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A New Chapter in Missouri Percolating Groundwater Law: The Non-Severability of Water Rights From Land

*City of Blue Springs v. Central Development Association*¹

I. INTRODUCTION

Although the State of Missouri may be rich in groundwater resources, Missouri case law is decidedly barren in percolating groundwater decisions. Only a handful of cases, including the instant one, address this area of water law either directly or indirectly. For the past twenty years, no Missouri court has dealt with this topic in the context of a dispute between adjoining landowners over a shared water supply. Many questions remained unanswered, chief of which was whether water rights were severable from the land. This Note will answer that question in the course of analyzing the most recent Missouri court decision in this area.

II. FACTS AND HOLDING

Blue Springs, a fourth class municipal corporation, originally purchased water for its citizens from the Missouri Water Company.² In 1979, Missouri Water informed Blue Springs that it would not renew its contract upon expiration in 1990.³ Blue Springs then began to seek a new water supply.

Central Development Association (CDA)⁴ held the title to a 6,000 acre parcel of farmland northeast of Independence, Missouri, in the Atherton Bottoms area.⁵ An expansive water supply, composed of a deposit of alluvial rocks, gravel, and sand filtering and retaining ground water, was located below CDA's farmland.⁶ In 1981 Blue Springs declared its intention to condemn CDA's land in the Atherton Bottoms.⁷

* The author wishes to thank Peter N. Davis, Isidor Loeb Professor of Law at the University of Missouri-Columbia, for his helpful suggestions and comments.

1. 831 S.W.2d 655 (Mo. Ct. App. 1992) [hereinafter *Blue Springs II*].

2. *Id.* at 656.

3. *Id.*

4. CDA is a Missouri corporation owned entirely by the Reorganized Church of Jesus Christ of Latter Day Saints. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

In May 1982, Community Water Company (CWC) incorporated.⁸ Ninety-four percent of CWC's stock was held by CDA.⁹ In a subsurface water deed, CDA transferred to CWC partial rights to the water under the western 4,000 acres of the farmland.¹⁰ Under the deed, CDA reserved the right to withdraw whatever water it needed for farming.¹¹ Furthermore, CDA was to receive fifty-percent of the earnings from any water sales by CWC.¹² At that time, CWC did not own any pipes, wells or a water treatment plant.¹³

In August 1982, Blue Springs initiated condemnation proceedings in the Circuit Court of Jackson County against 49.83 acres of CDA's land.¹⁴ The trial court granted CDA's and CWC's joint motion to dismiss Blue Springs' condemnation petition.¹⁵ The Missouri Court of Appeals for the Western District reversed the dismissal.¹⁶ On remand, the trial court ordered condemnation and designated commissioners,¹⁷ who awarded CDA and CWC

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* CWC has not acquired any pipes or wells, nor constructed a water treatment plant. *Id.*

14. *Id.* Blue Springs wanted 34.12 acres for transmission lines and a water treatment plant, and 15.71 acres for water wells. *Id.*

15. *Id.* Evidence was heard on the issue for three days. *Id.*

16. *City of Blue Springs v. Central Dev. Ass'n*, 684 S.W.2d 44, 51-52 (Mo. Ct. App. 1984) [hereinafter *Blue Springs I*].

17. In brief, a condemnation action proceeds as follows:

- (1) Acting in good faith, the condemnor must try to purchase the land directly from the condemnee.
- (2) If no settlement can be reached, the condemnor files a petition for condemnation in the circuit court of the county where the property is located, alleging the settlement offer and refusal, a description of the land and the name(s) of the owner(s), the statutory power to condemn, the use to which the land will be put, and a prayer for the appointment of three commissioners.
- (3) If the condemnee does not challenge the condemnor's authority, three commissioners are appointed. They view the land and file a report assessing the amount of damages.
- (4) Either party may file exceptions to the commissioners' report, and if this is done, a trial is held wherein damages are determined in an adversarial setting.

See Bradley J. Baumgart, Comment, *Preliminary Requirements For Condemnation in Missouri: Necessity, Public Use, and Good Faith Negotiations*, 44 MO. L. REV. 503, 504-05 (1979). See generally Mo. R. CIV. P. 86 (1993).

\$98,500.¹⁸ Blue Springs, CDA, and CWC filed exceptions to the commissioners' report.¹⁹

Prior to jury trial on the exceptions, Blue Springs moved to dismiss CWC's exceptions.²⁰ Blue Springs also requested that the court disallow the presentation of evidence by CDA and CWC regarding the water's separate value, any valuation of the land based on the income method, and the value of CWC's interest in the land.²¹ The trial court denied Blue Springs' motion to dismiss CWC's exceptions and made additional rulings that effectively granted Blue Springs' request to exclude such evidence.²²

A jury trial from August 6-10, 1990, resulted in an award to CDA and CWC of \$100,000, and the court entered a judgment consistent with the verdict on August 28, 1990.²³ The Missouri Court of Appeals for the Western District affirmed the trial court's decision,²⁴ holding that water is not severable from the land under or through which it flows.²⁵ Therefore, the value of the surface land and water rights would not be separately appraised because the condemnor (Blue Springs) did not violate the compara-

18. *Blue Springs II*, 831 S.W.2d at 656.

