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An Agricultural Law Research Article

## **South Dakota's Lakes: A Valuable Resource in Need of Land Use Protection**

by

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Originally published in SOUTH DAKOTA LAW REVIEW  
20 S. D. L. REV. 598 (1975)

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## SOUTH DAKOTA'S LAKES: A VALUABLE RESOURCE IN NEED OF LAND USE PROTECTION

*This comment exposes the lack of legal protection afforded the lakes of South Dakota and examines regulatory approaches designed to control shoreline development and its subsequent effects on lake ecosystems. The regulatory plans implemented by other Midwestern states to deal with the problem are examined in light of the resulting constitutional issues.*

### INTRODUCTION

The small lakes of America are threatened by a shortening lifespan. Their accelerated march toward extinction is caused primarily by man's activities. . . . These lakes, once blessed with the highest forms of aquatic life, have been thoughtlessly pillaged by man.<sup>1</sup>

The accelerated trend of water-oriented recreation in our society and its resultant stimulation of shoreline development is obvious to anyone in a state with significant lake formations.<sup>2</sup> Along with development, which may result in living structures tightly spaced and totally surrounding the lake, other structures such as boathouses and docks line the shorelands. The consequence is that the natural beauty which originally enticed shoreline development is now being sacrificed.<sup>3</sup> This onslaught of humanity is perpetrated on a decreasing supply of natural resources, the lakes. "[T]he supply of natural lakes is gradually diminishing due to natural extinction processes, water pollution, and the fill of shoreland areas."<sup>4</sup>

The intensity and type of land utilization on the shorelines of these lakes is the main determinant in the quality of the lake environment.<sup>5</sup> Thus land use controls designed to regulate the uses permitted in the critical areas surrounding these sensitive water systems have been implemented by both inland<sup>6</sup> and coastal<sup>7</sup> states

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1. HOUSE COMM'N ON GOVERNMENT OPERATIONS TO SAVE AMERICA'S SMALL LAKES, TO SAVE AMERICA'S SMALL LAKES, WATER POLLUTION CONTROL AND ABATEMENT, H.R. REP. NO. 594, 90th Cong., 1st Sess. 5 (1967).

2. Cooper & Vlasin, *Ecological Concepts and Applications to Planning, in ENVIRONMENT: A NEW FOCUS FOR LAND USE-POLICY* 204 (D. McAllister ed. 1973) [hereinafter cited as Cooper & Vlasin].

3. Beuscher, *Shoreland Corridor Regulations to Protect Lakes*, in NATIONAL ACADEMY OF SCIENCES, *EUTROPHICATION* 521 (1969).

4. Kusler, *Carrying Capacity Controls For Recreation Water Uses*, 1973 WIS. L. REV. 1 [hereinafter cited as Kusler].

5. Cooper & Vlasin, *supra* note 2, at 204.

6. MICH. STAT. ANN. §§ 13.1831-5 (1970); MINN. STAT. ANN. § 105.485 (Supp. 1974); WIS. STAT. ANN. §§ 59.971 (Supp. 1974), 144.26 (1967).

7. *E.g.*, CAL. GOV'T CODE § 66600 (West 1966); CONN. GEN. STAT. ANN. § 22a-21 (Supp. 1974); FLA. STAT. ANN. §§ 253.122, .123 (1963); GA. CODE ANN. § 45-136 (1974); ME. REV. STAT. ANN. tit. 12, §§ 4701-09 (1964); MASS. GEN. LAWS ANN. ch. 130, § 27a (Supp. 1971); N.H. REV. STAT. ANN. § 483:A:1 (1966); N.C. GEN. STAT. § 113-229 (Supp. 1974); N.J. STAT. ANN.

to protect their lakes and estuaries. This comment critiques these regulatory approaches while exposing the need for some form of land use zoning device in South Dakota to deal with the problem of ecological deterioration of the natural lake environment. Any regulatory approach adopted must conform with the guidelines set out by the federal<sup>8</sup> and state<sup>9</sup> constitutions. The resultant constitutional issues will be discussed in detail.<sup>10</sup>

#### THE SIGNIFICANCE OF SOUTH DAKOTA'S NATURAL LAKES

In South Dakota the use of natural waters for recreation has increased significantly over the past few years.<sup>11</sup> For many South Dakotans the main source of a recreational environment is the natural lake. South Dakota has over 500 such lakes which contain over 700,000 surface acres of water.<sup>12</sup> The different types of water recreation, which include water skiing, boating, fishing, swimming, hunting, and just enjoyment of the natural beauty, are becoming more popular as leisure time increases.<sup>13</sup> Modern transportation systems, such as the interstate highways, have permitted many to travel great distances to the popular water environments.<sup>14</sup> The result of easier travel is not only the increased popularity of water recreation, but also a significant stimulation of the state and local economics through tourism from out-of-state users.<sup>15</sup> An estimated 21 million dollars are spent every year in South Dakota in connection with the sport of fishing alone.<sup>16</sup> Thus South Dakota's lakes, through the recreational pleasures and resultant tourism that they provide, are extremely valuable assets.

Together with their recreational importance, South Dakota's natural lakes provide the unique and exclusive habitat for many forms of plant and animal life. The shorelands of these natural lakes are especially critical because they provide an important link in the food web for each water community. These wetlands supply

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§ 13:9A-1 (1970); R.I. GEN. LAWS ANN. § 11-46.1-1 (Supp. 1973); VA. CODE ANN. §§ 21-141 to -223 (1973).

8. U.S. CONST. amend. V.

9. S.D. CONST. art. VI, § 13.

10. See text accompanying notes 110-175 *supra*.

11. STATE PLANNING BUREAU, SOUTH DAKOTA WATER PLAN 21 (No. 1 January 1975) [hereinafter cited as SOUTH DAKOTA WATER PLAN].

12. Hanten, *Fishing*, S.D. CONSERVATION DIGEST 3 (March-April 1968) [hereinafter cited as Hanten].

13. By the year 2,000 the nation's population will double while the demand for outdoor recreation will triple. Water sports will be a focal point of increased outdoor recreation. Citizens Comm. for the Outdoor Recreation Resources Review Comm., Action for Outdoor Recreation for America 8, 9 (1964).

14. F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* 315 (1971) [hereinafter cited as BOSSELMAN & CALLIES].

15. See FIRST PLANNING AND DEVELOPMENT DISTRICT, MODEL RURAL DEVELOPMENT PROGRAM, POSITION PAPER ON LAKE RESTORATION FOR THE SOUTH DAKOTA CABINET OF NATURAL RESOURCES SUBCOMM. (January 3, 1975).

16. Merwin, *Impact of Sport Fishing*, S.D. CONSERVATION DIGEST 20, 21 (March-April 1974): "The \$21 million annual shot in the arm to the state's economy from fishing would indicate that management of the resource is of paramount importance . . . ."

the necessary habitat for the production of many forms of invertebrate animals. These invertebrates are the source of food for small fishes and other animals and thus are necessary for the continuation of that particular food chain.<sup>17</sup> These water environments also provide breeding and nesting grounds for the large influx of migrating waterfowl.<sup>18</sup> Once again, the shoreland is the critical area which provides both the vegetation necessary for nesting and the water animals many species of waterfowl need for food. This interrelationship between plants and animals forms the sensitive ecology for the lake environment. Thus the lake is more than a mere body of water; it is a *unique* environment which breeds both biological and aesthetic considerations. Whether any specific lake will satisfy the recreational, economic, aesthetic, and ecological demands will largely depend on the quality of its water and the survival of its wetlands.<sup>19</sup>

### THE PROBLEM

The degradation of a lake's quality is due to the reaction of its fragile ecosystem to the introduction of man-induced pollutants including sediment and fill. This interaction is a losing battle for the natural lakes because of the sensitivity of their ecosystems. The ecosystem of a natural lake is extremely fragile because of its dependence on the shoreland areas for habitat and food production for higher forms of aquatic life. When the shorelands are altered or destroyed, so too is an important link in the lake's natural web of life.<sup>20</sup> Another reason for the lake's ecological sensitivity is that the natural lake is essentially a closed microcosm with virtually no outflow of water. Therefore the substances that are introduced have no avenue of escape. The result of this clash between man and nature is not only accelerated eutrophication,<sup>21</sup> but a general deterioration of a lake's natural environment. This environmental destruction precipitates devaluation of shoreline property, retards future legitimate development, prevents recreational use, and destroys important food sources in the ecological web of life.

