water available.
- (2) That the applicant has the present ability to put the water to the proposed beneficial use.
- (3) That the use to which the water is to be devoted is consistent with the policies and principles of beneficial use as set forth in Chapter 455A, Iowa Code 1958, as amended.
- (4) That the proposed diversion, storage, or withdrawal of water will not be detrimental to the public interest, including drainage and levee districts.
- (5) That the proposed diversion, storage, or withdrawal of water will not be detrimental to the interests of property owners with prior or superior rights who might be affected.¹⁹³

There is no standard set for the level of proof of the evidence presented but presumably it is like that of civil trials, that is, a preponderance of the evidence.

In establishing such evidence, witnesses can either testify in narrative form or in response to questions asked. The Commissioner has discretion to allow leading questions. Hearsay is admissible, as are

192. See Procedural Guide III F.

193. *Id.* at §7.

exhibits which are accompanied by proper foundation testimony. All persons are given the right of cross-examination of any witness. However, it appears by statute that an interested person not a party cannot cross examine the witness himself but must do so through an attorney.¹⁹⁴ At any time during the hearing, the hearing officer has the prerogative to call and to examine any witness himself.

Except for the provision requiring a party to give his opening statement immediately prior to the presentation of his evidence, the order of the hearing follows the basic order of a court trial in Iowa. Testimony and evidence of the applicant and persons supporting the application is first presented. This is followed by testimony and evidence of persons opposing the application. Then the closing arguments of the applicant and those in support of the application are heard, followed by the closing arguments of the opponents. The applicant is reserved the right to make a final rebuttal argument.

There is no requirement either by statute or Council rule for preserving a record of the hearings on an application. However, the policy of the Commissioner is to make a transcription of each hearing through the use of a tape recorder. The hearing tapes are kept at least until after the period of appeal to the Council expires, 30 days from the date of the filing of the final determination. In addition to serving as an invaluable tool for helping the hearing officer review the testimony when he is writing the final determination, the tapes are also valuable in case an appeal is filed with the Council.¹⁹⁵

Once the hearing has been concluded, it cannot be reopened unless new evidence becomes available which could not, in the exercise of reasonable diligence, have been presented at the original hearing. The motion for reopening may be made within 30 days before the filing of the determination or within 30 days thereafter. The Commissioner must then give ten days written notice by ordinary mail of the time, date, and place of the reopened hearing to each person who filed an appearance at the original hearing and to the person requesting a reopening of the hearing. Notice also is given to per-

194. Iowa Code § 455A.19(4). "Any interested person may appear and present evidence at the hearing, and may be represented by counsel, who shall have the right to question others who present evidence." Such a rule seems a little ridiculous. The considerable discretion vested in the hearing officer would appear to allow him to permit a party without counsel to question other witnesses.

195. The Attorney General of Iowa has ruled that in his opinion the use, preservation and destruction of tape recordings by the hearing officers is a procedural matter wholly within the control and discretion of the Council and thus it is proper for the Council to destroy the record of hearings of a non-controversial nature after the period of appeal has expired. A Letter Opinion from the office of Att'y. Gen. of Iowa to Iowa Nat. Res. Council, dated May 14, 1959, on file in the Council's office.

sons who have requested notice of all hearings in that area and interested state officers and agencies. In no case may a hearing be reopened if an appeal has been taken to the Natural Resources Council.¹⁹⁶

Most applications for permits are not contested today. There was a period earlier in the history of the administration, however, when contests were the rule and not the exception. When the system first went into effect, almost all applications were opposed by one group or another. In 1957, only four permits were granted and appearances were filed in each case opposing the granting of the permit. In 1958, 248 permits were granted and 83 appearances were made in opposition to them. Certain cities and industries would oppose any application for a permit for consumptive withdrawal upstream from them on the grounds that such withdrawal would jeopardize their water supply. In addition, the Iowa Conservation Commission opposed applications for irrigation withdrawals on the basis that any lowering of a stream damaged fish and wildlife. Many of these objections were not based upon facts or knowledge of the law's operation and merely tended to add general confusion and undue length to the hearings.¹⁹⁷

The fears of many of these groups gradually diminished and all eventually discontinued the practice of opposing applications as a matter of principle. Lack of success in preventing the issuance of the

196. Procedural Guide III F § 11.

197. The following table shows the appearances entered at hearings by objectors according to the character of the objection. For this purpose, objectors were classed according to the use they represented, Municipality, Industry, Downstream Domestic Users, Well User, Recreation, and Other. The table documents the troubled times of the early years of administration when various fears were at large concerning the effect of the granting of a permit. For example, persons representing recreational interests objected 155 times in 1959, and almost all of these were at the hearings on irrigation permits.

Table 8
Objectors Classified

<i>Class</i>	1957*	1958	1959	1960	1961	1962	1963	1964	1965**
Municipality	3	27	40	30	5	17	28	3	3
Industrial	0	2	40	3	0	0	1	0	0
Downstream Domestic User	0	10	21	9	2	0	4	5	2
Well User	0	4	11	9	5	9	3	4	0
Recreational	3	39	155	49	0	3	3	1	1
Other	0	1	1	3	2	2	1	6	2
Total	6	83	268	103	14	31	40	19	8

* 1957 figures represent approximately one-half year.

** 1965 figures represent only the first six months of the year.

permit was undoubtedly one factor contributing to the cessation of objections, but according to the Commissioner, the explanation lies more in the fact that objectors appearing at the hearings usually returned home satisfied even though a permit was granted. Explanation by the hearing officer of the effect of the requested withdrawal of water upon the objector's water supply was normally sufficient to allay the unfounded worries of most objectors.¹⁹⁸

4. Final Determination

A written determination must be made by the Water Commissioner on all applications. This determination states his findings and must be filed with the Council and a copy mailed to the applicant and anyone else who filed an appearance at the hearing and has requested a copy.¹⁹⁹

In making the determination, the Commissioner is directed by the Council to "seek all available pertinent scientific and technical information not presented at the hearing, concerning the availability and present or future use of all water connected to the source for which the permit is requested."²⁰⁰ This information may be used by the Commissioner in making his final determination regardless of whether it was presented at the hearing. Generally, the findings for the final determination are derived from six sources:

- (1) The application;
- (2) Evidence presented at the hearing;
- (3) Policies and principles of "beneficial use;"
- (4) Policies of the Council;
- (5) Results of Water Commission investigations;
- (6) Technical reference works and basic data studies.

The acquired expertise of the Water Commissioner is also utilized.²⁰¹

If, after due consideration of all the pertinent factors and guidelines the Water Commissioner finds that the granting of the permit applied for will not be detrimental to the public interest or the interests of property owners with prior or superior rights, and, where applicable, that the minimum flow of a stream is preserved and neither navigability nor the pollution control laws will be impaired, the permit is granted. Such a permit may be granted for any period

198. Interview with Water Commissioner Richard Bullard in Iowa City, Iowa, Oct. 20, 1965.

199. Iowa Code § 455A.19 (7) (1962).

200. Procedural Guide III F § 10.

201. *Ibid.*

of time not exceeding ten years.²⁰² The amount of water use autho-

202. Iowa Code §455A.20 (1962). The following table shows the permits granted by the Water Commissioner by use and by year, both original and renewal. The numbers to the left of the dividing line represent original permits granted, the number to the right renewal permits.

Table 9
Permits Granted

Use	1957*	1958	1959	1960	1961	1962	1963	1964	1965**	Total
Industrial										
Material Production	0/0	55/0	134/5	69/7	33/13	16/10	19/10	26/15	6/3	358/63
Power Production	0/0	14/0	17/0	0/0	2/6	0/0	0/0	0/1	0/0	33/7
Food Processing	0/0	5/0	7/0	4/0	1/1	3/1	1/0	6/2	1/0	28/4
Manufacturing	0/0	7/0	5/1	3/1	3/1	4/3	5/1	4/0	2/1	33/8
Air Conditioning	0/0	2/0	4/0	2/0	3/1	0/0	0/0	0/1	0/0	11/2
Irrigation										
Farms	3/0	82/0	262/2	86/3	7/21	15/91	21/120	22/104	9/19	507/360
Golf Courses	0/0	4/0	3/0	5/0	2/0	2/2	6/8	7/3	3/1	32/14L
Specialty Crops	0/0	18/0	41/1	9/0	6/4	6/16	0/20	6/10	6/3	92/54
Municipal	1/0	29/0	20/0	9/0	9/2	11/2	16/3	9/3	4/1	108/11
Recreation	0/0	5/0	14/0	4/1	1/1	5/3	3/3	2/7	1/0	35/15
Storage	0/0	27/0	69/0	63/0	59/1	62/2	90/0	94/5	62/2	526/10
Other	0/0	0/0	2/0	2/0	3/2	2/1	2/0	3/0	4/0	18/3
Total	4/0	248/0	578/9	256/12	129/53	126/131	163/165	179/151	98/30	1781/551

* 1957 figures represent approximately one-half year.

** 1965 figures represent only the first six months of the year.

rized may be either less than or equal to the amount applied for.

Ordinarily from the time of the hearing it now takes about 30 days to receive the permit. This is another time interval that has been substantially decreased as administrative experience has been gained.²⁰³

5. Appeal

A right of appeal is provided from the Water Commissioner's determination to the Natural Resources Council. Appeal may be taken by any party aggrieved by the determination of the Commissioner. Such an appeal must be filed with the Council within 30 days of the determination and must state the grounds of the appeal. The director of the Council sets the time and date of the hearing and

203. The following table shows the average time lapse between the time an applicant received a hearing on his original application and the time his permit was ultimately granted. The figures tend to document the Council's "go slow" policy on potentially consumptive users practiced during the early years of administration. For example, in 1960 the average farm irrigation permit granted was received nearly a year and a half after the hearing. In the later years the figures show relatively prompt action in issuing the permit.

Table 10
Time Lapse Between Hearing and Permit

<i>Use</i>	1957*	1958	1959	1960	1961	1962	1963	1964	1965**
Industrial									
Materials Production	NI†	83	97	76	28	24	24	25	44
Power Production	NI	113	89	NI	71	NI	NI	NI	NI
Food Processing	NI	62	77	10	NI	7	19	80	23
Manufacturing	NI	33	137	46	15	37	92	28	8
Air Conditioning	NI	32	118	46	28	NI	NI	NI	NI
Irrigation									
Farms	127	162	298	349	75	80	26	53	66
Golf Courses	NI	81	158	297	82	18	130	40	22
Specialty Crops	NI	196	334	512	51	56	NI	75	162
Municipal	8	63	36	18	26	41	64	59	23
Recreation	NI	59	271	12	37	160	195	10	25
Storage	NI	44	31	151	18	12	9	11	14
Other	NI	NI	2	6	8	2	NI	NI	15
Average for all uses	97	111	201	205	30	37	33	30	33

† NI means no permits were issued in this year for this use.

* 1957 figures approximately one-half year.

** 1965 figures represent only the first six months of the year.

The next table shows the total average time elapsed from the date application is filed until the date a permit is issued. In essence, this table is a combination of the two previous tables dealing with time lapse.