19. *Id.* at 656-57.

20. *Id.* at 657.

21. *Id.*

22. *Id.* The exact rulings of the trial court were:

[1.] Any evidence of or discussion of the separate value of the water is excluded. Counsel are directed not to discuss in any way a separate value for the water in the presence of the venire or the jury;

[2.] The Jury will not be permitted to consider evidence based on the income approach in its determination of the value of the partial taking of this unimproved property;

[3.] The testimony of William Davis, Jr., is excluded;

[4.] Any evidence or testimony that relies on the conclusions of William Davis, Jr., is excluded;

[5.] Both Community Water Company and the Central Development Association may participate in the trial of the exceptions; and

[6.] Any evidence of the conveyance of water rights is excluded.

Id. (footnote omitted). William Davis Jr., CWC's expert witness, proposed to testify on the separate value of CWC's water right. *Id.* at n.1. Subsequently, Blue Springs requested the court to exclude Keith Wilson Jr., an expert witness for CWC, because he had not been so identified until one week before trial. *Id.* at 657. As Wilson's testimony would have been based on valuing the water separately, it was excluded. *Id.*

23. *Id.*

24. *Id.* at 662.

25. *Id.* at 659.

tive reasonableness rule for percolating groundwater allocation,²⁶ and all evidence and testimony regarding the severance of water rights and the water's separate value was properly excluded.²⁷

III. LEGAL BACKGROUND

The legal foundation upon which the *Blue Springs II* court relied in reaching its decision consists of Missouri eminent domain law, general groundwater law principles, and Missouri groundwater case law. Each of these areas will be discussed below.

A. Missouri Eminent Domain Law

The Missouri Constitution provides that "private property shall not be taken or damaged for public use without just compensation."²⁸ Fourth class cities have the condemnation powers pursuant to Missouri Revised Statutes sections 79.380 and 88.667.²⁹

When property is physically appropriated, the landowner is immediately entitled to compensation.³⁰ Once it is established that a landowner is due compensation, the landowner is entitled to "the market value of the land actually taken [the direct damages],³¹ and the consequential damages, if any, to the remainder of the land caused by the taking."³² Consequential damages are "any other damages that flow to the landowner as a consequence of the taking."³³

If only part of a tract of land is condemned, damages are equal to the "difference between the fair market value of the entire property before the taking and the fair market value after the taking."³⁴ Furthermore, factors that have "present, quantifiable effect[s] on the market value of the property [are properly considered as] element[s] of damages."³⁵ There is a prohibition against remote, speculative, and contingent damages that prevents landowners

26. *Id.*

27. *Id.* at 662.

28. MO. CONST. art I, § 26.

29. MO. REV. STAT. §§ 79.380, 88.667 (1986).

30. *State ex rel. Missouri Highway & Transp. Comm'n v. Horine*, 776 S.W.2d 6, 10 (Mo. 1989).

31. *Id.* at 10 & n.1.

32. *State ex rel. State Highway Comm'n v. Long*, 422 S.W.2d 276, 278 (Mo. 1967) (quoting *City of St. Louis v. Vasquez*, 341 S.W.2d 839, 846 (Mo. 1960)).

33. *Horine*, 776 S.W.2d at 10 n.1.

34. *Id.* at 12 (citation omitted).

35. *Id.* (citations omitted).

from "recovering for events that do not now, or may not ever, diminish the market value of the land."³⁶

For valuation purposes, Missouri generally follows the undivided fee rule,³⁷ which provides that "where there are different interests or estates in property taken by condemnation, the proper procedure is 'to ascertain the entire compensation as though the property belonged to one person and then apportion this sum among the different parties according to their respective rights.'³⁸ An exception, often called the separate valuation rule,³⁹ is recognized when, under exceptional circumstances, "damages to the various interests when added together exceed the value of the property as a whole; in such a case the particular interests should of course be separately appraised, because the owner of each is entitled to be compensated in damages for the amount of his interest taken."⁴⁰

Mineral deposits in condemned land generally are not valued separately, but are considered as a factor that may augment the overall value of the land.⁴¹ When there has been a severance of surface and mineral rights into separate estates, two distinct property rights are created, each subject to compensation under condemnation proceedings.⁴²

There is an additional exception to the undivided fee rule, often called the primary purpose rule.⁴³ Under application of this rule, when a party has specifically condemned an identifiable portion of the property (*i.e.*, mineral deposits) without condemning the entire fee, evidence establishing the

36. *Id.* (citations omitted). Additionally, the Missouri Supreme Court has stated:

Damages which are sought on the theory of injury to the remainder of land after the taking of a part must be direct and certain at the time of the appropriation and, conversely, not remote and speculative; and loss of profits is usually regarded as too speculative and remote to be considered as a basis for ascertaining the damages in a condemnation proceeding.