### Pollution

Pollution is generally considered to be an undesirable change in the biological characteristics of the land, air, or water.<sup>22</sup> There

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17. See E. ODUM, *FUNDAMENTALS OF ECOLOGY* 10 (3d ed. 1971) [hereinafter cited as ODUM].

18. STATE OF SOUTH DAKOTA WATER RESOURCES COMMISSION, *QUALITY OF WATER IN SELECTED LAKES OF SOUTH DAKOTA* (Report No. 1 1972).

19. *Id.* at 13.

20. ODUM, *supra* note 17, at 70-71.

21. "Eutrophication . . . is the process of giving a lake a bellyache." A. REITZE, *ENVIRONMENTAL LAW* ch. 4 at 25 (1972) [hereinafter cited as REITZE].

22. See ODUM, *supra* note 17, at 432. For a statutory definition of pollution see S.D. COMPILED LAWS ANN. § 46-25-24(1) (Supp. 1974) which defines pollution as

are many types of pollutants each with its own cause and effect. A short synopsis of several important sources of pollution is necessary to understand the problems created by pollutants.

First, there are organic materials or untreated domestic wastes the source of which is ineffective sanitary disposal methods. The effect of this type of pollutant is to cause a decrease in the available amount of dissolved oxygen in the lake's water. Because each aquatic ecosystem has a definite biological oxygen demand,<sup>23</sup> the decrease in dissolved oxygen content has harmful effects on all water organisms that utilize oxygen to sustain life.<sup>24</sup>

Plant nutrients and bacteria from municipal waste treatment systems form a second group of water pollutants. These forms of bacteria stimulate production of microorganisms, mostly algae. Thus this type of pollutant is partially responsible for the immense growth of nuisance algae blooms<sup>25</sup> which make water unacceptable for most recreational uses.<sup>26</sup>

Another form of damaging pollutants is suspended and dissolved particles of soil. The source of such pollution is siltation caused by shoreline cultivation, erosion, overgrazing, road building, and general development.<sup>27</sup> These solid materials, while in suspension, cause waters to become turbid. Consequently, sunlight cannot penetrate the water as readily and the process of photosynthesis by oxygen-producing water plants is retarded.<sup>28</sup> Thus this form of pollution has a detrimental effect on the biological oxygen demand of any affected water environment.

Changes in water temperature, as a result of man's activities, are also a form of pollution. Even a small increase in the water temperature of a lake has deleterious effects on aquatic animals which have definite limits to their adaptive capacities.<sup>29</sup> The removal of shoreline vegetation and the return of irrigating waters are the main causes of this type of pollution.<sup>30</sup>

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contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state as exceeds that permitted by state effluent and/or water quality standards, including but not limited to change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such water harmful, detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life . . . .

23. C. WARREN, *BIOLOGY AND WATER POLLUTION* 58 (1971) [hereinafter cited as WARREN].

24. *Id.*

25. *Id.* at 59.

26. *SOUTH DAKOTA WATER PLAN*, *supra* note 11, at 21.

27. Glover, *And Nary a Drop to Drink*, *SOUTH DAKOTA CONSERVATION DIGEST* 18 (March-April 1968).

28. WARREN, *supra* note 23, at 60.

29. *Id.* at 61.

30. *Id.*

Finally, the run-off of manure from feedlots and pesticides from fields contributes excess nutrients and deadly toxins to the lake's water.<sup>31</sup> The nutrients accelerate algae growth while the toxins are detrimental to the animal forms of aquatic life.<sup>32</sup> For example, the extensive use of DDT in the 1960's caused near extinction of the peregrine falcon and condemnation of salmon from Lake Michigan as unsafe for human consumption.<sup>33</sup> In South Dakota, the collective run-off from agriculture and development is one major cause of poor water quality in the natural lakes.<sup>34</sup>

The most obvious result of the accumulation of all the preceding types of pollution is accelerated eutrophication.<sup>35</sup> Eutrophication is the process of a body of water accumulating an excess amount of algae because the pollutants feed the algae with nutrients.<sup>36</sup> The process produces so much algae that it dies in great quantities creating unstable chemical conditions in the water. The resultant increase of carbon dioxide, phosphorus, and nitrogen changes the character of the water environment upon which the aquatic animals depend. Algae blooms cause a decrease in the number of fish, restrict the utilization of recreational facilities, devalue shoreline property, and desecrate aesthetic beauty.<sup>37</sup> The end result of eutrophication is the transition of the lake into a swampy mass of algae and ultimately into dry land.<sup>38</sup>

Although lakes even without pollution are considered short-lived and transitory,<sup>39</sup> the input of man-derived nutrients in a natural lake can produce in a few years a eutrophic condition equal to that which under natural conditions would have taken thousands of years.<sup>40</sup> Thus eutrophic conditions can relatively quickly inhibit the beneficial uses a lake provides.

The effects of pollutants upon streams and rivers, although extremely detrimental, are less damaging than they are in a lake's ecosystem. The reason is that streams and rivers are constantly in motion which prevents stagnation and settling and assures a new supply of water at each point along the channel.<sup>41</sup> In contrast, a natural lake is a sensitive, closed microcosm with little, if any, in or out-flow of water.<sup>42</sup> Pollutants which flow into a natural lake tend to accumulate. A natural lake is also more susceptible than

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31. *Id.*

32. W. D. RUSSELL-HUNTER, AQUATIC PRODUCTIVITY 151 (1970) [hereinafter cited RUSSELL-HUNTER].

33. *Id.*

34. SOUTH DAKOTA WATER PLAN, *supra* note 10, at 28.

35. REITZE, *supra* note 21, ch. 4 at 25. See generally NATIONAL ACADEMY OF SCIENCES, EUTROPHICATION (1969).

36. REITZE, *supra* note 21, ch. 4 at 25.

37. *Id.*

38. *Id.*

39. G. HUTCHINSON, A TREATISE ON LIMNOLOGY 1 (1957).

40. See REITZE, *supra* note 21, ch. 4 at 26.

41. See generally R. COKER, STREAMS, LAKES, PONDS (1954).

42. RUSSELL-HUNTER, *supra* note 32, at 108-09.

are streams and rivers to shoreline destruction by uncontrolled development because its delicate ecosystem is entirely dependent on food produced by its shorelands. These natural lake characteristics reveal the sensitivity of the lake ecosystem and the imperative need for increased protection for the natural lake from all sources of pollution.<sup>43</sup>

### *The Problem in South Dakota*

The number of lakes available for all types of recreational use and for management of basic ecological systems is gradually diminishing due to accelerated eutrophication, increased water pollution, and uncontrolled construction on shoreline areas.<sup>44</sup> Although lakes near metropolitan areas are the first to be exposed to these forms of "progress," the lakes in rural areas such as South Dakota, are now subject to the same developmental pressures.<sup>45</sup>

South Dakota's lakes are peculiarly susceptible to eutrophication because of their shape, structure and shallow depth. Lakes of this type tend to be more eutrophic because of the ability of sunlight to pass through shallow waters stimulating algae growth at all levels.<sup>46</sup> This result of water pollution has been categorized as the most inherent threat to sport and commercial fishing in South Dakota.<sup>47</sup>

The lakes of eastern South Dakota are rapidly falling prey to uncontrolled shoreline development. These developmental pressures may result in irreversible changes in the natural lake environment. The physical destruction of the lakeshore environment by the dredging, damming, and filling needed for large scale development is one of these irreversible processes. Shorelands compose fragile habitats which have been formed over many years through the growth of shoreline vegetation;<sup>48</sup> therefore their destruction is essentially an irreversible process.