(Note 203 Continued on next page)

everyone who appeared at the Commissioner's hearing or any hearing is given notice by ordinary mail.²⁰⁴

By statute, the Council is to prescribe rules and regulations governing the appeal to this body.²⁰⁵ The same set of rules and regulations used for the original hearing before the Commissioner has apparently been adopted to cover the hearing on appeal. This means that the appeal is, in effect, a complete retrial of the original hearing before the Commissioner.

After hearing all the evidence the Council files its own determination setting forth its findings. The Council apparently applies the same standards as the Commissioner. A copy of the determination is sent to the applicant and to any person appearing who in writing requests a copy.²⁰⁶

Further appeal is permitted if a party is not satisfied with the Council's determination.²⁰⁷ Within 30 days of an adverse determination by the Council, a party may file suit in the district court of the county in which the property affected is located. Upon receipt of notice of this appeal, the Council must file a certified transcript of

(Continued from preceding page)

Table 11

Time Lapse from Application to Permit

Use	1957*	1958	1959	1960	1961	1962	1963	1964	1965**
Industrial									
Materials Production	NI+	207	280	174	64	55	56	56	72
Power Production	NI	202	426	NI	159	NI	NI	NI	NI
Food Processing	NI	123	248	37	49	30	47	110	51
Manufacturing	NI	118	247	79	71	62	123	61	40
Air Conditioning	NI	64	277	81	52	NI	NI	NI	NI
Irrigation									
Farms	180	339	562	666	260	150	64	97	102
Golf Courses	NI	209	560	568	110	46	164	69	68
Specialty Crops	NI	340	580	779	101	84	NI	103	193
Municipal	39	157	154	135	50	70	96	353	50
Recreation	NI	126	497	506	69	405	254	58	50
Storage	NI	101	80	151	41	34	44	38	50
Other	NI	NI	36	33	31	27	28	51	34
Average for all uses	145	236	410	361	66	72	64	70	64

+ NI means no permits were issued in this year for this use.

* 1957 figures represent approximately one-half year.

** 1965 figures represent only the first six months of the year.

204. Iowa Code § 455A.19(8) (1952).

205. Iowa Code § 455A.19(9) (1962).

206. *Ibid.*

207. Iowa Code § 455A.37 (1962).

all proceedings and orders affecting the case with the clerk of the court. On this appeal the case is again given a complete airing as the statute provides for the court to hear the matter *de novo*. In this round the Council has the burden of showing that its acts and orders were "reasonable and necessary."²⁰⁸ If the Council can show both, its determination should be affirmed. This required showing by the Council represents a complete shift of the risk of non-persuasion between the parties. At the original hearing, the applicant must show by affirmative evidence his right to obtain a permit. On appeal to the courts, it is the Council which must take the affirmative role.

Appeal to the Iowa Supreme Court is also available to a party aggrieved by the district court's judgment. The Iowa Rules of Civil Procedure control the procedures in this appeal.²⁰⁹

On its face the appeal procedures are subject to severe criticism for their redundancy. As a result of the multiple appeals available, any aggrieved party may demand no less than three separate full hearings on the same issue. Further, the scheme provides motivation to continue appealing by requiring the Council to shoulder the burden of justifying its determination when the third round of appeals is reached. After losing three full hearings, a party may still try his luck with the Supreme Court. About the only good thing that can be said about the appeal procedure is that it has not been invoked frequently. In only nine instances have the Commissioner's determinations been appealed to the Council. In all cases the Commissioner's findings were sustained. One appeal was filed in the district court, but it was subsequently dismissed.²¹⁰ Thus far good fortune has smiled on the Council in the form of relatively bountiful water supplies. When water shortages again occur, this seemingly endless appeal procedure could prove to be a substantial obstacle to administrative efficiency.²¹¹

208. *Ibid.*

209. See Iowa R. Civ. P. 368. Sect. 455A.37 of the act provides that the district court or Supreme Court may stay the "order" of the Council, but otherwise an appeal will not stay the operation of an order. This has been interpreted as including permits.

210. The City of West Des Moines filed an appeal in district court challenging the short duration of the permit it received on the ground that the time was too short to allow advantageous borrowing. Later a sufficient water supply was obtained without the construction for which the permit was sought, so the appeal was dismissed.

211. The Iowa Natural Resources Council, Report for the Biennium Ending June 30, 1964 contains the following passage:

"It is again recommended that Section 455A.37 be amended to avoid the possibility of unwarranted expenditure of State funds through litigation of appeals encouraged by the statute. This section provides for appeal to the district court from Resources Council actions and orders and, contrary to

C. *Transfer of Permits*

Section 455A.20 states that a water use permit is an appurtenance to the land on which the water is used. This indicates that even though the permit is granted to an individual, it does not confer on the permittee a general personal privilege to divert, withdraw, or store water. Instead it allows the use of the specified amount of water for the specified purpose on that land. If the permittee moves his water using operation to another location, his permit for use at the old location does not move with him; a new permit will be required if water is to be used at the new location.²¹²

Consistent with the theory of the permit attaching to a particular tract of land the statute provides that a permittee may transfer his interest in the permit by "conveying, leasing, or otherwise transferring the ownership of the land described in the permit" ²¹³ Because the permit is appurtenant to the land, presumably no special procedure is required to transfer it. An ordinary deed or lease should therefore suffice to assign the rights and duties represented by the permit to the transferee of the land.

The policy of the Commissioner has been to generally discourage permit transfers. As a practical matter, this policy has taken the form of inducing applications by the party in possession of land who will use the water rather than by the land owner. Thus, if a permit is required for water which will actually be used by a lessee, an effort is made to encourage the lessee to make the permit application rather than the owner. If this effort is successful and the lessee is the applicant, then the permit will usually be granted for the remaining term of his lease. This is not true for short term leases by farmers who would be required to apply for a new permit every year, but

normally applicable rules of law, places the burden of proof that such actions are reasonable and necessary upon the Resources Council. Imposition of the burden of proof on the regulatory agency tends to encourage appeals from Resources Council actions and orders, many of which are the result of review proceedings. Other provisions of this section requiring the Resources Council to furnish a certified transcript of all proceedings before the Council and providing for a trial de novo on appeal to the district court would seem to afford ample protection to individual rights."

The bill submitted by the Council to the 1965 session of the Iowa General Assembly contained a provision changing the burden of proof in appeal. S.F.518 § 4. The bill was passed, but the section relating to appeal procedure was deleted. Iowa Acts 61st G.A. ch. 372 (1965).

212. See Iowa Code § 455A.20 (1962).

213. Iowa Code § 455A.30 (1962).

long term lessees (up to ten years) and lessees who are not likely to renew their lease are uniformly subjected to this treatment.²¹⁴

If for some reason the lease is terminated before the expiration date of the water permit, the Commissioner will encourage the departing lessee to cancel his permit voluntarily. The same encouragement is given to owners who sell their property during the term of their water permit. In this manner, any new owner or lessee will be required to make his own application for a permit. This gives the Commissioner the opportunity to make direct contact with the new user and explain what will be required of him. The Commissioner feels that this policy leads to a much better understanding between himself and the user than would be possible otherwise.

The chance to talk to the user also dispels any notions that, because he succeeds to an existing permit, he is not really regulated. The statute provides that the transferred permit remains "subject to the principle of beneficial use and the orders of the Council."²¹⁵ The new user has the same duties and obligations as his predecessor had. However, without the opportunity on the part of the Commissioner to explain what these obligations are, the new user would likely be uncertain or unaware of them. The policy of the Commissioner therefore appears sound in that it avoids problems later on for both himself and the user.

D. Renewal and Modification

The Commissioner's policy is to notify a permittee that his permit is about to expire approximately 60 days before the permit expiration date. Once notified the water user should then complete and submit to the Commissioner an application to renew the permit. A form is provided for this purpose. Permits may be renewed by the Commissioner if an application for renewal is made before the expiration of the preceding term. In his application the applicant should notify the Commissioner of any desired changes in the permit.²¹⁶

214. Interview with Water Commissioner Richard Bullard in Iowa City, Iowa, Oct. 20, 1965.

215. Iowa Code § 455A.30 (1962).

216. This table shows the volume and distribution of renewal applications by years. The figures reveal the approximate pattern that the foregoing discussion of the administration would lead one to expect. Irrigation renewals were high in 1962-64 because the bulk of the three-year permits were issued 1959-1961. Materials producers were originally given short term permits because the policy toward them was not yet settled, therefore many were regularly seeking renewals. Permits of most other indus-

The Commissioner sends notices of the receipt of the application for renewal by ordinary mail to all persons who filed an appearance at the next previous proceeding and to those persons who have requested notice of any hearings affecting that area. If an objection is filed within 30 days of the date of notice by any person shown to have an interest, a hearing must be held. Notice of this hearing is sent to the objector and to the same persons who received notice of the application for renewal.²¹⁷

If no objection is made within 30 days and if no change in the permit terms is requested, then the permit may be renewed without any hearing. The provision authorizing the granting of renewal applications without hearings was added by amendment in 1965.²¹⁸ Before that time hearings were required for all renewals. There is no fee charged for a simple renewal.

If, however, a modification of the terms of the permit is requested which involves a change in the beneficial use, a change in the place of such diversion, or an increase in the quantity, time, or rate of water usage, then the applicant must pay the \$15.00 fee as re-

trial and municipal users have yet to expire the first time. In this table applicants seeking renewals and those seeking renewal with modification are compared.

Table 12
Renewal Applications

Use	1957*	1958	1959	1960	1961	1962	1963	1964	1965**
Industrial									
Materials Production	0	1	9	4	11	11	13	3	3
Power Production	0	0	0	1	5	0	1	0	0
Food Processing	0	0	0	0	1	1	1	0	0
Manufacturing	0	0	2	0	3	1	0	1	1
Air Conditioning	0	0	0	0	1	0	0	1	0
Irrigation									
Farms	0	0	3	2	35	115	95	95	15
Golf Courses	0	0	0	0	0	2	8	3	1
Specialty Crops	0	0	1	0	4	23	14	9	3
Municipal	0	0	0	0	3	2	2	3	1
Recreation	0	0	0	1	2	3	3	6	0
Storage	0	0	0	0	2	1	0	5	2
Other	0	0	0	0	2	1	0	0	0
Total	0	1	15	8	69	160	135	137	26

* 1957 figures represent approximately one-half year.

** 1965 figures represent only the first six months of the year.

217. Iowa Code § 455A.20 (1962) as amended by Iowa Acts, 61st G.A. ch. 372 § 3 (1965).

218. Iowa Acts, 61st G.A. ch. 372 § 3 (1965).

quired in section 455A.19(5) and a hearing is required. Notice for this hearing includes notice by publication as prescribed in section 455A.19(3). The procedures followed at all hearings on applications for renewals and renewals with modifications are the same as those used at the hearing for the original permit.