State ex rel. Kansas City Power & Light Co. v. Salmark Home Builders, Inc., 375 S.W.2d 92, 98-99 (Mo. 1964) (citations omitted).

37. 4 PHILLIP NICHOLS, *LAW OF EMINENT DOMAIN* § 12.05[1] (1990).

38. *State ex rel. State Highway Comm'n v. Willis*, 483 S.W.2d 599, 603 (Mo. Ct. App. 1972) (quoting *State ex rel. McCaskill v. Hall*, 28 S.W.2d 80, 81 (Mo. 1930), and *City of St. Louis v. Wabash R.R.*, 421 S.W.2d 302, 303-05 (Mo. 1967)).

39. *See* 4 NICHOLS, *supra* note 37, § 12.05[2].

40. *State ex rel. McCaskill v. Hall*, 28 S.W.2d 80, 82 (Mo. 1930).

41. *State ex rel. State Highway Comm'n v. Foeller*, 396 S.W.2d 714, 719 (Mo. 1965).

42. *Id.* This can be viewed as one of the "exceptional circumstances" that triggers the separate valuation rule.

43. *See* 4 NICHOLS, *supra* note 37, § 13.22[1] (Supp. 1993). *See also Greystone Heights Redevelopment Corp. v. Nicholas Investment Co., Inc.*, 500 S.W.2d 292, 298 (Mo. Ct. App. 1973), for a discussion of the application of this exception.

separate, compensable value of the fee portion may be introduced.⁴⁴ Conversely, when the entire fee is taken, evidence pertaining to the separate value of the mineral deposits is allowable only to the extent it enhances the overall property value.⁴⁵

B. General Principles of Groundwater Law

Groundwater can be classified into two categories: underground streams and percolating groundwater.⁴⁶ Underground streams "flow[] in a fixed and defined channel whose existence and location is known or ascertainable."⁴⁷ Percolating groundwater "seeps, oozes, filters, and otherwise circulates through subsurface strata without a defined channel."⁴⁸ There is a legal presumption that groundwaters are percolating, rebuttable by evidence establishing the existence of an underground stream.⁴⁹

Common law doctrines govern the allocation of water in surface watercourses and groundwater in most eastern states, including Missouri.⁵⁰ Water allocation rules for underground streams follow the riparian doctrine for surface watercourses.⁵¹ Water allocation rules for percolating groundwater

44. *Greystone*, 500 S.W.2d at 298. This is equivalent to the creation by condemnation of a subsurface estate, and thus is just another very limited application of the separate valuation rule.

45. *Id.*

46. ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 7.5 (1984). See also Peter N. Davis, *Eastern Water Diversion Permit Statutes: Precedents for Missouri?*, 47 MO. L. REV. 429, 439 (1982) [hereinafter Davis, *Permit Statutes*]; Rhonda Churchill Thomas, Note, *Water Law—Groundwater Rights in Missouri—A Need for Clarification*, 37 MO. L. REV. 357, 358 (1972).

47. Davis, *Permit Statutes*, *supra* note 46, at 439 n.41.

48. Davis, *Permit Statutes*, *supra* note 46, at 439 n.44.

49. CUNNINGHAM ET AL., *supra* note 46, § 7.4; Davis, *Permit Statutes*, *supra* note 46, at 440 n.44. Neither CDA nor CWC asserted that the underground water in the Atherton Bottoms was an underground stream. *Blue Springs II*, 831 S.W.2d at 658.

50. Davis, *Permit Statutes*, *supra* note 46, at 432.

51. *Id.* at 439; CUNNINGHAM ET AL., *supra* note 46, § 7.4. The reasonable use rule of the riparian doctrine for surface watercourses allows a riparian to make any reasonable use of the water so long as that use does not interfere with nor cause harm to other riparians' reasonable uses. CUNNINGHAM ET AL., *supra* note 46, § 7.4; Davis, *Permit Statutes*, *supra* note 46, at 432-33. The reasonableness of any given use is determined through a comparative evaluation of the conflicting uses. *Id.*, at 433. A nonexclusive list of factors for consideration can be found in Restatement (Second) of Torts § 850A (1979). CUNNINGHAM ET AL., *supra* note 46, § 7.4 n.8. The text of § 850A can be found *infra* text accompanying note 68.

vary from state to state,⁵² but three⁵³ principal doctrines are followed. These doctrines are: (1) the absolute ownership rule; (2) the American reasonable use rule; and (3) the comparative reasonableness rule.