Examples of uncontrolled development in South Dakota are: Brandt Lake (Lake County) where "third row"<sup>49</sup> development has occurred; McCook Lake (Union County) which is virtually a private lake because it is completely encircled by privately-owned cabins

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43. Kusler, *Water Quality Protection For Inland Lakes in Wisconsin: A Comprehensive Approach To Water Pollution*, 1970 WIS. L. REV. 35, 37 [hereinafter cited as Kusler].

44. See Kusler, *supra* note 4.

45. Johnson & Morry, *Filling and Building On Small Lakes: Time For Judicial and Legislative Controls*, 45 WASH. L. REV. 27 (1970) [hereinafter cited as Johnson & Morry].

46. RUSSELL-HUNTER, *supra* note 32, at 109.

47. Van Ray, *Fishing Dividends For the Future*, S.D. CONSERVATION DIGEST 26 (March-April 1968).

48. In fragile landscapes the intensity and distribution of human utilization must be responsive to ecological limitations. Cooper & Vlasin, *supra* note 2, at 203-04.

49. Row development is home and cabin development in concentric rings around the shores of a lake.

and homes; and Lake Poinsett (Hamlin County) which has over 600 thinly-spaced shoreline cabins.<sup>50</sup>

Shoreline development appears to be increasing in northeastern South Dakota because the northern lakes have better water quality.<sup>51</sup> Two reasons for inferior water quality in lakes in southern South Dakota are greater shoreline development and increased farming of the lake watersheds.<sup>52</sup> The inference naturally follows that the more northern lakes are next to succumb to uncontrolled development, pollution, and the ecological destruction which follows. Besides the environmental problems, uncontrolled development may result in usurpation of the public rights in any such lake by lakeshore property owners.<sup>53</sup> Without access to a lake encircled by shoreline development, the recreational potential and the natural beauty to be enjoyed by the general public is totally inhibited.

Our society has a tendency to assess the utilization of land solely in economic terms. However the cost of irreversible environmental destruction is not prone to valuation by cost-accounting. It is difficult to create an economic standard by which environmental degradation can be expressed:<sup>54</sup> "(t)he problem inherent in quantifying a way of life, or the beauty of an unspoiled mountain, may never be soluable with any degree of certitude."<sup>55</sup>

Recently the public has become aware of certain environmental problems. A survey conducted by the First Planning and Development District, Watertown, South Dakota, revealed that two of the top priorities for the District in 1975 were to stop lake and stream pollution and to save the natural lakes through shoreline zoning and lakeshore improvements.<sup>56</sup> The finite number of these sensitive lakes need legal protection if they are to survive our generation. The legal approaches taken by other states will now be analyzed to determine their effectiveness in achieving this goal of lake protection.

#### THE REGULATORY APPROACHES BY OTHER STATES

The adoption of land use planning to control the uses permitted in critical areas of our environment is increasing as we become more

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50. Telephone interview with Clint Nagel, counsel for the South Dakota Dep't of Game, Fish & Parks, Pierre, South Dakota (January 14, 1975).

51. Telephone interview with Roger Steinberg, Environmental Specialist, Cooperative Extension Service, Brookings, South Dakota (January 15, 1975).

52. *Id.*

53. *Id.*

54. Cooper & Vlasin, *supra* note 2, at 203. There are now attempts to put environmental change in monetary terms so as to provide a basis for balancing the effects of development against environmental degradation in economic terms. See UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF RESEARCH AND DEVELOPMENT, AN ASSESSMENT METHODOLOGY FOR THE ENVIRONMENTAL IMPACT OF WATER RESOURCE PROJECTS (July 1974).

55. Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956, 959 (1st Cir. 1972).

56. SOUTH DAKOTA, FIRST PLANNING AND DEVELOPMENT DISTRICT, MODEL RURAL DEVELOPMENT PROGRAM, TOP TWELVE PRIORITIES IN DISTRICT I (1975).



aware of the need for such protection. "This country is in the midst of a revolution in the way we regulate the use of our land. It is a peaceful revolution, conducted entirely within the law."<sup>57</sup> In recent years several inland states have recognized the need for the legal protection of their natural lakes.<sup>58</sup>

### *The Wisconsin Approach*

In Wisconsin, the construction of highways stimulated cabin and resort development in areas along previously undeveloped lakes. This increased development precipitated the use of waste disposal systems not suited for lakeshores, and significant water pollution problems resulted.<sup>59</sup> The construction itself led to siltation pollution from the grading and filling necessary for most shoreline development. The cumulative effect of this uncontrolled development was destruction of both the scenic beauty and ecology of the natural lakes of Wisconsin.<sup>60</sup>

The State reacted to the problem by enacting the Water Resources Act of 1966<sup>61</sup> which required all counties of Wisconsin to promulgate regulations for the protection of all unincorporated areas along natural lakes in order to "further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and other aquatic life; control building sites, the placement of structure and land uses and reserve shore cover and natural beauty."<sup>62</sup> The 1966 Act also provided that if counties failed to adopt an ordinance protecting shorelines by January 1, 1968, the State Department of Natural Resources was authorized to impose its own regulations.<sup>63</sup> Specifically, the counties were given the authority to enact zoning regulations affecting all unincorporated land in their jurisdiction within 1,000 feet of a lake, pond, or flowage and within 300 feet of a navigable<sup>64</sup> river or stream, or the landward side of a floodplain, whichever was greater.<sup>65</sup> The Wisconsin Department of Natural Resources was commanded to prepare general recommendations for zoning standards which were to take into consideration: safe conditions for the enjoyment of aquatic recreation, the demands for water traffic and sports, the capabilities of the water resource, the requirements necessary to assure proper operation of sewage disposal, setback lines for buildings, the preservation of shoreline vegetation, conservancy uses for low-lying lands, shoreline layouts for development, and the

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57. BOSSELMAN & CALLIES, *supra* note 14, at 1.

58. Statutes cited note 6 *supra*.

59. BOSSELMAN & CALLIES, *supra* note 14, at 235.

60. *Id.*

61. WIS. STAT. ANN. § 144.26(1) (1967).

62. *Id.*

63. *Id.* § 59.971(6) (Supp. 1974).

64. Navigable means all natural inland lakes, streams, ponds, sloughs, flowages or other waters within Wisconsin. *Id.* § 144.26(2)(d) (1967).

65. *Id.* § 59.971(1) (Supp. 1974).

effective administration and enforcement of such regulations.<sup>66</sup>

With these considerations in mind, a model ordinance<sup>67</sup> was prepared to assist counties in formulating their own shoreline zoning regulations. The model ordinance created three shoreline zoning districts: conservancy,<sup>68</sup> recreational-residential,<sup>69</sup> and general purpose.<sup>70</sup>

The conservancy district was designed to protect areas not normally suitable for development such as marshy areas and wetlands which are essential to the ecology of any natural lake. All residential, commercial, and industrial development was prohibited.<sup>71</sup> The recreational-residential zoning district included all shoreline areas not in the conservancy district that were suited for residential or recreational uses. Single-family dwellings, hotels, campgrounds, and trailer parks were all permitted in the district.<sup>72</sup> The general purpose district allowed all uses with special exception permits available to industry.<sup>73</sup> The model ordinance also limited lot size,<sup>74</sup> regulated subdivision by encouraging cluster development for more efficient waste disposal,<sup>75</sup> preserved natural areas, and provided a sanitary code for control of waste disposal.<sup>76</sup>

The Wisconsin counties recognized the need for land use planning of shorelands and their response to the legislative mandate was excellent considering the short time between the passage of the 1966 Act and the deadline for compliance, eighteen months.<sup>77</sup> By 1969, the Department of Natural Resources had received ordinances from sixty-five of Wisconsin's seventy-two counties.<sup>78</sup>

Despite the comprehensive nature of the Wisconsin regulatory scheme to control the pollution and development of its lakes and rivers there are certain weaknesses. First, the only shorelands protected are those adjacent to *navigable* bodies of water. Thus, pollutants which washed into lakes through nonnavigable watersheds are not subject to regulation.<sup>79</sup> Second, counties can only zone in unincorporated areas thereby excluding all lakes within municipalities.<sup>80</sup> Third, inadequate funds were available to map floodplain areas so most counties were only able to apply the 300 foot zone

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66. *Id.* § 144.26(6) (1967).