Prior to the 1965 amendment, the average length of time required to process the applications for renewal from the date the application is received by the Commission until the date the renewal is granted has been around 70 days. When a modification was involved, the time required was slightly more. The effect of the amendment should be to cut this time period approximately in half for uncontested renewals. The 30-day period required for notice is still required, however the amendment should cut out many unnecessary hearings thus making it possible for the Commissioner to complete his determinations much more rapidly. Where the applicant is diligent in submitting his renewal application it should be possible frequently to issue the renewal permit immediately on the expiration of the preceding permit.²¹⁹

219. The following table shows the average time lapse between the time an application to renew or modify an existing permit was received by the Commissioner and the time the renewal permit was ultimately granted. The 1965 figures cover only the first six months of the year, therefore it was too early to expect any reduction in the time delay due to the 1965 amendment providing for the possibility of renewals without hearings. The number of permits included in each classification is shown at note 202 *supra*.

Table 13
Time Lapse Between Renewal Application and Permit

Use	1959*	1960	1961	1962	1963	1964	1965**
Industrial							
Material Production	112	99	58	81	58	63	76
Power Production	NI	NI	68	NI	NI	35	NI
Food Processing	NI	NI	35	95	NI	43	NI
Manufacturing	59	77	48	236	30	NI	29
Air Conditioning	NI	NI	25	NI	NI	51	NI
Irrigation							
Farms	108	73	69	78	77	57	51
Golf Courses	NI	NI	NI	77	47	114	51
Specialty Crops	30	NI	60	63	71	67	78
Municipal	NI	NI	47	102	54	55	44
Recreation	NI	23	30	158	45	79	NI
Storage	NI	NI	22	194	NI	55	38
Other	NI	NI	25	31	NI	NI	NI
Average for all uses	92	85	59	82	72	60	54

+ NI means no permits were issued in this year for this use.

* No renewal or modification permits were granted during 1957 or 1958.

** 1965 figures represent only the first six months of the year.

In cases where for one reason or another the renewal permit cannot be issued by the time the preceding permit is due to expire, the Commissioner has the power to grant an extension of not more than 90 days to the expiring permit during the pendency of the application for renewal.²²⁰ This very useful power is generously exercised to avoid the problems of requiring another full application and hearing.

An application to modify a permit may be submitted at any time; it need not be associated with an application for renewal. If the modification sought involves only a decrease in the amount of water used, the Commissioner may grant the application without a hearing.²²¹ All other modifications, whether involving changes in the amount, source, diversion method, rate of withdrawal, duration or location of the permitted use must be applied for and processed in the same procedure as an original application.²²² For this reason, when the original permit is issued, the Commissioner tries to anticipate any probable changes and make allowance for them in the permit.

E. Termination and Suspension

All permits are continuously subject to modification and cancellation by the Commissioner.²²³ Nearly all permits issued expressly advise the permittee that his permit is subject to modification and cancellation under the provisions of Iowa Code section 455A.38, however, absence of this statement either in the determination or on the permit does not free the permittee from the operation of this provision.

A permit may be modified or canceled by the Commissioner with the consent of the permittee, and without the permittee's consent in case of:

- (1) Any breach of the terms or conditions of the permit;
- (2) Any violation of the law pertaining to the permit by the permittee;
- (3) Nonuse;
- (4) Necessity to protect the public health or safety;

220. Iowa Code § 455A.20 (1962), as amended by Iowa Acts, 61st G.A. ch. 372 § 3 (1965).

221. This is more or less a policy derived from the negative inference of § 455A.20 in which a hearing is specifically required for a change in the terms of a permit effecting an "increase in quantity."

222. Iowa Code § 455A.20 (1962), as amended by Iowa Acts, 61st G.A. ch. 372 § 3 (1965).

223. Iowa Code §§ 455A.20, .28 (1962).

- (5) Necessity to protect the public interest in lands or waters; and
- (6) Necessity to prevent substantial injury to persons or property in any manner.²²⁴

In all cases where the modification or cancellation is without the permittee's consent, a hearing after a minimum of 30 days notice to the permittee is required.

Other than consensual modifications and cancellations, the only ground of the statute invoked to date to cancel a permit has been that dealing with breach of the terms or conditions of the permit. Typically these situations arise when the permittee becomes delinquent in submitting required reports describing his water use.²²⁵

224. Iowa Code § 455A.28 (1962). One provision associated with possible termination that deserves further comment is § 455A.29. Although the purpose of this section is fairly clear, the language defies comprehension. Apparently the idea is that the Commissioner is to notify a permittee whose use has ceased for three consecutive years, that unless he applies for and receives an extension, his permit will be terminated. If such an application is then made, the Council may grant it; if no application is forthcoming, the permit is terminated. The situation sets out no time limits for applications for extensions and is otherwise generally unintelligible. The Commissioner has not found occasion to utilize this section—he is not sure what it means either.

225. In the following table all permits no longer in effect are classified by use according to the four possible explanations for their termination. It is readily observable that the great majority of non-active permits were simply allowed to expire by their holders. The number of irrigation permits that have expired is significant from the point of view of overall potential of irrigation in Iowa. As was noted earlier, the total acreage under irrigation permits in Iowa has remained fairly constant over the last five years. In this same time 107 irrigation permits were permitted to expire. It is reasonable to suppose that the onset of water shortage could easily lead to an awakening of interest in these currently dormant potential irrigators.

Table 14
Non-Active Permits

<i>Use</i>	<i>Expired</i>	<i>Vol. Term.</i>	<i>Consolidated</i>	<i>Canceled</i>
Industrial				
Material Prod.	42	17	1	2
Power Production	1	1	0	0
Food Processing	0	0	0	0
Manufacturing	3	1	0	0
Air Conditioning	1	0	1	0
Irrigation				
Farms	89	0	1	0
Golf Courses	0	0	0	0
Specialty Crops	18	1	0	0
Municipal	0	0	2	1
Recreation	8	0	0	0
Storage	2	0	0	1
Other	1	0	1	0
Total	176	20	5	4

As a general rule, permit holders are diligent in preparing and submitting the necessary reports to the Water Commissioner. Failure to do so is usually attributed to either oversight or a failure on the part of the permittee to realize that reports are necessary even though no water has been used. In such cases, the Commissioner sends a letter advising the permit holder of the facts and normally the report is promptly submitted. But, if the permit holder still fails to submit the reports after receiving notice of his delinquency the Commissioner writes a final letter informing the permittee that a hearing for cancellation of his permit will be held if the reports are not forthcoming. If the reports are not then filed, the hearing is held and the permit cancelled.²²⁶

A number of permits have been cancelled in this manner but no appeals have been taken. It is the Commissioner's opinion that these permit holders were not exercising their water use right and thus were unconcerned by the cancellation of the permit.

Under the act the Commissioner also has the power to summarily suspend a permit for a period up to 30 days if he finds it necessary in an emergency to protect the public health or safety or to protect the public interests in lands or waters against imminent danger of substantial injury, or to protect persons or property against such danger. In connection with an emergency the Commissioner may also require the permittee to take such affirmative actions as may be necessary to prevent or remedy the types of injuries described above. The Commission exercises this power through a written order to the permittee.²²⁷

If the order is intended to remain in effect for more than 30 days, the permittee must be given ten days written notice and an op-

226. Interview with Water Commissioner Richard Bullard in Iowa City, Iowa, March 14, 1966.

227. Iowa Code § 455A.28(3) (1962). Another interesting question associated with the Council's power to modify and cancel permits for cause relates to water impounded under a storage permit. Stated bluntly, the question is, could the Commissioner cancel or modify a storage permit in time of water shortage, and thereby require the permittee to release his stored water for the benefit of downstream users. This issue should not be confused with the requirement commonly inserted in storage permits requiring the release of stream inflow where necessary to prevent downstream damage. See note 157 *supra*. Section 455A.1 includes a definition of "Impounded or stored water" which seems to give the impounding party absolute ownership if the water is captured pursuant to the provisions of the act. Does this refer to all impounding and storage, or only to unregulated activity authorized by § 455A.27? It would appear logical arguments can be made for either position. Understandably, the Commissioner is unwilling to venture an opinion, but it seems likely that the Council would be very reluctant to require the owner of an impoundment, who had planned ahead for times of water scarcity, to open his drain valves for the benefit of downstream grasshoppers.

portunity to be heard. The hearing should be of such a nature as to guarantee the permittee fair treatment, but a hearing of the type held before the permit was granted is probably not required.

One question raised by the statute is whether the Commissioner is empowered to issue more than one 30 day suspension consecutively to the same permittee. The availability of the ten day notice procedure argues convincingly against such a practice. The Commissioner has not yet found it necessary to use this emergency power to suspend the permit.

PART III

CONSTITUTIONAL LIMITATIONS

On its face the Iowa Water Act makes rather extensive alterations in the rights to the capture and use of water which existed under the common law riparian doctrine. Because of these changes, it is perhaps inevitable that the constitutionality of the act will at some time be called into question. Therefore, it may be helpful at this point to review the possible constitutional principles upon which the act might be challenged as deficient—substantive due process, procedural due process, and delegation of powers.

A. The Police Power and Substantive Due Process

Each state has a positive power, termed the "police power," to make regulations in the best interests of the health, safety, and welfare of its citizens.²²⁸ The police power is exceedingly broad in scope, encompassing regulations affecting traffic, health control, zoning, fire prevention, and conservation, to name only a few. Of course, the state is not unlimited in its exercise of the police power. The regulations enacted under the power must be consistent with the substantive due process provisions of the state and federal constitutions.²²⁹

228. See, e.g., *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946); *Sinclair Ref. Co. v. City of Chicago*, 178 F.2d 214 (7th Cir. 1949); *Consolidated Gas Util. Corp. v. Thompson*, 14 F. Supp. 318, 326 (W. D. Texas 1936).

229. The federal constitution guarantees in the fifth amendment that no person shall be deprived of property without due process of law and prohibits any taking of private property for public use without just compensation. *U.S. Const. amend. V*. The various states are subject to the same limitation under the due process clause of the fourteenth amendment. *U.S. Const. amend. XIV*, §1. Also see, e.g., *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *Delaware, L. & W.R.R. v. Town of Morristown*, 276 U.S. 182, 193-95 (1928); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

The Iowa Constitution has two relevant provisions: Article I, section 9 bars deprivation of property without due process of law and Article I, section 18 specifically provides for compensation where a public taking is exercised.

The due process requirement is essentially a test of reasonableness. It requires that a statute be rationally related to some legitimate end of the state. The means selected must be reasonable both in the sense that a rational legislator could believe that they could achieve the desired end, and in the sense that they are not an unreasonable means to achieve that end.²³⁰ For example, a legitimate end of the state might be the elimination of typhoid fever. A rational legislator might think that that end could be achieved either by implementing a comprehensive vaccination program, or by shooting every discovered victim of typhoid. Both means would be rationally related to the end, but only one would be reasonable. Within these broad limits, the states have much discretion in their regulations. The means selected need not actually achieve the end in every situation so long as it might reasonably be thought that the legislation could do so.²³¹ Moreover, the means selected need not be the most reasonable means available. As the Supreme Court stated in *Williamson v. Lee Optical*, "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."²³²

The Iowa Supreme Court agrees with the United States Supreme Court axiom that state legislative acts deserve a strong presumption of constitutionality. If legislation regulating economic interests is "within the zone of doubt and fair debate" and "not clearly and plainly prohibited by some constitutional provision," it is presumed constitutional.²³³ It is not within the judicial prerogative "to pass upon the policy, wisdom, advisability or justice of a statute."²³⁴

An examination of due process leaves little doubt that the state has the constitutional power to regulate the capture and use of water. That such regulation is a legitimate end of the state goes almost

230. See, e.g., *Ray v. Blair*, 343 U.S. 214, 226 (1952); *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928); *Lawton v. Steele*, 152 U.S. 133 (1894).