67. WISCONSIN DEP'T OF RESOURCE DEVELOPMENT, MODEL SHORELAND PROTECTION ORDINANCE (December 1967).

68. *Id.* § 12.

69. *Id.* § 13.

70. *Id.* § 14.

71. *Id.* § 12.

72. *Id.* § 13.

73. *Id.* § 14.

74. *Id.* § 6.

75. *Id.* §§ 16, 17.

76. *Id.* § 5.

77. Kusler, *supra* note 43, at 63.

78. *Id.*

79. *Id.* at 76. See also BOSSELMAN & CALLIES, *supra* note 14, at 247.

80. See BOSSELMAN & CALLIES, *supra* note 14, at 247.

along rivers.<sup>81</sup> Also, the 1966 Act provided no enforcement at the state level so variances granted by counties were not subject to state review.<sup>82</sup> Finally, the model ordinance excluded from its regulations the sources of run-off pollution from the agricultural practices of spreading manure on frozen fields and the use of pesticides within the zoning district.<sup>83</sup> Despite these weaknesses, the Wisconsin regulatory approach is a credible attempt to save its natural lakes from permanent destruction caused by uncontrolled development.

In summary, the Wisconsin approach utilizes the concept of placing the primary responsibility for protection of shorelands with the counties which employ the land use techniques formulated by the state-level agencies. The shoreline protection program is designed to stimulate the state and county cooperation necessary to provide satisfactory land use control.<sup>84</sup>

#### *The Minnesota Approach*

The State of Minnesota has also reacted to the deterioration of its lake environments by passage of a shoreland protection program.<sup>85</sup> Although its counties already had the power to enact their own zoning ordinances, it was necessary to stimulate county action on shoreland preservation through compliance with state legislation.<sup>86</sup> The Minnesota shoreland protection program was designed to regulate uncontrolled development of shoreland areas which was causing crowding, destruction of scenery, undersized lots, water pollution and general deterioration of the environment.<sup>87</sup> Thus the purpose of the Minnesota shoreland protection program was to provide guidelines for development of shorelands, the preservation of water quality and the natural environment, and the wise utilization of water.<sup>88</sup>

Under the shoreland protection program all counties in Minnesota were required to adopt a shoreland conservation ordinance by July 1, 1972, which regulated lot size, set backs, land uses, sanitary disposal, and preservation of natural shoreland.<sup>89</sup> The ordinance affects all land within 1,000 feet of lakes greater than twenty-five acres in area, and all land within 300 feet of the delineated floodplain or river or stream, whichever is greater.<sup>90</sup>

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81. *Id.* at 248.

82. *Id.* at 246.

83. Kusler, *supra* note 43, at 76-77.

84. BOSSELMAN & CALLIES, *supra* note 14, at 254.

85. MINN. STAT. ANN. § 105.485 (Supp. 1974).

86. UNIVERSITY OF MINNESOTA, COOPERATIVE EXTENSION SERVICE, MINNESOTA'S SHORELAND MANAGEMENT PROGRAM (Minnesota Tourist Travel Notes, vol. 1, February 1971) [hereinafter cited as Minnesota Tourist Travel Notes].

87. *Id.*

88. MINN. STAT. ANN. § 105.485(1) (Supp. 1974).

89. *Id.* § 105.485(3), (4).

90. *Id.* § 105.485(2).

Although the sanitary requirements are the same for all shoreline areas, other land use regulations vary according to the specific lake's zoning classification. Lake classification is important in any land use zoning scheme designed to protect natural lakes because the amount of protection necessary varies with the particular lake's characteristics. The lakes were classified on the basis of their size, depth, existing development, and crowding potential.<sup>91</sup>

A recent amendment to Minnesota's shoreland program requires municipalities to submit zoning plans for protection of shorelands within their jurisdiction.<sup>92</sup> This amendment cures one of the weaknesses in the Wisconsin shoreland program which did not require shoreline zoning of lakes within incorporated areas.

There is optimism that the Minnesota comprehensive zoning regulations will curb uncontrolled development and preserve its natural lakes for future generations. "Perhaps their greatest additional impact will be to retard and control shoreland development for the enhancement of the scenery afforded those who have an opportunity to enjoy one of Minnesota's most valuable natural resources."<sup>93</sup>

#### *The Estuarine Analogy: Wetland Statutes*

The estuarine system is analogous to the natural lake in its sensitivity, production of unique habitat, and current destruction by uncontrolled development.<sup>94</sup> The estuary has been recognized as an extremely sensitive and valuable ecosystem.<sup>95</sup>

Estuarine areas attract recreationists for swimming, boating, . . . or just an opportunity to enjoy the beauty of natural resources along coastal areas. When they are destroyed through residential or industrial development, or are badly polluted, they cannot be replaced. When this happens, the Nation as a whole is the loser.<sup>96</sup>

#### *91. Minnesota's Lake Classification System and Corresponding Land Use Regulation*

| Lake Class               | Depth            | Size     | Density of Development        | Building Setback | Sewage Setback | Lot Size | Front Width |
|--------------------------|------------------|----------|-------------------------------|------------------|----------------|----------|-------------|
| Natural Environment      | less than 15 ft. | —        | 3 dwellings per mile          | 200 ft.          | 150 ft.        | 2 acres  | 200 ft.     |
| Recreational Development | more than 15 ft. | 60 acre  | 4-24 dwellings per mile       | 100 ft.          | 75 ft.         | 1 acre   | 150 ft.     |
| General Development      | more than 15 ft. | 225 acre | 25 or more dwellings per mile | 75 ft.           | 50 ft.         | ½ acre   | 100 ft.     |
| Critical                 | —                | —        | —                             | 200 ft.          | 150 ft.        | 2 acres  | 200 ft.     |

#### **MINNESOTA DEP'T OF NATURAL RESOURCES, PUBLIC WATERS CLASSIFICATION—LAND USE REGULATION (Cons. 71 1971).**

92. MINN. STAT. ANN. § 105.485(6) (Supp. 1974).

93. Minnesota Tourist Travel Notes, *supra* note 86, at 3.

94. ODUM, *supra* note 17, at 352.

95. *Id.*

96. *Hearings on Estuarine Areas Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 90th Cong., 1st Sess. 29 (1967).

The estuarine complex occurs where inland freshwater mixes with mineral-rich seawater in a semi-closed coastal zone.<sup>97</sup> The resultant habitat provides an environment rich in animal plankton which forms the foods for the higher forms of valuable marine life such as shrimp and sport fish.<sup>98</sup> When uncontrolled development occurs in these estuarine areas, the required filling and grading effectively destroys the ecosystem's productivity and thereby has a drastic effect on the ecological, economic, and recreational output of the coastline.<sup>99</sup> Such occurrences are increasing because coastline development, like lakeshore development, is becoming more popular.<sup>100</sup>

In reaction to such environmental destruction, nearly all coastal states<sup>101</sup> have passed legislation protecting the estuary.<sup>102</sup> A typical statute is Georgia's Coastal Marshlands Protection Act<sup>103</sup> which provides for the regulation of coastal wetlands for the purpose of finding a balance between the preservation of the environment and development.<sup>104</sup> The approach used to protect these areas is the requirement that "[n]o person shall remove, fill, dredge or drain, or otherwise alter any marshlands . . . within the estuarine area thereof without first obtaining a permit from the Coastal Marshlands Protection Agency."<sup>105</sup> Thus, the state-level agency has control over what and where development is permissible.