231. See *Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955); *Williams v. United States*, 327 U.S. 686, 710-11 (1945).

232. 348 U.S. 483, 488 (1955). The court further stated: "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Id.* at 488.

233. *Steinberg-Baum & Co. v. Countryman*, 247 Iowa 923, 929, 77 N.W. 2d 15, 18 (1956). See also *Benschoter v. Hakes*, 232 Iowa 1354, 1364, 8 N.W. 2d 481, 487 (1943); *City of Des Moines v. Manhattan Oil Co.*, 193 Iowa 1096, 1103, 184 N.W. 823, 826 (1921); *Stoner McCray Sys. v. City of Des Moines*, 247 Iowa 1313, 78 N.W. 2d 843 (1956).

234. *Steinberg-Baum & Co. v. Countryman*, 247 Iowa 923, 929, 77 N.W. 2d 155, 18 (1956).

without saying. It is difficult if not impossible to overemphasize the importance of water to a state and its citizens. Surely the importance of water makes its regulation by the state as appropriate as other types of police power regulations, such as zoning. Although the Iowa Supreme Court has not had the occasion to hold directly on the constitutionality of legislative interference with riparian rights, it has spoken in favor of such regulation in a few cases. In *Hatcher v. Board of Supervisors*, the plaintiff made constitutional objections to the county's actions assessing him for drainage work approved pursuant to a statute establishing drainage districts. In upholding the act, the court spoke extensively of the state's right to regulate property for the greater collective benefit of the public:

Recognizing in its fullness the individual right to the control of property held by private ownership, there accompanies that right, as a limitation upon it, the right of government to exercise control, at time absolute but more often abridged, but always upon the claim that such control is necessary to subserve the public good. . . . The court's so holding [a valid police power exercise in drainage projects] have not recognized as the sole question that of a purpose exclusively or essentially of public benefits in the results sought, but have proceeded upon the broader grounds that it is important to the state, to its citizens, as a whole, as well as to individuals whose property may thus be directly affected by charges for benefits, that all resources of a state shall, so far as practicable, be brought to the point of effective service.²³⁵

The significance of this language for the Iowa water statute is two-fold: 1) The Iowa Supreme Court recognizes that water is an important "public" resource and therefore a proper subject of police power regulation, and 2) the court realizes that the essence of a police-power based regulatory scheme is not its ability to achieve a precise balance of equity among all regulated persons, but rather, it is to marshal the state's resources and to plan their use in a manner calculated to maximize the public benefit on a state level.

Although, in general, it can be said that the regulation of water is a legitimate end of the state, specific applications of the regulations might still be constitutionally challenged. Police power regulations have often been attacked on the ground that, as applied to the particular property in question, they constitute a "taking" of "vested property rights" without due process, prohibited by the federal and

235. 165 Iowa 197, 201-02, 145 N.W. 12, 14 (1914).

state constitutions.²³⁶ Thus, in water regulation, it might be argued that rights inherent in riparian owners under the common law have become "vested" and that the alteration or termination of these vested rights through the enactment of a water statute violates due process.²³⁷

The vested rights argument seems misleading in several respects. In the first place riparian rights are "property" only in a very limited sense. The common law riparian owner had no property rights in the water in a stream, but only a restricted right to use it. This right was subject to similar rights in all other riparian owners on the watercourse, as well as to a considerable number of federal and state powers.²³⁸

Perhaps an even more serious objection to the "vested rights" argument is that the term would seem to be meaningless. Whether or not a particular right is termed "vested" sheds very little light on whether the state can constitutionally take it. Even the most faultless of property rights can be taken for a public purpose through the eminent domain power, accompanied by appropriate compensation.²³⁹ Thus, the real question arising from water legislation is not the ability to take, but whether the owner must be compensated for the taking. The term "vested" is merely a label attached by courts to interests they deem worthy of protection under the facts of a particular case.

The cases reveal a tendency to require compensation in those situations where government action is direct and is aimed at a specific party or a specific piece of property. Thus, compensation was awarded where the federal government condemned a dam,²⁴⁰ requisitioned all the electric power produced by a particular power

236. See e.g., *Reconstruction Fin. Corp. v. Bankers Trust Co.*, 318 U.S. 163 (1943); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *United States v. Tilley*, 124 F.2d 850, 861 (8th Cir. 1942).

237. See *McCord v. High*, 24 Iowa 336, 342 (1868) where the court says: "The right which the owner of lands has to a water-course flowing over them . . . cannot be taken from him constitutionally for public use without just compensation."

238. See generally, *Willis v. City of Perry*, 92 Iowa 297, 301-02, 60 N.W. 727, 728 (1894). T. Lauer, *The Riparian Right as Property*, in Legislative Research Center, Univ. of Mich. Law School, *Water Resources and the Law*, 131, 133-268 (1958); O'Connell, *Iowa's New Water Statute—The Constitutionality of Regulating Existing Uses of Water*, 47 Iowa L. Rev. 549, 581-94 (1962).

239. See *Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, in 1962 *The Supreme Court Review* 63, 65-71 and cases cited therein.

240. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 345 (1893).

company,²⁴¹ or revoked the easements of a particular railroad.²⁴² However, where a demonstrable injury results indirectly from an exercise of governmental powers, the courts are less likely to require compensation.²⁴³ Compensation has been denied, for example, for consequential damages arising from a readjustment of a regulatory scheme, such as a modification of regulations for optical appliance²⁴⁴ or rental regulations.²⁴⁵ In *Higgins v. Board of Supervisors*, the Iowa Supreme Court made its position quite clear in this respect:

Acts done in the proper exercise of governmental powers [in this case the police power], and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision.²⁴⁶

While in general consequential damages arising from government regulations do not require compensation, this is not always the case. Sometimes the damage to the individual is so great, even though it arises only indirectly and from a perfectly proper exercise of regulatory power, that courts will require compensation. The test used to determine whether a particular injury is compensable is essentially one of fairness. As such, the outcome of the test will depend heavily upon the peculiar facts of the case under consideration. Compensation will be awarded if, after considering all the facts, the court decides the public benefit achieved by the regulation is outweighed by the amount of injury to the plaintiff.²⁴⁷ An example is the United States Supreme Court case of *Griggs v. Allegheny County*.²⁴⁸ That case involved landing routines established for commercial jet aircraft by the United States Civil Aeronautics Administration at the Greater Pittsburgh Airport. The landing routine resulted in so

241. *International Paper Co. v. United States*, 282 U.S. 399 (1931).

242. *Noble v. Union River Logging R.R.*, 147 U.S. 165 (1893).

243. See *Dunham*, *supra* note 239, at 73-90 and cases cited therein.

244. *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

245. In *Fleming v. Rhodes*, 331 U.S. 100 (1947), the Supreme Court, in preventing enforcement of an eviction order of the state court rendered before the enabling legislation was enacted, rejected the contention that vested rights were taken without due process when the application of certain rent regulations were sustained. The Court stated, "So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it." *Id.* at 107.

246. 188 Iowa 448, 457, 176 N.W. 268, 271 (1920).

247. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922).

248. 369 U.S. 84 (1962).

many low-altitude jet flights over plaintiff's property as to render that property unusable for practically any purpose. The court held that this was a taking worthy of compensation.

One can only speculate as to what result will be reached in litigation involving the Iowa Water Act. However, the uncompensated alteration of riparian rights is not without precedent. For example, in *Gibson v. United States*,²⁴⁹ the Supreme Court held that the consequential interference with riparian rights resulting from the improvement of a navigable river was not a taking requiring compensation. Moreover, in *United States v. Commodore Park, Inc.*,²⁵⁰ the court upheld government action changing the course of a stream to improve navigation, thereby cutting off completely the riparian's access to the watercourse. Damages have been awarded, however, when overflow from a government dam deprived the agricultural land in back of the dam of all value.²⁵¹

State courts likewise have denied compensation in upholding state action. A recent decision by the Ohio Supreme Court held no compensation was due plaintiff, a marine terminal operator, when the state highway commission built a bridge which substantially impaired traffic to and from his terminal.²⁵² The Supreme Court of Louisiana held that where oyster beds were destroyed by dredging operations of a state agency, the lessees of such beds were not entitled to compensation for an "appropriation" of private property under the Louisiana Constitution.²⁵³

A group of Iowa cases speak of "vested rights," which, although they concern zoning and building regulations, could influence the Iowa Supreme Court if and when the vested rights question comes up concerning the Iowa water statute. It is probably most accurate to characterize their facts as situations where individuals have relied to their financial detriment on building and zoning permits that were subsequently revoked because they were erroneously issued.

In *Des Moines v. Manhattan Oil Co.*,²⁵⁴ defendant received a permit to build a gas station on a lot zoned residential. Before the permit was rescinded, the defendant had contracted to buy the land and to build the gas station and had placed some construction materials on the lot. Nevertheless, the Iowa Supreme Court held that

249. 166 U.S. 269 (1897).

250. 324 U.S. 386 (1945).

251. *United States v. Lynah*, 188 U.S. 445 (1903).

252. *State ex rel. Anderson v. Preston*, 2 Ohio App. 2d 244, 207 N.E. 2d 664 (1963).

253. *Marie v. Police Jury*, 161 So. 2d 407 (La. App. 1964).

254. 193 Iowa 1096, 184 N.W. 823 (1921).

since title to the land had not yet passed nor had any construction commenced, defendant's reliance was insufficient to establish a vested right. Language later in the opinion, however, suggests the real rationale for the decision was that, although the defendant perhaps had some property rights, they should be regulated to this extent because of the police power policy behind the zoning scheme.

*Call Bond & Mortgage Co. v. Sioux City*²⁵⁵ involved similar facts with a commercial green house in a residential zone. The only reliance in this case was that the plaintiff met a Mr. Mahoney on the street and orally ordered five thousand bricks—no price was set, no delivery was made, nor was there performance of any kind by either party. The issue of the existence of "vested rights" here was not in constitutional terms as it was in *Manhattan Oil*, but the court did hold there were not vested property rights.

The Iowa court found a vested right in *Crow v. Board of Adjustment*,²⁵⁶ where the appellant proceeded to construct a combination apartment-animal clinic in a residential zone, relying on a building permit and an erroneous legal opinion from the Iowa City City Attorney. The court emphasized that "due to the change in status quo during this period, Dr. Crow secured a vested right to proceed under the building permit as issued." *Stoner McCray System v. Des Moines*,²⁵⁷ approached on the due process level the question whether an ordinance which interferes with rights in existing billboards amounts to an impairment of vested rights. The court held there was an unconstitutional taking in regard to the existing billboards; but they stated that the "regulation" (barring) of *future* billboards is a valid exercise of the state's police power, thus expressing the dichotomy of existing versus future rights which was only implied in the above cases. The most recent of these cases, *Board of Supervisors v. Paaske*,²⁵⁸ involved a real estate entrepreneur who purchased five houses, acquired permits to move them, dug basements, laid concrete

255. 219 Iowa 572, 259 N.W. 33 (1935).