The analogy between the estuarine system and the natural lakes is important. Both ecosystems are equally fragile, finite, and subject to environmental destruction by the effects of uncontrolled development. Because this destruction is an irreversible process, the unique habitat and life forms that survive here are not relocatable in another environment. While nearly all coastal states<sup>106</sup> have passed protective legislation for their estuaries only a few inland states<sup>107</sup> have comprehensive land use regulations protecting their natural lakes. Perhaps the reason for the anomaly is that the economic value of the estuary has long been recognized, whereas the value of the natural lake as a recreational resource, tourist attraction, and vital ecological link in the web of life has only recently been appreciated. Because the importance of natural lakes is now apparent, land use regulations protecting their existence should follow in the path of statutory development of estuarine protection.

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97. ODUM, *supra* note 17, at 352. See also THE ENVIRONMENTAL CRISIS 143 (H. Helfrich ed. 1970).

98. See S. REP. No. 1981, 85th Cong., 2d Sess. (1958).

99. ODUM, *supra* note 17, at 352-62.

100. BOSSELMAN & CALLIES, *supra* note 14, at 304.

101. *E.g.*, statutes cited note 7 *supra*.

102. Comment, *Land Use Management in Delaware's Coastal Zone*, 6 U. MICH. J.L. REF. 251 (1973).

103. GA. CODE ANN. § 45-136 to -147 (1974).

104. Comment, *Regulation and Ownership of the Marshlands: The Georgia Marshlands Act*, 5 GA. L. REV. 563 (1971).

105. GA. CODE ANN. § 45-140(a) (1974).

106. *E.g.*, statutes cited note 7 *supra*.

107. See statutes cited note 6 *supra*.

THE CONSTITUTIONAL ISSUES INHERENT IN LAND  
USE REGULATIONS

Other than through the nuisance theory, which could be used to enjoin a person from using his land unreasonably so as to interfere with his neighbor's use and enjoyment of his land, the common law did not interfere with a property owner in the use of his land.<sup>108</sup> In response to changing values, however, the concept of the private ownership of land has changed in the last few years.<sup>109</sup> Previously the predominant idea was that a land's only value was in the amount of money it could produce. Wetlands, formerly thought of as economically worthless are now considered to have a high natural value.<sup>110</sup> This country's awareness of the land's importance as our source of sustenance is increasing steadily as we face an environmental crisis perpetrated by our own misuse and overuse of our land. One commentator analyzed the result: "In response to this crisis, the concept of property rights in land . . . is contracting rather than expanding."<sup>111</sup>

Contrasting with this new view of property rights is the individual's freedom to use his private property as he sees fit.<sup>112</sup> The exercise of this right, however, has always been limited. Land has traditionally been subject to governmental condemnation by eminent domain<sup>113</sup> or subject to regulation by a state's exercise of its police power.<sup>114</sup> Condemnation of all shorelands in need of legal protection is impractical because state governments simply do not have the funds required for compensation under the Constitution,<sup>115</sup> thus the police power is generally used to exercise control over the use of private property.<sup>116</sup> The South Dakota Supreme Court has recognized this concept and declared that the police power is an inherent regulatory device in state government.<sup>117</sup>

Because the police power is the source of authority for zoning and land use controls, there are certain constitutional criteria that must be met before any shoreland zoning or wetland statute can be upheld. The land use regulation must control activity which is deemed detrimental to the public health, safety, morals, or wel-

108. Large, *This Land Is Whose Land? Changing Concepts of Land As Property*, 1973 WIS. L. REV. 1039, 1046-47 [hereinafter cited as Large].

109. *Id.* at 1039. See also *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761, 768 (1972).

110. BOSSELMAN & CALLIES, *supra* note 14, at 314.

111. Large, *supra* note 108, at 1040.

112. *Id.* at 1047.

113. See Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954).

114. *E.g.*, *State v. Central Lumber Co.*, 24 S.D. 136, 154, 123 N.W. 504, 510 (1909).

115. U.S. CONST. amend. V.

116. 6 E. MCQUILLIN, *MUNICIPAL CORPORATIONS*, § 24.02 (3d ed. 1969) [hereinafter cited as MCQUILLIN].

117. *State v. Central Lumber Co.*, 24 S.D. 136, 154-55, 123 N.W. 504, 510 (1909).

fare,<sup>118</sup> or in other words, it must serve a valid police power objective;<sup>119</sup> it must bear a reasonable relationship to the objective desired;<sup>120</sup> and it must be reasonable in that it can not deprive the owner of all the practical use of his land so as to constitute a "taking without compensation" under the federal or state constitutions.<sup>121</sup>

### *The Public Health, Safety, and Welfare*

To be constitutional, a zoning ordinance must regulate activity harmful to the public health, safety, or welfare.<sup>122</sup> If the land is regulated or taken because it is useful to the public, then the state must follow eminent domain procedures and pay just compensation.<sup>123</sup> Thus eminent domain takes private property because it is useful to the public interest.<sup>124</sup> The police power, on the other hand, regulates the use of property, because if unregulated, the use would be harmful to the public interest.<sup>125</sup> In applying this general rule, if a land use regulation is used to preserve natural areas from destruction by a landowner's harmful activities, rather than to improve the public condition, this facet of the police power is fulfilled.

Under South Dakota law it has been declared that "the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to a public use or controlled for public protection."<sup>126</sup> In *Knight v. Grimes*,<sup>127</sup> the South Dakota Supreme Court, when considering the issue of water apportionment, declared that where the public interest regarding water is involved, it is a characteristic of the police power to give preference to the public interest over the property owner's interests. Thus, at least in South Dakota, the prevention of destruction of our water resources could be deemed an activity which is a proper object of the police power.

The recent recognition of the critical importance of environmental values will play an important role in legitimatizing police power regulations for the public welfare;<sup>128</sup> these environmental

118. 6 McQUILLIN, *supra* note 116, § 24.11.

119. *E.g.*, *Lawton v. Steele*, 152 U.S. 133 (1894), discussed in Garton, *Ecology and the Police Power*, 16 S.D.L. REV. 275 [hereinafter cited as Garton].

120. *E.g.*, *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

121. *E.g.*, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

122. *See* *Berman v. Parker*, 348 U.S. 26 (1954).

123. 1 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING*, ch. 6 at 6-7 (1974).

124. *Id.*

125. *See* *Iowa Natural Resources Council v. Van Zee*, 261 Iowa 1287, 158 N.W.2d 111, 118 (1968).

126. S.D. COMPILED LAWS ANN. § 46-1-1 (1967).

127. 80 S.D. 517, 523, 127 N.W.2d 708, 711 (1964).

128. "It is the destiny of the Fifth Circuit to be in the middle of great, oftentimes explosive issues of spectacular public importance. So it is here as we enter in depth the contemporary interest in preservation of our environment." *Zabel v. Tabb*, 430 F.2d 199, 200-201 (5th Cir. 1970).

values may portend change in the police power criteria for land use regulation. Regulations which have controlled water pollution where the public's actual health and safety were at stake have been upheld as a valid exercise of the police power.<sup>129</sup> If the detrimental effect of *all* water pollution is recognized, not only that which threatens the public health, but also that which damages the ecology and indirectly threatens the public health, safety, or welfare, then water pollution control through zoning should be logically upheld.<sup>130</sup>

### *The Public Welfare and Aesthetics*

Another issue regarding the constitutionality of a land use regulation is whether it can be upheld on the basis of the protection of aesthetics. Undoubtedly, uncontrolled development and pollution of natural waters could be considered damaging to the lakes' natural beauty; a blue-green mass of algae blooms or a tight assemblage of dingy cabins can ruin the aesthetics of any lake. Whether a court will recognize aesthetic values to uphold the constitutionality of a shoreline zoning ordinance is not yet apparent. The courts, however, have come a long way from the early cases that held that the police power could not be used to uphold aesthetic values.<sup>131</sup>

[T]he attitude of the courts has now changed. Instead of seeking grounds for upsetting such regulations the courts now seek means of holding them valid and the courts of a number of states have held that, at least in certain situations, aesthetic grounds alone would support restrictions upon the use of property.<sup>132</sup>

The United States Supreme Court in *Berman v. Parker*<sup>133</sup> substantiated this view when it suggested that the term "public welfare" can include aesthetics. Thus, perhaps aesthetics alone could be used to uphold shoreline zoning laws designed to preserve the beauty and ecology of a natural lake.