256. 227 Iowa 324, 288 N.W. 145 (1939).

257. 247 Iowa 1313, 78 N.W. 2d 843 (1956). In dictum the court stated:

We do not wish to infer herein that under certain circumstances a municipality could not provide for the termination of nonconforming uses, especially if the period of amortization of the investment was just and reasonable, and the present use was a course of danger to the public health, morals, safety or general welfare of those who have come to be occupants of the surrounding territory. *Id.* at 1319-20.

There is a question whether this would apply to any alterations of water rights under the Iowa Act since this dictum appears to apply only to non-conforming uses.

258. 250 Iowa 1293, 98 N.W. 2d 827 (1959).

footings, contracted to have foundations laid, and placed construction materials on his 2.4 acre tract, only to be confronted with a subsequently enacted zoning ordinance requiring at least a one acre lot per house. The court had no difficulty in finding that the plaintiff had "relied" to the point that his rights should be considered vested.

Although the exact portent of these cases for the Iowa water statute is unclear, it is obvious that they represent some of the Iowa Supreme Court's thinking about the nature of vested rights in general. In the first place, a finding or not of vested property rights depends to a great extent on the particular facts of each situation. Next, the court is concerned with detrimental financial reliance—do the facts stack up to show such reliance? In the three cases that found vested rights, there was a substantial investment irrevocably committed to the claimant's project. The *Stoner* case approached this reliance aspect in terms of existing versus nonexisting billboards, and probably did so because this was the distinction expressed by the ordinance. Although unexpressed in other cases, this existing-non-existing analysis is implicit in their rationale, and thus all of these cases may present a cluster of authority which might be regarded as threatening the ability of the Iowa water act to adversely affect uses of water existing at the time the act was adopted, without providing damages to the owners of such rights.

Since the Iowa act has never operated during a period of water shortage, it is difficult to predict under what circumstances a constitutional challenge might arise. At the present time the most likely complainant would seem to be the irrigator. The irrigator is the primary consumptive user of water. Therefore, he is the one most likely to be adversely affected by the minimum flow restriction. The typical irrigator would probably not have a valid constitutional claim. He is required to obtain a permit and to pay a fee for it, but this would not seem to be a substantial deprivation. His permit states a limit of the amount of water he can take, but at the present time the limits are set sufficiently high that he can probably take all he can use. Indeed, so long as the water in the watercourse remains above the minimum flow the irrigator would not seem to be in any worse position than he was under the common law.

Even when the minimum flow is reached and no further water can be taken, the irrigator is adversely affected by the act only to the extent that the established minimum flow exceeds the point at which he would have been denied further access to the watercourse under the "reasonable use" theory of the riparian rights doctrine.

It is very doubtful that this relatively minor imposition is sufficient to outweigh the benefit derived by the public from the guarantee of a certain minimum flow in Iowa streams.

While the typical user of water would probably have no valid complaint, a possibility exists that the act might be held unconstitutional as applied to individuals who can show special circumstances. For example, an irrigator who, at considerable expense, built pumps capable of withdrawing from a stream enough water to raise a specialized crop needing much more water than normal Iowa crops, might claim an analogy between his position and that of the complainants in the zoning and building regulations cases discussed above. However, to do so it would be necessary to show that his substantial financial outlay was in reasonable reliance on the riparian law existing before the Iowa act was passed. Given the uncertainties inherent in the riparian system of water rights, reasonable reliance on any right claimed under the former law will be extremely difficult to show. Therefore, except for the possibility of a few extraordinary circumstances, it is doubtful that there can be successful constitutional attacks upon the Iowa act on the grounds that it is violative of substantive due process.

Nevertheless, because the fear of unconstitutionality is a cloud that seems always to cast its shadow on regulation of this species,²⁵⁹ there is considerable merit in the idea of amending the act by adding to it a statute of limitation-type curative provision. In essence, such a provision should require all persons claiming rights to use Iowa waters as the result of interests acquired prior to the effective date of the act to file their claims with the Commissioner before a certain date or the right to enforce their claims will become barred. If the period allowed for filing is adequately long, such a provision should effectively erase the possibility of the act as administered being held to have unconstitutionally purported to destroy valid rights.²⁶⁰ Of

259. See C. Fisher, *Due Process and the Effect of Eastern Appropriation Proposals on Existing Rights, With Special Emphasis on the Michigan Proposal*, in *The Law of Water Allocation in the Eastern United States* 441 (D. Haber and S. Bergen eds. 1958); T. Lauer, *The Riparian Right as Property*, in *Legislative Research Center, Univ. Mich. Law School, Water Resources and the Law* 131, 133-36 (1958); O'Connell, *supra* note 238, at 581.

260. See Lauer, *supra* note 238, at 264-68. An example of statutory limitation on existing uses can be found in § 303 and § 304 of the Model Water Use Act. The drafter's comments to these sections suggest that they should satisfy constitutional requirements.

"Section 303. [Preservation of Existing Uses]

Alternate 1

[(a) The withdrawal of water directly from any contained or ground water source,

course any claims filed within the period would have to be closely examined and if a meritorious claim turned up it would have to be recognized, but it is likely that not many such rights would be claimed, and that fewer could be substantiated.

B. Adequacy of Procedural Safeguards

As a matter of fundamental fairness a person whose rights may be adversely affected by the action of an administrative agency should be afforded the opportunity to appear before the agency and present his case.²⁶¹ This principle is most honored where the agency

an application of water for the production of power, or an impounding by any dam, waterway obstruction, or reservoir of any contained water, which is a lawful and beneficial use, other than a domestic use, (1) being made at the effective date of this Act, (2) to be made in conjunction with facilities under construction at the effective date of this Act, or (3) made within the [three] years prior thereto, may be continued if the user complies with the provisions of section 304.]

Section 304. [Certification of Existing Uses.]

(a) Within [three] years after the effective date of this Act, the Commission shall require by rule any person making a use preserved under section 303(a) to file a declaration of his use with the Commission within [three] months after the effective date of the rule. In its rules requiring the filing of declarations of existing uses, the Commission may divide the State into areas and prescribe different date for filings from the various areas.

(b) Any person making a use preserved under section 303(a) may file a declaration of his use with the Commission at any time.

(c) (1) When the Commission requires filings of declarations of uses by rule, it shall cause notice of the rule to be given by publication [once each week for the three weeks prior to the effective date of the rule] in a newspaper of general distribution in the affected areas.

(2) The Commission shall also cause notice of the rule to be given by registered or certified mail to any person required to file of whom the Commission has or could readily obtain knowledge or who has requested mailed notice to be given when the Commission adopted a rule requiring the filing of declarations.

(d) The declaration shall be in such form and contain such information as the Commission by rule prescribes including the quantity of water used, the purpose or manner of the use, the time of taking the water, and the point of diversion of the water.

[(e) If no declaration is filed as required by rule of the Commission, the Commission shall conclusively determine the extent of the uses preserved under section 303(a).]

(f) If the Commission has not acted upon a declaration within [90] days after its filing, the Commission shall certify those uses described in the declaration.

(g) When uses preserved have been ascertained in accordance with the provisions of this section, the Commission shall issue a certificate describing those uses.

(h) The Commission shall hold a hearing upon the request of any person adversely affected by the certification or the refusal to certify any water use."

261. Mr. Justice Douglas once stated the proposition in these terms. "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123, 179 (1951). For a comprehensive discussion of the necessity of hearings in the administration process see 1 K. Davis, *Administration Law* § 7 (1958).

is adjudicating a case in which the person's rights are directly involved. The Iowa permit statute is an example of the general practice as it spells out in detail the hearing procedures afforded to an applicant for a permit, and requires hearing in connection with the cancellation or modification of a permit. It is generally recognized that certain procedural guarantees may be forgone in times of emergency. Also, where the agency is engaged in rule making (legislative) activity it is generally held that members of the general class of parties to be affected need not be provided a hearing, although in many instances these parties are invited to present their views.²⁶²

The difficult procedural problem presented by the Iowa statute in this area concerns the participation of third parties in the hearing concerning issuance, modification or cancellation of a permit. Without question, any person interested in the outcome of the hearing may appear and support or oppose the issuance modification or cancellation of a permit offering both evidence and arguments. In the early days of administering the Iowa statute such appearances were commonplace. Whether such persons are entitled to any personal notice of the hearings admits of great uncertainties, however.

Under modern constitutional notions of procedural due process, a person whose rights may be adversely affected by any proceeding to which finality is to be accorded is entitled to a notice of such proceeding in a manner reasonably calculated, under all the circumstances, to apprise the interested person of the pendency of action and to afford him an opportunity to present his objections. In evaluating the adequacy of the Iowa notice provisions *vis-a-vis* third parties, three elements must be considered: (1) The nature of the interests of "affected" third parties, (2) the "finality" of the determination awarding the permit, and (3) the reasonableness of the notice provisions.

1. Third Party Rights

As an initial proposition, it would seem that the granting of a permit to use Iowa waters may affect rights of persons other than the particular permittee involved. Under the statute the grant of a permit is conditioned on the Water Commission's finding that the proposed withdrawal is not detrimental "to the interests of property owners with prior or superior rights who might be affected."²⁶³ As

262. See 1 Cooper, State Administration Law 173-208 (1965), 1 K. Davis, *id.*, § 7.08.

263. Iowa Code § 455A.20 (1962).

administered this limitation is rendered somewhat nugatory, yet it suggests that the legislature contemplated that the property interests of third persons might be affected by the issuance of a permit to any particular applicant.

More to the point might be the interest of an irrigator, already holding a permit, in the granting of a permit to another irrigation use in the same reach of the stream. Under the summation flow doctrine utilized by the Water Commissioner each irrigation use permitted on a stream reach raises proportionally the level of stream flow that must exist before any irrigator may draw water from the stream without an approved sharing agreement.²⁶⁴ The granting of a new permit, therefore, could be said to reduce in some measure the quantum of water rights held by existing permittees. Although it is impossible to predict with certainty whether the courts would regard such third party rights as of a substantial enough nature to require that they be adequately notified of the hearing, in a proper case the likelihood of such a result must be recognized.

2. Finality of the Hearing

Before it can be said that third parties must be notified of hearings that might affect their water rights, it must be determined that such hearings can have a substantial adverse effect on such rights.²⁶⁵ Under the Iowa scheme, it might be suggested that third parties rights are not adversely affected because the proceeding through which a permit is issued lacks finality. This argument is premised on section 455A.28 which provides: "Subject to appeal in the manner provided by section 455A.19, subsection 8, a permit may . . . in case the water commission finds such modification or cancellation necessary to protect the public health or safety, or to protect the public interests in lands or waters, *or to prevent substantial injury to persons or property in any manner . . .*" Under this provision it would seem that the question of the grounds for issuance of a permit is always open and that at any time subsequent to the granting of the permit, these matters may be re-opened and re-examined.

On the other hand, the statute provides no procedure for an interested third party to initiate a review of the grounds for continuation of a particular permit except the regular appeal provisions, which are useful only to the extent that the third party is made aware

264. See discussion accompanying footnotes 151-73 *supra*.

265. See 1 Cooper, *supra* note 262, at 135-59; Oberst, Parties to Administrative Proceedings, 40 Mich. L. Rev. 378 (1941).

of the hearing result in time to file an appeal. Therefore, it would seem that in many cases the third party who did not know about the permit application considered at the hearing would have no direct procedure to call in question the "substantial injury" to his rights, but would have to depend on the water commissioner to exercise his discretion and call for a hearing on the issue of cancellation or modification. Such a restricted method for later raising his rights seems considerably less protection for third parties than what could be provided by notifying them of the hearing in the first instance. Further, it could be argued that any damage that might occur between the granting of the permit and a later cancellation is not remedied by a modification provided in the section authorizing such cancellations. On the whole, it would seem that the proceeding through which a water permit is granted partakes of sufficient finality as to third parties as to raise a procedural due process question if the notice of the hearing is not adequate.

3. Reasonableness of the Notice

Thus, we come down to the crucial question—the adequacy, as to third parties, of the notice provisions in the water statute. The test for adequate notice has been stated thusly: "The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . . or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes."²⁶⁶

Under the Iowa Act the notice requirements are specified in detail. Upon application for a permit to use water under the Iowa Act, the Water Commissioner shall cause due notice of a hearing thereon to be published once a week for two consecutive weeks in a newspaper of general circulation in each county in which the property affected is located.²⁶⁷ This publication must be within thirty days, but not less than ten days, of the hearing date.²⁶⁸ The statement "shall specify the date, time and place of hearing and shall include a concise statement of the designated beneficial purposes for which diversion

266. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 315 (1950). This case is universally recognized as the touchstone for almost all due process notice questions.

267. *Iowa Code* § 455A.1 (1962) as amended by *Iowa Acts*, 61st G.A. ch. 372 § 1 (1965).

268. *Ibid.*

is sought, the specific limits as to quantity, time, place, and rate of diversion, storage or withdrawal of waters, the name of the applicant and the description of the land upon which waters are to be diverted, stored or withdrawn." In addition, provision is made that such notice must be sent to interested state agencies," and to any other person who has filed a written request for a notification of any hearings affecting a designated area. . . .²⁶⁹

Considering that a water user may be affected by a permitted use miles upstream and perhaps in a different county, can it be said with assurance that the notice provided for in the Iowa act is reasonably calculated to actually apprise all interested parties of the pendency of a permit application hearing?²⁷⁰ Four related issues are raised by this question: (1) the necessity for some type of personalized notice to interested third parties; (2) the sufficiency of the Iowa publication requirements if it is determined that general notice may be adequate; (3) the effect of permitting interested parties to file requests for hearing; and (4) the possible curative effect of giving better notice than the statute requires.

(1) The constitutional requirements for due process notice laid down in the *Mullane* case have been further developed in recent years. An examination of several of the important cases should shed some light on the question of the sufficiency of the Iowa act's notice provisions.

Walker v. City of Hutchinson,²⁷¹ involved a condemnation proceeding brought by an administrative agency regulating private property for the public benefit. Under the statutes of Kansas notice could be given by publication "in the official city paper," and it was so done even though the plaintiff's name and address could have been ascertained from the official city records. The court held that because his name could have been easily ascertained, conditions reasonably required direct written notice, and the failure to so provide was a violation of the due process clause of the fourteenth amendment. In discussing the *Mullane* principles, the court emphasized the significance of the particular factual situation:

269. *Iowa Code* § 455A.19(3) (1962).

270. From the statutory syntax it seems clear that "property affected" in § 455A.1 refers to the property on which the permitted use is to be made and not other property that may be affected by granting of the permitted use. One way around the notice problem discussed subsequently might be to strain the statutory language to obtain the latter interpretation.

271. 352 U.S. 112 (1956).

We there called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with the circumstances and conditions. . . . In the present case there seems to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value.²⁷²

Recently the court passed on the constitutionality of a statute dealing with condemnation of riparian rights which provided for notice by newspaper publication and the posting of handbills.²⁷³ The plaintiff failed to make a timely application for compensation for the taking of her riparian rights. The provision in issue required notice by publication in two specified New York City papers and two papers in the county where the property was located, once a week for six consecutive weeks. Also handbills were to be posted simultaneously along affected watercourses at appropriate intervals. The court found actual compliance with these requirements. The plaintiff asserted that the requirements of *Mullane* and *Walker* were not met by this statute because she used the property only in the summer and thus the provisions were not likely to give her notice. The Supreme Court reversed the New York Court of Appeals holding that in the circumstances, the newspaper publications and posted notices did not measure up to the quality of due process required by *Mullane* and *Walker*. The crucial factor seemed to be that her name and address could have been easily discovered from the public records and that she did not actually see the newspaper notice, nor was any handbill posted on her property.

Closer to the issue under study is the decision of the Federal District Court in *Baumann v. Smrha*,²⁷⁴ holding that the Kansas Water Act was not constitutionally defective for its failure to provide for notice to affected parties for a permit hearing. However, the rationale for this decision seemed to rest on the ground that the Kansas permits are necessarily granted subject to valid existing vested rights and to prior appropriations, and provision for the pro-

272. *Id.* at 115-16.

273. *Schroeder v. City of New York*, 371 U.S. 208 (1962). The plaintiff's complaint alleged damages based on impairment of her riparian rights relating to bathing, swimming, fishing and boating due to the diminution in the velocity of flow in the river.

274. 145 F. Supp. 617 (D. Kan. 1956).

tection of those rights, either by actions for damages or injunction, is carefully made by the act. The court seemed to be saying in effect that no notice issue was presented because no third party's rights can be affected by the hearing. As discussed earlier, this conclusion is not so easily reached under the Iowa statute.

The adequacy of the Iowa notice procedures is very difficult to evaluate under the emerging due process standards. The cases seem to say that if the party raising the issue has an interest in the nature of a property right, he must be given some sort of personalized notice if his identity is known or can be discovered in the exercise of reasonable diligence. Thus, it would seem to follow that where the identity of other permittees and existing nonregulated water users likely to be affected by an action in regard to a particular permit are known to the Water Commissioner, due process requires better service than a two-time publication. On the other hand, the cases developing this doctrine involve parties whose rights were clearly and directly affected by the action taken, not third parties, the nature of whose rights border on the speculative. It should be noted in this regard that the Iowa court has in the past attempted to distinguish between substantial and speculative interests in applying the *Mullane* standards.²⁷⁵

A modification of the approach adopted by the court in the *Baumann* case considering the Kansas provision might provide something of a compromise answer. It is very difficult to take the position that third parties are entitled to no notice because their rights can in no way be affected by the hearing. But, because the Iowa permits are always subject to review and the rights of third parties are therefore never completely cut off, perhaps it is reasonable for Iowa to take the position that, although notice of hearings concerning permits should be provided for interested third parties, a general notice reasonably likely to apprise such parties of the action will suffice, even in cases where better notice might readily have been given. Whether this rationale will weather the test of litigation, only

275. See *In re Estate of Pierce*, 245 Iowa 22, 27, 60 N.W.2d 894, 898 (1953) where the court said in connection to the right of a will contestant to receive personal notice of the admission of the will, "These objectors . . . only interest in the estate was contingent upon a successful contest of the will . . ." and then quoted from the *Mullane* decision the passage, "Nor do we consider it unreasonable for the State to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future."

time will tell; however, it does have a certain practical appeal to commend it.²⁷⁶

(2) Assuming for the moment the validity of the foregoing rationale, can it be said that the Iowa provisions provide adequate general notice? The statute provides for publication of the notice for two weeks in the county in which the property affected is located. Is this reasonably calculated to apprise of the hearing a water user on the same reach of the stream, but in a different county? Ought not notice be published in every county in which an affected user might be located? The answers to these questions are not readily apparent from the case authorities. A certain common sense efficiency and expediency suggest that it might be nigh to impossible to determine the full range of effect of any particular water use. Still, to the extent it can readily be determined that effects are likely to cross county lines it would seem reasonable to require notice in the other counties.

Although by no means conclusive on the question, the rules and practices of other administrative agencies with regard to published general notice are suggestive of the result a court might reach on this question. A federal agency somewhat analogous in activity to the Water Commissioner is the Federal Communications Commission. The F.C.C., in allocating licenses for radio and television stations, regulates a resource—the air waves—not unlike water in many of its characteristics. The F.C.C. issues and modifies communication licenses after a hearing on the matter at which competitors of the applicant may appear and present objections. The F.C.C. rules provide for only a publication type notice of such hearings, and only in the city in which the facility in issue is located. Although the licenses at issue are prized considerably higher than water permits, no question has ever been raised concerning the sufficiency of such notice.²⁷⁷

Insofar as they purport to provide general notice, the Iowa pro-

276. It is likely that the notice provisions will stand a fair chance of being sustained by the Iowa Supreme Court under the doctrine of the *Pierce* case cited in note 275 *supra*. In federal court the outlook may not be so good, See 1 Cooper, *supra* note, at 277.

277. See 47 C.F.R. § 1.580(c) (1966). Admittedly this is a weak argument for supporting the validity of the Iowa notice provision, but the weakness lies less in the analogy than in the circumstance that the F.C.C. rules have never been questioned. Signals from radio or T.V. transmitters in a particular city can affect stations in nearby cities in much the same way that withdrawal of water at one location can affect uses some distance downstream. The absence of challenge in a competitive business like communications might indicate the acceptability of the notion that requiring anything more than general published notice at the site of the proposed facility would be highly impractical.

visions are at best minimally adequate. As a matter of sound policy, notice should be published where it is likely to reach persons whose interests may be affected, even if outside the county of the proposed use.

(3) If the notice provisions are found inadequate in a particular case on either of the grounds discussed above, it is extremely unlikely that the opportunity to request notice²⁷⁸ provided in the act will cure the deficiencies. The very persons for whose benefit the notice requirements are created are those unlikely to know of the proceeding other than by receiving adequate notice at the time it is held. It makes little sense to suggest that because they had a right to file a request to receive notice if a proceeding of a certain kind were ever held, by not filing such a request they rendered themselves undeserving of adequate notice when the event occurred.²⁷⁹

(4) One final possibility for sustaining the adequacy of the notice provisions deserves mention. Suppose the Water Commissioner affords better notice to interested parties than the statute requires, i.e., he mails notice of hearings to all parties known to be interested. Is the sufficiency of the notice to be judged by the notice in fact received by interested parties or by the notice provided for by the statute?

A formidable body of older authority substantiates the proposition that to be effective notice must be "legal", that is, it must comply with the terms of the statute under which it is given.²⁸⁰ Under this theory, notice beyond the requirements of the relevant statutory provisions is extralegal and of no effect. Therefore, the argument runs, such notice would be ineffective to cure the constitutional deficiencies of the statute.