### *The Reasonable Relationship*

A zoning regulation based on the police power must be reasonably necessary for the fulfillment of the object of that power.<sup>134</sup>

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129. *E.g.*, *United States v. 531.13 Acres of Land*, 366 F.2d 915 (4th Cir. 1966).

130. University of South Dakota, *The Laws, Institutional Organizations, and Court Cases Affecting Water Resources and Related Land Development* (prepared for the South Dakota Resources Commission, June 1973, on file at McKusick Law Library, University of South Dakota).

131. *Quintini v. City of St. Louis Bay*, 64 Miss. 483, 1 So. 625 (1887); *Romar Realty Co. v. Board of Comm'rs*, 96 N.J.L. 117, 114 A. 248 (1921), discussed in *Garton*, *supra* note 119, at 276-77.

132. Rodda, *The Accomplishment of Aesthetic Purposes Under the Police Power*, 27 S. CAL. L. REV. 149, 175-176 (1954).

133. 348 U.S. 26, 33 (1954) (dictum).

134. *E.g.*, *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).



For example, a shoreline zoning ordinance must have a "reasonable tendency"<sup>135</sup> to control development, pollution, and preserve the natural environment of a lake's ecosystem. If the regulation cannot possibly achieve its desired end or the threat to public welfare is remote it will be declared unconstitutional.<sup>136</sup> The courts will generally look to the legislature for guidance as to whether the regulation will accomplish the end sought for the public welfare.<sup>137</sup> Therefore, a shoreline zoning ordinance which is carefully worded as to legislative intent and based on known scientific facts should fulfill the reasonable relationship requirement.

### *The Taking Issue*

The South Dakota Constitution<sup>138</sup> prohibits the taking or damaging of private property for public use without just compensation. The question then becomes, what is considered a taking or damaging under a land use regulation promulgated under the state's police power. This question may turn wholly on what test the reviewing court uses to determine if a taking has occurred.<sup>139</sup> For example, when the court looks solely to the diminution of the economic value of the property which would occur under the operation of a land use statute, a taking is rather easily found.<sup>140</sup> However, the "[m]ere diminution of market value or interference with the property owner's personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance . . . ."<sup>141</sup> Therefore, the reviewing court will normally balance the harm to the property owner by the operation of the statute against the harm to the public if the property is not regulated.<sup>142</sup>

The South Dakota Supreme Court has adopted a similar approach by balancing the interests of the public against the detriment to the landowner. In an action for inverse condemnation for claimed loss of access to an interstate highway, the court held that circuitry of travel necessary to gain access to the highway was not a taking and therefore compensation was not required.<sup>143</sup>

### *Land Use Statutes: Constitutional Regulation or a Compensable Taking?*

The key determinant of whether a land use statute will be up-

135. Kusler, *supra* note 43, at 52.

136. *E.g.*, Krol v. County of Will, 38 Ill. 2d 587, 233 N.E.2d 417 (1968).

137. *E.g.*, Block v. Hirsch, 256 U.S. 135 (1920).

138. S.D. CONST. art. VI, § 13.

139. Perhaps the most widely quoted rule was formulated by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922): "The general rule at least is that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking."

140. See *State v. Johnson*, 265 A.2d 711 (Me. 1970).

141. 8 McQUILLIN, *supra* note 116, § 25.44.

142. *E.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

143. *Darnall v. State Highway Comm'n*, 79 S.D. 59, 108 N.W.2d 201 (1961); see text accompanying note 161 *infra*.

held is the facts surrounding the effect of the statute upon any particular piece of property. Therefore, the cases involving land use statutes have been decided either way depending on the peculiar facts. The following cases illustrate this concept.

The court in *Morris County Land Co. v. Parsippany-Troy Hills*<sup>144</sup> considered a flood basin zoning ordinance which restricted development in a swampy area with a high water table. The court held that the zoning regulation diminished the value of the plaintiff's property too severely when it limited the use of the land to open space. The court took notice of the fact that the substantive effect of keeping the plaintiff's property in its natural state as a water-detention basin was a benefit to the local public and thus just compensation was required.<sup>145</sup>

In *Dooley v. Town Plan & Zoning Commission of Town of Fairfield*<sup>146</sup> a city ordinance which restricted uses in a flood-plain area to parks and playgrounds and prevented residential and commercial development was declared unconstitutional as it applied to the plaintiff's property. The court stated that the property's economic potential was reduced by seventy-five percent because of the operation of the statute and thereby resulted in an unconstitutional taking which required just compensation.<sup>147</sup>

The Maine Wetlands Control Act,<sup>148</sup> which required a permit before altering any of the state's coastal wetlands, was held to constitute a taking as it applied to the plaintiff's land in *State v. Johnson*.<sup>149</sup> In that case the court looked solely to the economic harm caused to the plaintiff's property. The court found that the permit requirement rendered the land commercially valueless because without filling the coastline property was not suitable for development.<sup>150</sup> "To leave appellants with commercially valueless land in upholding the restriction presently imposed, is to charge them with more than their just share of the cost of the statewide conservation program, granting fully its commendable purpose."<sup>151</sup> Therefore, the permit requirement constituted a taking and compensation was required to validate it. Other courts have severely criticized this case and declared that it is not the law in their jurisdictions.<sup>152</sup>

The three previous cases illustrate the result when a court finds that the economic harm caused to a person's property by operation

144. 40 N.J. 539, 193 A.2d 232 (1963), discussed in Garton, *supra* note 119, at 285-86.

145. *Id.* at —, 193 A.2d at 240.

146. 151 Conn. 304, 197 A.2d 770 (1964).

147. *Id.* at —, 197 A.2d at 773.

148. ME. REV. STAT. ANN. tit. 12, § 4701 (1964).

149. 265 A.2d 711 (Me. 1970), discussed in Garton, *supra* note 119, at 286-87.

150. *Id.* at 716.

151. *Id.*

152. See *Potomac Sand & Gravel v. Governor*, 266 Md. 358, 293 A.2d 241 (1972). *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

of a land use statute outweighs the public interest. Had the ecological impact of the property owner's use of his land been fully exposed, perhaps a different result would have occurred.<sup>153</sup> This view is supported by several recent cases which have taken the ecological impact into consideration.<sup>154</sup>

In *Turnpike Realty Co. v. Town of Dedham*,<sup>155</sup> a flood-plain zoning ordinance, which had the substantive effect of preserving the natural condition of the area, was held constitutional as a legitimate exercise of the police power. The court in upholding the statute took notice of the ecological purpose stated by the legislature. Thus in applying the "balancing test" they determined that although the petitioner was substantially restricted in the use of his land, he had not been deprived of all beneficial uses. Therefore, because noncompliance with the zoning ordinance would result in harm to the public health, safety, or welfare, the decrease in economic value of his property was not sufficient to constitute a taking of private property.<sup>156</sup>

In *Potomac Sand & Gravel Co. v. Governor*,<sup>157</sup> the court upheld a statute prohibiting dredging in wetlands. The court enunciated the ecological benefits that the wetlands produced which prompted it to validate the statute:

Mattawoman creek is one of ten main spawning streams supporting anadromous fish in the drainage system of the Potomac River. It is one of the finest fresh water marshes in the Upper Potomac Estuary, and is the *only* area along the Maryland shores where the rare native lotus . . . and . . . (wild rice) are to be found. . . . The vegetation is an important source of dissolved oxygen, food, and protection necessary for anadromous fish which utilize the marshes for resting and spawning each spring. . . . It is also a habitat for the bald eagle, black duck, mallard duck, deer, rabbit, mink, otter, beaver, and has one of the larger wood duck roosts.<sup>158</sup>

The court concluded that the statute had an ecological purpose and that the protection of exhaustible natural resources was valid under the police power.