Arrayed against this ancient learning is the modern constitutional law concept of standing. The standing doctrine is concerned with the ability of a particular party to challenge the constitutionality of a procedure and is premised on notion that constitutional questions should not be determined unless the claimant raising the issue can show some injury as a result of the alleged invalidity.²⁸¹

Applying this thinking, a party who in fact received constitutionally adequate notice, or had actual knowledge of a proceeding, could not complain that the statutory notice requirements were deficient.

278. *Iowa Code* § 455A.19(3) (1962).

279. See generally on waiver of notice, 1 Cooper, *supra* note 262, at 278.

280. See *Wuchter v. Pizzutti*, 276 U.S. 13 (1928); *Boivin v. Talcott*, 102 F. Supp. 979 (N.D. Ohio 1951).

281. See generally 3 K. Davis, *Administrative Law* § 22.01 *et seq.* (1958).

As yet, Iowa courts have not been faced with the necessity to choose between the "legal notice" and "standing" approaches to the due process notice problem. When the issue is faced the "standing" theory will probably hold sway. Hopefully, the water permit procedures will not furnish the occasion for this test.

C. *Improper Delegation of Powers*

Perhaps the stiffest challenge the water permit law faces in the constitutional area relates the possible improper delegation of legislative powers to the Council. State courts, generally, and the Iowa court in particular, have been extremely vigilant in protecting the balance of powers between the several branches of government.²⁸² This concern that the various departments of government not overreach one another is expressed in Article III, Section 1 of the Iowa Constitution: "[N]o person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others. . . ."

Receiving the closest scrutiny in Iowa are attempts by the legislature to confer on an administrative agency decision making powers requiring legislative-type judgment. Although the Iowa court has addressed itself frequently to the improper delegation issue, no clear pattern of approach has yet emerged. Iowa's handling of the delegation of powers issue depends heavily on the type of situation before the court. In almost all cases a balancing process is utilized, weighing the public interest against the danger to rights intended to be protected through the separation of powers concept. Where the public interest is highest, as in matters of health and safety, a proper delegation is usually found. Where the public interest is less and the threat to important rights is substantial, the likelihood is greater for finding an excess delegation. Where the scale is more or less in equilibrium, the presence or absence of several factors may cause the balance to be struck one way or the other. In passing, it should be noted that the state of the Iowa law on the issue of legislative delegation is very similar to that of most other jurisdictions.²⁸³ The federal cases are much more liberal, though not terribly better reasoned.²⁸⁴

282. See 1 Cooper, *supra* note 262, at 31-94 (1965); Lewis Consolidated School Dist. v. Johnson, 256 Iowa 236, 127 N.W.2d 118 (1964).

283. See 1 Cooper, *id.*, 1 K. Davis, *supra* note 261, §§ 2.07-16.

284. See 1 K. Davis, *supra* note 261, §§ 2.01-06. The traditionally liberal Federal approach to undue delegation problems has been extended to new heights in the recent interstate water apportionment case, *Arizona v. California*, 373 U.S. 546 (1963), decree

The delegation of a power to an administrative agency will not be struck down solely because the power delegated is legislative in its nature. Powers of a type ordinarily exercised by the legislature may be delegated under circumstances where the necessity for such delegation may be readily perceived.²⁸⁵ This statement is most likely to hold true where the function to be performed lies in the area of public health, safety or morals.²⁸⁶ For example, the Iowa court has approved the delegation of authority to local health boards to discover and remedy any "nuisance, source of filth or cause of sickness" found on private premises in the community, including the power to prescribe necessary health rules.²⁸⁷ The court pointed out that in absence of such a delegation of power the enforcement of acts involving public health would be ineffective.

Similarly, in the recent case of *Danner v. Hass*,²⁸⁸ the Iowa court sustained the validity of a statute authorizing the State Department of Public Safety to suspend, without preliminary hearing, the license of an operator who has committed a "serious" violation of the motor vehicle laws. The plaintiff challenged the suspension of his license on the ground that the term "serious violation" was so vague a standard as to constitute an unconstitutional delegation of legislative power to the public safety department. The court noted that the question was not free from difficulty, but went on to state that the "trend of authority is to uphold a considerable vesting of discretion in the department for the purpose of promoting public safety."

entered 376 U.S. 340 (1964). The majority rejected guidance from the traditionally applied equitable apportionment doctrine, and upheld the language of the statute as providing an adequate standard for the allocation of Colorado River waters to the contending states. The majority apparently was untroubled by the literal absence of any standard as they explained, "while the Secretary must follow the standards [broad limits] set out in the Act, he nevertheless is free to choose among the recognized methods of apportionment or to devise reasonable methods of his own."

285. See Davis, *id.* §§ 2.07-10; In *McLeland v. Marshall County*, 199 Iowa 1232, 1238, 201 N.W. 401, 403 (1924) the court said,

The exact line of demarcation between legislative power and administrative duties in some cases is not easily determinable. It may be stated, in a general way, that it is for the legislature to determine what the law shall be, to create rights and duties, and provide a rule of conduct. This does not necessarily mean that the legislature must lay down a strict rule that must be followed by an administrative officer, but that an executive or commission may be vested by the legislative branch of the government with discretion; within certain limits, in carrying out the provisions of a statute.

286. See 1 Cooper, *supra* note 262, 85-87 and cases cited therein.

287. *State v. Strayer*, 230 Iowa 1027, 299 N.W. 912 (1941).

288. 257 Iowa 654, 134 N.W.2d 534 (1965). See also *Broadlay v. Sioux City*, 229 Iowa 1291, 291 N.W. 171 (1940).

Where the public interest in the regulatory activity carried on by the administrative agency is not large, but the possible prejudice to private rights involved is substantial, the delegation of power must be spelled out in sufficient detail that the administrative officer has relatively clear guidelines in which he must operate. For example, where the city of Des Moines by ordinance delegated to its board of zoning adjustments the power to authorize a permit to occupy a stockyard after receiving certain fire and health reports, the court found such ordinance completely devoid of guides or standards, conferring on the board "virtually unlimited power . . . to authorize or not authorize a permit. . . ." ²⁸⁹

Even where the public interest is substantial, a strong possibility for deprivation of individual rights may cause the courts to require clear legislative standards. For example, where the state highway commission was authorized to establish regulations governing the use of highways, the violation of which would constitute misdemeanors, the court found an unlawful delegation of power owing to the absence of any real standards to guide the agency in formulating its rules. ²⁹⁰

In circumstances in which the public interest in the activity regulated is substantial but less critical than matters touching on safety and health and no great threat to private rights is apparent, it is very difficult to predict how the court will resolve the adequacy of the standards provided to guide administrative decisions. One factor recognized in Iowa in such cases is the need for relatively broad standards where a particularly complicated activity is being regulated to permit the administrative agency's expertise to be utilized. In *Miller v. Schuster*, ²⁹¹ the court approved a grant of power to the State Banking Board authorizing them to fix maximum interest rates for small loans in an amount "as will induce efficiently managed commercial capital to enter such business in sufficient amount to make available adequate credit facilities to individuals without the security or financial responsibility usually required by commercial banks." The court explained its holding on the basis of a long standing "common sense" policy through which due regard is given to the difficulty of adapting legislation to complex conditions.

However, the difficulty of legislating effective standards does not

289. *Chicago, Rock Island & Pac. R.R. Co. v. Liddle*, 253 Iowa 402, 408, 112 N.W.2d 852, 855 (1962).

290. *Goodlove v. Logan*, 217 Iowa 98, 251 N.W. 39 (1933).

291. 227 Iowa 1005, 289 N.W. 702 (1940), commented on in 25 Iowa L. Rev. 812 (1940).

excuse the failure to specify any standards whatsoever where it is clear some standards could be formulated. In an important recent case the court struck down the grant of power to the state superintendent of public instruction to "formulate standards, regulations and rules . . . for the approval of the schools and public junior colleges under his supervision" and to enforce such rules by removing from his approved list schools which he finds do not comply with them.²⁹² The statute in question contained no provisions expressly bridling the superintendent's exercise of this discretion in these matters. As the court put it, the statute seems "to give the superintendent, with the approval of the department, unlimited authority to do whatever he deems best in furthering the educational interests of the state." The court continued by recognizing that the modern trend is to require less exactness in the setting of legislative standards, but held "where standards or guidelines are readily possible, we think the legislature may not abandon them altogether. . . ."

Other factors that may play a role in the outcome of cases of this type are the extent to which the regulatory action is penal in nature, the degree to which the separation of powers principle is compromised, the extent to which regulation of the type at issue is established as a matter of tradition, and the measure of procedural protections built into the regulatory scheme.²⁹³

What does all of this discussion forbode for the Iowa water permit statute? Several sections of the Iowa act would seem to be susceptible to attack on delegation of powers grounds. Under section 455A.20 the Water Commissioner is directed to issue a permit if he determines that the use in question "will not be detrimental to the public interests . . . , or to the interests of property owners with prior or superior rights who might be affected. . . ." Later in the same section in relation to renewal permits, it is provided ". . . permits *may* be renewed by the Water Commissioner for any period of time not to exceed ten years." Section 455A.21 attempts to assist the administrator in his deliberations by directing him that "the declared policies and principles of beneficial use, as set forth in this chapter, shall be the standard for determination. . . ." Section 455A.28 authorizes the Water Commissioner to modify or cancel a permit ". . . in case of any breach of the terms or conditions thereof or in case of any violation of the law pertaining thereto by

292. *Lewis Consolidated School District v. Johnston*, 256 Iowa 236, 127 N.W.2d 118 (1964).

293. See 1 Cooper, *supra* note 262, 74-91, 1 K. Davis, *supra* note 261, § 2.10.

the permittee . . . or in case the Water Commissioner finds such modification or cancellation necessary to protect the public health or safety or to protect the public interests in lands or waters, or to prevent substantial injury to persons or property in any manner."

In relation to the issuance of a permit, it could be argued that the standards are illusory and in fact the Water Commissioner is given complete discretion in the issuance of a permit. After all, whether a use is detrimental to the public interest or to other private rights is not a matter of fact; these are matters requiring the exercise of the Commissioner's judgment. If the judgment goes against the applicant, the permit is not issued. How many definitions might be imagined to such vague terms as "detrimental," "public interest" and "superior rights." Are these meaningful guidelines for the exercise of administrative discretion? Does reference to the "policies and principles of beneficial use" serve to chart the administrator's path of decision?

Similarly, where are the standards governing the exercise of the Commissioner's discretion in renewing a permit? Presumably, if the Commissioner may renew a permit, he also may not. What criteria are to be employed in determining whether or not to renew? The same sort of objections can be raised concerning the modification and cancellation powers. What standards control the terms and conditions on which a permit is issued, the breach of which may lead to cancellation? What Solomon knows when "any manner" of injury to persons or property is substantial? Of what law pertaining to permits may the violation lead to cancellation or modification of the permit; is it the rules and regulations promulgated by the Council?

Anyone familiar with state delegation of powers cases will realize that these questions are by no means spurious or facetious. These are the kinds of inquiries courts make when issues of legislative standards are presented to them. The rhetorical nature of many of these questions indicates the potential vulnerability of the Iowa statute. But how vulnerable is it really?

Projecting the water statute against the backdrop of Iowa authority, no completely analogous situation emerges. Although the public has a great interest in water, regulation of the resource may not quite reach the level of police power exercise found in the health and safety regulation cases, although a sound argument could be made that it should.²⁹⁴ On the other hand, the private rights being regu-

294. *Cf. State v. Van Trump*, 224 Iowa 504, 275 N.W. 569 (1937) where a rule making grant to the Conservation Commission was held an unconstitutional delegation.

lated are of questionable substance. Consider the tenuous nature of both the existing interests being regulated and the new rights created by the statute. Hardly the weighty variety of rights that cause the judicial balancing arm to tilt abruptly downward.

The situation posed by the water regulation statute is more similar to the *Miller* and *Lewis School District* cases where the test employed by the court seemed to be whether the explicitness of the legislative standards were reasonably appropriate to the flexibility and discretion necessarily required of the administrative agency by reason of the complexity of the task with which it is charged. If the water act is measured against this criterion, the chances for a finding of constitutional delegation seem bright.

It cannot be said in connection to the water statute, as was said in *Lewis School District*, that no standards were provided by the legislature. The act purports to provide standards, although in some instances it may be necessary to imply them. The principal difficulty is the vagueness of the standards. However, water use regulation is an incredibly complex matter. Such regulation necessarily involves utilization of the talents of an expert administrative agency. Assuming the legislature has determined to regulate water (and note that a paramount state interest in water resources was declared), how much more definite standards than those contained in the act could be formulated? Is beneficial use not a standard that can be intelligently interpreted?²⁹⁵ The difficulty of creating more specific guidelines was compounded by the fact that nowhere had experience at the type of regulation envisioned by the Iowa statute been acquired. Judged on a common sense basis, the standards provided by the water statute should be found sufficient considering the uncertainties inherent in the regulatory venture at issue and the high current public interest in safeguarding the continued availability of adequate water supplies.²⁹⁶

295. For an excellent collection of cases discussing the constitutional adequacy of a standard couched in terms of "beneficial uses" see Ziegler, *Statutory Regulation and Water Resources*, in *Water Resources and the Law* 87, 97-101 (1958).

296. An excellent statement of the permissive doctrine relating to legislative delegation is contained in *American Power and Light Co. v. S.E.C.*, 329 U.S. 90, 105 (1946).

The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general

Reinforcing this view of the act's validity are such factors as the adequate procedural guarantees provided in the statute, the availability of judicial review to correct abuses, the non-penal nature of the statute, and the circumstance that under the statute the agency is performing something of a proprietary function—managing a resource owned by the state. Also of possible relevance is the fact that the Water Commissioner has over the last ten years succeeded in interpreting and applying these vague standards to develop a rational and workable administrative system that has so far operated in such a fashion as to minimize the likelihood of the kinds of dissatisfaction that give rise to constitutional litigation.

One other rather far-fetched constitutional issue should be noted in passing. The Iowa act provided that "[a]ny person aggrieved" may appeal to the district court from a determination by the Natural Resources Council, and that the court is to try the matter *de novo* with the burden on the Council to prove its acts "reasonable and necessary." The court has power to "make such order to take the place of the order appealed from as it is justified by the record before it."²⁹⁷ This provision might possibly be thought to present a constitutional question under the Iowa separation of powers provision as it purports to allow the court to review and alter all aspects of the Council's orders.

Courts often indulge in *de novo* review of certain acts deemed to concern an administrative agency's "judicial function." Other acts considered to concern the discretion of the agency in its area of expertise, are termed "nonjudicial" functions, and it is review of these matters that is occasionally declared unconstitutional as an invasion of the executive power.²⁹⁸ Although the Iowa act seems to authorize the courts to substitute their judgment for the Natural Resources Council's discretion in its area of expertise, it is unlikely the review provision could be successfully challenged as an unconstitutional delegation of executive power to the judiciary. Such an arrangement is probably unwise, but it should not be unconstitutional.

policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the policy in the light of these legislative declarations.

297. *Iowa Code* § 455A.37 (1962).

298. See *Sellin v. City of Duluth*, 248 Minn. 333, 80 N.W.2d 67 (1956) (discharge of employees); *Jones v. Marsh*, 148 Tex. 362, 224 S.W.2d 198 (1949) (denial of license); *Household Fin. Corp. v. State*, 40 Wash. 2d 451, 244 P.2d 260 (1952) (denial of license); *Jaffe v. State Dept. of Health*, 135 Conn. 339, 64 A.2d 330 (1949) (revocation of license).

CONCLUSIONS AND RECOMMENDATIONS

This work might appropriately have been entitled "A *humid* decade of experience, etc." One factor that must constantly be kept in mind in evaluating this discussion of the Iowa experience is the circumstance that this water allocation scheme, born in the drought years of the mid 1950's, has had its infancy blessed with nearly a decade of relatively abundant water supplies. This general plentitude of water has been something of a mixed blessing. It has enabled the administrative agency delegated to carry out the legislative plan to evolve its regulatory techniques with a minimum of resistance. On the other hand, the relative lack of competition for Iowa's water has postponed the kind of conflicts that constitute the sternest test for such a regulatory scheme. The permit system seems to work very well in Iowa, but there is always that haunting uncertainty of how it will work under the stress of drought.

Adoption of the Iowa water permit system signaled the beginning of a new era in Iowa water use law, but the Iowa act was by no means a radical solution to water allocation problems in terms of either the changes actually wrought in Iowa water rights or the contemporary thinking about water use as reflected by the water law of other states. Although the Iowa system has several unique characteristics that render it readily distinguishable from other states' water use laws, the Iowa statute is essentially eclectic, attempting to draw the best and most appropriate features from a number of different sources. As written and administered, the system is characterized by an extremely broad coverage of water uses and a relatively low degree of regulation thereof.

Because the Iowa legislation seemingly was generated in great measure by concern about increased demand for drought-diminished stream supplies anticipated from a rapidly growing interest in irrigation within the area, the principal regulating function of the Iowa system has been to settle the heretofore uncertain position of irrigation in the hierarchy of water uses. Under the riparian system, it was unclear whether any priority existed between various uses such as municipal, industrial and irrigation; all are artificial uses, but only irrigation is completely consumptive. Under the permit system as administered, an irrigation use in excess of 5,000 gallons a day is a regulated use while municipal and industrial uses are initially unregulated. Further, among regulated uses, the totally source depleting nature of irrigation is recognized through the specification of

protected minimum flows in the permits of all irrigators withdrawing from streams. The effect of the protected minimum flow requirement is to prevent consumptive users from withdrawing water during periods of low flow that would otherwise be available to non-consumptive users. To date, only irrigation permits regularly contain protected flow limitations, although some other uses may be partially source depleting. Thus, to the extent the irrigator had rights equal to other artificial users under Iowa's riparian rules, the Water Permit statute has altered those rights through recognition of the essential difference between irrigation and other less consumptive uses. However, in all likelihood no persuasive constitutional objections can be raised concerning this alteration of an indefinite right into a regulated use.

Aside from the changes relating to irrigation, Iowa water users have approximately the same rights under the statute as they did under common law. True, if their use exceeds the statutory minimum, they must apply for a permit, but if the use is beneficial (and it is difficult to conceive of a user making a non-beneficial use, as the term is defined in the statute) the permit may be obtained with a minimum of expense and delay. Presumably, any one may receive a permit to use water if he can show his use beneficial. The statute makes no requirement that the user own land contiguous to the water supply. This represents a departure from riparian principles, but because no power to obtain access rights is granted in the statute, it is unlikely that many non-riparians will seek permits. Another change of little practical consequence is the possibility of losing a water use right through non-use created by the act.

Because the law, as administered, attempts to create no priorities among users, permittees under the act occupy the same general position as did riparian owners under the common law. Rights of water users not regulated by the statute are still apparently fully governed by riparian principles. No real advantage is enjoyed by regulated or non-regulated users over one another, save in the case of irrigators.

Other than regulating irrigation, the principal achievement of the Iowa act has been the creation of a base upon which further regulation can be built when it becomes necessary to do so. The permit system serves several very important purposes. In the first place it establishes conclusively the principle that water use is an appropriate subject for regulation in Iowa and it allows for the development of an administrative framework through which future problems can be handled. Secondly, it takes the formulation of water rules away

from the courts, and places it in the hands of a public agency which will presumably develop considerable expertise in handling the problems of water use. Moreover, it serves the very important function of gathering information. Many of the problems encountered in the common-law rules concerning riparian owners and ground water were due to a lack of factual knowledge about water. No efficient regulatory system can exist until it is known how much water is available, how it is used, and what effect such use has on the supply. This information is now being systematically gathered and recorded.

Finally, the Iowa act provides for the public enforcement of the newly promulgated water rules. Violations of the common law water rules could be ended only by those private citizens who had standing to complain of the violations. This was, at best, an inefficient system of enforcement. The Iowa act provides an agency which is attuned to the public interest, and which is given the power to enforce the rules by which the public interest is served. The permit system does not contain the answers to all the questions concerning the use of Iowa's water resources; it does, however, provide many of the tools through which those answers may ultimately be found.

The temptation at this juncture is to include a long and detailed list assembling in one place all of the relatively minor suggestions and recommendations scattered throughout this work. Such a list would undoubtedly include some fairly important items such as the suggested amendment to cure the shadowy vested rights problem and the recommendation relating to providing better notice of hearings to affected third parties. This temptation is resisted in favor of placing concentration on one issue that strikes to the very heart of the permit system under development in Iowa.

Perhaps the most unusual characteristic of the Iowa system, at least as presently administrated, is that it does not purport to do that which one would normally suppose to be the purpose of water regulation—the establishment of priorities of use for times of scarcity.

The supply of water is relatively inelastic, but the demand for it is not. Population and technological advances in the next century may put a severe strain on our water resources. There is a limit to the number of users, consumptive or otherwise, that can coexist in using any water source without rendering that source permanently near or below the level required for it to be fully used beneficially by anyone. If and when water demands reach that stage in Iowa, necessity will compel the water administrators to discriminate be-

tween beneficial uses, and to grant priorities to those which are most beneficial in the light of the public interest.

At present, and for the immediate future, our resources are probably great enough to justify the practice of granting a permit for any beneficial use. Increased regulation may not be necessary as long as water scarcity is caused only by occasional temporary shortages or droughts. At some point in the future, however, this policy is likely to require re-examination.

If current projections of future water demands are to be believed, the time of true competition for water may not be as far away as many Iowans believe. If the Iowa permit system is to be an enduring institution in the water allocation field, those responsible for its development must face up to the need to begin thinking about the priorities problems of the future now while time still remains to fully investigate and reflect on the matter. Establishing priorities is such a difficult undertaking because no recognized standards exist for evaluating the relative beneficialness of a use. It seems very likely that the greatest contribution the present water administration could make to assuring the orderly future development of Iowa's resources would be to commence now the protean process of research and deliberation that must underlie the creation of standards for distinguishing among beneficial uses. The hour may already be late.