In *Candlestick Properties, Inc. v. San Francisco Bay Conservation & Development Commission*,<sup>159</sup> the court upheld the police power as used to prevent the placing of fill in San Francisco Bay

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153. See Garton, *supra* note 119, at 288.

154. *Turnpike Realty Co. v. Town of Dedham*, — Mass. —, 284 N.E.2d 891 (1972). See also *Candlestick Properties, Inc. v. San Francisco Bay Conservation & Development Comm'n*, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970); *Potomac Sand & Gravel v. Governor*, 266 Md. 358, 293 A.2d 241 (1972); *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

155. — Mass. —, 284 N.E.2d 891 (1972).

156. *Id.* at —, 284 N.E.2d at 900.

157. 266 Md. 358, 293 A.2d 241 (1972).

158. *Id.* at —, 293 A.2d at 243.

159. 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970), discussed in Garton, *supra* note 119, at 288-89.

even though the plaintiff's land supposedly had no value unless filled. The court noted that there was a definite public interest in prevention of filling, because "the bay is the most valuable single natural resource of the entire region" and filling would threaten the future usefulness of the bay.<sup>160</sup>

Although the South Dakota Supreme Court has not yet decided a case where a land use regulation limited the uses available to the owners of shorelands, at least one writer has commented on its probable approach if the regulation were enacted to prevent public harm:

The court could very well abandon its balancing test in such a case and hold public health and noxious use regulations which have the effect of absolutely prohibiting a formerly profitable use from continuing under a valid exercise of the police power and not be required to pay any compensation to the landowner.<sup>161</sup>

Perhaps the most far-reaching court decision in this area is the case of *Just v. Marinette County*.<sup>162</sup> The court had to decide the constitutionality of a county shoreland zoning ordinance promulgated pursuant to a legislative mandate.<sup>163</sup> In 1961, the plaintiff purchased thirty-six acres of land along a navigable lake in Wisconsin. Subsequently a county ordinance was passed and it designated the plaintiffs' land as part of the conservancy district where no development was permitted because of the importance of wetlands. The plaintiffs, however, proceeded to fill in their shoreland without a permit in violation of the ordinance. In Wisconsin circuit court the plaintiffs were fined and an injunction was issued restraining them from further alteration of the shoreline. On appeal to the Wisconsin Supreme Court the plaintiffs raised the issue of whether the ordinance resulted in an unconstitutional taking of property without compensation because the present zoning classification provided for little economic return. In upholding the county ordinance the court revealed its attitude concerning the constitutional issue of the taking of private property:

The Justs [plaintiffs] argue their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While the loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.<sup>164</sup>

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160. *Id.* at —, 89 Cal. Rptr. at 900.

161. Ellingson, *The Line Between Eminent Domain and the Police Power in South Dakota Law* 15-16 (July 1974, unpublished paper on file South Dakota Law Review).

162. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

163. WIS. STAT. ANN. §§ 59.971 (Supp. 1974), 144.26 (1967); see text accompanying notes 56-84 *supra*.

164. 56 Wis. 2d 7, 201 N.W.2d 761, 771 (1972).

Historically, the landowner's *expectancy of profit* was always taken into consideration when ascertaining a property's worth.<sup>165</sup> The Wisconsin Supreme Court, however, seems to have abandoned that concept, at least where zoning regulations protecting wetlands are concerned. Thus when deciding whether a taking has occurred, it will look at the value of the land *in its natural state* to determine whether the land still has some value after operation of the ordinance. The expectancy of profit from development of land is irrelevant to whether a zoning regulation for wetlands will be upheld. Thus what value the land could have, if altered, is not an essential factor.

This redefinition of a property's value regarding the taking issue may result in the widespread use of this new judicial attitude toward the regulation of private property.<sup>166</sup>

Is the ownership of a parcel of land so absolute that man can change its nature to suit any of his purposes? . . . An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. . . . [a]nd we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses.<sup>167</sup>

An important aspect of the *Just* decision is that the court acknowledged what science has recognized for some time: shorelands are a special type of environment critical to a lake's survival.

What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty. . . . Swamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated, possess their own beauty in nature.<sup>168</sup>

This perceptive attitude toward land is also expressed by the First Circuit Court of Appeals in *Steel Hill Development Inc. v. Town of Sanbornton*.<sup>169</sup> In that case the plaintiff brought a declaratory judgment proceeding attacking a zoning law which had rezoned the plaintiff-developer's land to require a minimum lot size of six acres. The court concluded that the ordinance did not constitute a taking because the town had a right to protect itself against uncontrolled development which would, among other things, result in pollution of a nearby lake. "[A]t this time of uncertainty as to the right balance between ecological and population pressures,

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165. Large, *supra* note 108, at 1078.

166. *Id.*

167. 56 Wis. 2d 7, —, 201 N.W.2d 761, 768 (1972).

168. *Id.* at —, 201 N.W.2d at 768.

169. 469 F.2d 956 (1st Cir. 1972).

we cannot help but feel that the town's ordinance, which severely restricts development may properly stand for the present as a legitimate stop-gap measure."<sup>170</sup> The court, admitting it was caught up in the environmental revolution,<sup>171</sup> held like the Wisconsin court, that the estimated value of what the plaintiff's land would be worth is irrelevant, and although the value of the plaintiff's land was diminished, it was not totally worthless in its natural state.<sup>172</sup>

If the *Just* and *Steel Hill Development* cases illustrate a trend in the concept of property valuation when regarding the issue of whether the operation of any particular regulation may constitute a taking, significant gains may be made by the states in their attempt to control development near the critical areas surrounding sensitive water ecosystems.<sup>173</sup>

#### AN APPEAL TO THE SOUTH DAKOTA LEGISLATURE

South Dakota has a valuable resource in its 500 natural lakes.<sup>174</sup> The loss of one of South Dakota's lakes through pollution caused by uncontrolled development has greater impact than the loss of one in Wisconsin where there are over 8,800,<sup>175</sup> or in Minnesota where there are over 10,000.<sup>176</sup> Yet, those states have protective legislation for their shorelands along natural lakes while South Dakota does not.<sup>177</sup> It is also apparent that no state agency in South Dakota claims to have statutory authority for development of programs for reclamation of its lakes.<sup>178</sup>

#### *The State's Commitment to Water Resources*

The State of South Dakota holds title to the bed of every navigable<sup>179</sup> lake or stream within its boundaries in trust<sup>180</sup> for the

170. *Id.* at 962.

171. *Id.* at 959.

172. *Id.* at 963.

173. Some writers have suggested that the mere regulation of land cannot constitute a taking. J. BANTA, F. BOSSELMAN, & D. CALLIES, *THE TAKING ISSUE* (1973) [hereinafter cited as BANTA, BOSSELMAN & CALLIES].

174. Hanten, *supra* note 12, at 3.

175. Kusler, *supra* note 43, at 36.

176. See Minnesota Tourist Travel Notes, *supra* note 86.

177. "It is somewhat surprising that zoning has not yet been consciously applied to small lake fills and structures." Johnson & Morry, *supra* note 53, at 53.

178. FIRST PLANNING AND DEVELOPMENT DISTRICT, MODEL RURAL DEVELOPMENT PROGRAM, RECOMMENDATIONS TO THE SPECIAL LEGISLATIVE COMM. ON LAND USE PLANNING (1974).

179. Navigable means the lake is of such a character and extent that its waters constitute public waters. *Flisrand v. Madson*, 35 S.D. 457, 152 N.W. 796 (1915).

180. See generally J. MACDONALD & J. CONWAY, *ENVIRONMENTAL LITIGATION* § 5.02 (1972).

Intermediate between rights which the government possess as property owner . . . and the power under which it regulates human activities in the interest of the environment . . . are powers in the nature of trusteeship which partake of some of the characteristics of both ownership and regulation. These powers may be related to water, air, or land. Federal and state navigational servitudes in

people that they may enjoy the waters for fishing, boating, and other public purposes freed from the interference of private property owners.<sup>181</sup> This public trust theory has been the basis for land use legislation in Wisconsin,<sup>182</sup> Minnesota,<sup>183</sup> and Michigan.<sup>184</sup> The trust theory was also used as the foundation for the South Dakota Environmental Protection Act of 1973.<sup>185</sup> Another legislative mandate for the protection of South Dakota's water resources is that "the people of the state have a paramount interest in the use of all the water of the state. . . ."<sup>186</sup>

The State Planning Bureau of South Dakota has set the following policies for the protection of water quality and the natural environment:

It shall be the policy of the state that environmental benefits and costs will receive equal weight with economic benefits and costs.

[It shall also be the policy] to recognize that water necessary for instream fish, wildlife, and aesthetic purposes is a beneficial use and capable of protection by a water right.<sup>187</sup>

To fulfill these promises to the people of South Dakota as the beneficiaries of the trust held by the state, legal protection from the consequences of uncontrolled development should be afforded its natural lakes.

#### *A County Initiated Shoreline Protection Program*

Hamlin County, South Dakota, has recently enacted a shoreline zoning ordinance pursuant to statutory authority<sup>188</sup> which permits but does not demand county initiated protection for the lakes within its boundaries. "The real purpose for lake zoning is to provide for orderly lakeshore development on Lake Norden, Lake Albert, Dry Lake, and others before they get out of hand."<sup>189</sup> The lake-residential district, as set out by the ordinance, contains all land within

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navigable water and in airspace are examples of such powers; another example is the ownership of land and water by government in trust either for a variety of purposes or for the purpose to which first dedicated. *Id.* at 97.

181. *Flisrand v. Madson*, 35 S.D. 457, 152 N.W. 796 (1915). See also *Hillebrand v. Knapp*, 65 S.D. 414, 274 N.W. 821 (1937); 1959-60 ATT'Y GEN. BIENNIAL REP. 359; Comment, *Are We Losing Our Lakes?*, 3 S.D.L. Rev. 109 (1958).

182. WIS. STAT. ANN. §§ 59.971 (Supp. 1974), 144.26 (1967).

183. MINN. STAT. ANN. § 105.485 (Supp. 1974).

184. MICH. STAT. ANN. § 13.1831 (1970).

185. [1973] S.D. Sess. L. ch. 133. The South Dakota Environmental Protection Act is "[a]n Act to provide for actions for declaratory and equitable relief for protection of the air, water, and other natural resources of this state and the public trust therein . . ." *Id.* § 1 (emphasis added).

186. S.D. COMPILED LAWS ANN. § 46-1-1 (1967).

187. STATE PLANNING BUREAU, 6 SOUTH DAKOTA WATER PLAN 5, 6 (January 1975).

188. S.D. COMPILED LAWS ANN. ch. 11-2 (1967).

189. *Brookings Register*, April, 1974, at 2, col. 1.

1,000 feet of the normal high water line of a meandered lake.<sup>190</sup> Uses in the lake-residential district are limited to single family residential, parks, agricultural, and commercial outdoor recreation areas. In addition, lot sizes, setbacks, shoreline vegetation removal, sewage disposal, and grading are all regulated. While nonconforming uses are allowed,<sup>191</sup> a structure devoted to a use not permitted by this resolution cannot be structurally altered or enlarged unless such alteration changes the use to a use now permissible.<sup>192</sup>

Such land use zoning to protect shorelands initiated at the county level is to be commended. Whether other counties will act with similar shoreline zoning plans is not determinable because, as noted, the present South Dakota statute does not demand such zoning. Therefore, a state-level statute with enabling legislation designed to require uniform lake zoning by each is necessary. Also as was discovered in Wisconsin, counties normally do not have the expertise or data available to develop a comprehensive scheme for lakeshore zoning. Thus state-level legislation which provides for the formulation of a model ordinance is imperative, not only to aid counties in development of their own ordinance, but also to require certain minimum environmental protection standards based on scientific data.

#### *The Federal Water Pollution Control Act of 1972*

Authorities on water pollution control concede that the lack of scientific data on the morphology and biology of each lake is the greatest hurdle to adequate pollution abatement.<sup>193</sup> Thus South Dakota which at this time does not have adequate scientific data on its lakes should take advantage of the federal legislation designed to stimulate such studies. Under the Federal Water Pollution Control Act of 1972<sup>194</sup> each state is required to identify and classify its lakes according to their eutrophic condition. The procedures to control the sources of lake pollution and restore lake quality are also to be studied.<sup>195</sup> If South Dakota were to promptly comply with the Federal Water Pollution Control Act,<sup>196</sup> sufficient information could be gathered to provide a scientific basis for the promulgation of statutory requirements that would attempt to save South Dakota's natural lakes from ultimate ecological destruction by the effects of uncontrolled development.

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190. HAMLIN COUNTY, S.D., ZONING ORDINANCE, sched. L-R (April 8, 1974).

191. *Id.* art. IV.

192. *Id.* § 404.

193. Cooper & Vlasin, *supra* note 2, at 204. See also ODUM, *supra* note 17, at 420; WARREN, *supra* note 23, at 385. It has been noted that "[t]he application of ecological principles to land use planning is now undoubtedly the most important application of environmental science." ODUM, *supra* note 17, at 420.

194. 33 U.S.C.A. §§ 1251-1376 (Supp. 1975).

195. *Id.* § 1324(a). See also Comment, *The Federal Water Pollution Control Act Amendments of 1972*, 1973 Wis. L. Rev. 893.

196. 33 U.S.C.A. §§ 1251-1376 (Supp. 1975).



## CONCLUSION

If South Dakota does not heed the warning which prompted other states to enact protective legislation for their natural lakes it would indeed be unfortunate:

In this new decade, population growth and urban expansion will be accompanied by increased developmental pressure on our nation's small lakes. We would thus close by stressing the urgent need for prompt action on the part of urban planners and other officials if comprehensive controls are to become operational before more of our small lakes fall prey to the accelerated onslaught of private development.<sup>197</sup>

Zoning pursuant to the police power is not a new legislature device. However, applying such principles to protect shorelands and lakes from environmental destruction is relatively new.<sup>198</sup> The theory of this type of zoning is quite simple: because most forms of pollution enter a lake from its shorelines or watersheds, the regulation of land uses in those critical areas should control the inflow of pollution. Although land use zoning is not the total answer to the prevention of all forms of pollution, it may accomplish a great deal in deaccelerating destruction of the lakeshore environment effectuated by uncontrolled development.

The economic, recreational, aesthetic, and ecological importance of the system of natural lakes in South Dakota can not be doubted. While realizing that land uses which conflict with nature will always continue, there is no reason that future uses cannot be *balanced* against the ecosystem as a whole.

Although we may all be aware of the need for environmental protection, it can and should not be accomplished through relaxation of constitutional principles. The prohibitions against the taking or damaging of private property without just compensation must always be considered with any land use statute. Such a constitutional limitation, however, does not preclude a new approach to the valuation of land by looking to its value in its natural state to determine if a taking or damaging has occurred by the operation of a land use regulation.<sup>199</sup>

As man and his relationship to the land becomes more *mutually* beneficial, there is hope that future generations will not have to be the victims of our shortsightedness. South Dakota needs legal protection in the form of land use zoning to deaccelerate eutrophica-

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197. Johnson & Morry, *supra* note 53, at 64.

198. See Kusler, *supra* note 43.

199. "Our strongest impression from this survey is that the fear of the taking issue is stronger than the taking clause itself. It is an American fable or myth that a man can use his land any way he pleases regardless of his neighbors. The myth survives, indeed thrives, even though unsupported by the pattern of court decisions." BANTA, BOSSELMAN & CALLIES, *supra* note 173, at 318-19.

tion, control development, and prevent shoreline destruction of the natural lake and the ecological web of life it maintains. "*The land belongs to the people . . . a little of it to those dead . . . some to those living . . . but most of it belongs to those yet to be born.*"<sup>200</sup>

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200. *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761, 771 n.6 (1972) (emphasis added).