The absolute ownership rule is often referred to as the English common law rule.⁵⁴ Under the absolute ownership rule, percolating groundwater is part of the land under which it is found; as such, it belongs absolutely to the landowner, who may, without liability, withdraw as much as (s)he pleases, regardless of any injurious consequences to adjoining landowners' water supplies.⁵⁵

The instant case does not involve an underground stream. See *supra* note 49 and accompanying text. Therefore, the remainder of this Note will concentrate on groundwater law as it pertains to percolating waters.

52. Davis, *Permit Statutes*, *supra* note 46, at 439-41.

53. See Peter N. Davis, *Federal and State Water Quality Regulation and Law in Missouri*, 55 MO. L. REV. 414, 490-94 (1990) [hereinafter Davis, *Water Quality*]; Davis, *Permit Statutes*, *supra* note 46, at 439-41; Thomas, *supra* note 46, at 359-60.

Thomas speaks of a fourth variation, the "California correlative rights" doctrine. "Under this doctrine, the rights of all landowners over a common saturated area are co-equal or correlative and one cannot use more than his proportional share, even for the benefit of his own land, where the rights of others are injured by such use." Thomas, *supra* note 46, at 361. See also CUNNINGHAM ET AL., *supra* note 46, § 7.5, which recognizes the "California correlative rights" doctrine as a third theory for percolating groundwater law. There, the second theory is the "American reasonable use" rule, but the text mentions instances when courts have stretched this theory, and this seems to refer to the comparative reasonableness rule. See also Davis, *Permit Statutes*, *supra* note 46, at 441 n.49, which also (indirectly) refers to this rule.

Thomas, *supra* note 46, at 361 & n.25, also mentions a fifth variation, the "prior appropriation" doctrine applied to percolating groundwater. This is primarily a "Western" water law doctrine (as is the "California correlative rights" doctrine). Neither will be discussed further in this Note.

54. CUNNINGHAM ET AL., *supra* note 46, § 7.5; Davis, *Water Quality*, *supra* note 53, at 491; Thomas, *supra* note 46, at 359 n.13. *Acton v. Blundell*, 12 M. & W. 324, 152 ENG. REP. 1223 (Ex. Ch. 1843), is typically given credit for the establishment of this rule. See CUNNINGHAM ET AL., *supra* note 46, § 7.5; Davis, *Water Quality*, *supra* note 53, at 491 n.632; Thomas, *supra* note 46, at 359. However, two Missouri cases recognize that much the same result was previously reached in *Greenleaf v. Francis*, 35 Mass. (18 Pick.) 177 (1836). See *Blue Springs II*, 831 S.W.2d at 658 n.2; *Higday v. Nicholas*, 469 S.W.2d 859, 865 n.3 (Mo. Ct. App. 1971).

55. CUNNINGHAM ET AL., *supra* note 46, § 7.5; Davis, *Water Quality*, *supra* note 53, at 491; Davis, *Permit Statutes*, *supra* note 46, at 440; Thomas, *supra* note 46, at 359. There is a limitation on this rule based on malice and waste. CUNNINGHAM ET AL., *supra* note 46, § 7.5; Davis, *Water Quality*, *supra* note 53, at 491; Davis, *Permit Statutes*, *supra* note 46, at 440; Thomas, *supra* note 46, at 359-60.

American courts began moving away from the absolute ownership rule toward more equitable solutions, in part because the original justifications for this rule were less applicable,⁵⁶ and in part because of dissatisfaction with the harsh results it produced.⁵⁷

The American rule is more often called the "reasonable use" groundwater rule.⁵⁸ It allows a landowner to make any use of the underlying groundwater, so long as that use is on or related to the overlying land.⁵⁹ As with the absolute ownership rule, the landowner does not incur liability for damages to adjoining landowners' water supplies.⁶⁰ In this context, reasonableness hinges more on the nature of the use and the relationship of that use with the overlying land.

The comparative reasonableness rule⁶¹ is also called the (eastern)⁶² correlative rights rule.⁶³ It is often confused with the American rule when that rule is labeled the "reasonable use" rule.⁶⁴ Under the comparative reasonableness rule, a landowner may make any use of the percolating groundwater, so long as that use does not unreasonably impair adjoining

56. Davis, *Water Quality*, *supra* note 53, at 491; Thomas, *supra* note 46, at 359-60.

57. *Blue Springs II*, 831 S.W.2d at 658; *Higday*, 469 S.W.2d at 865; Davis, *Water Quality*, *supra* note 53, at 492.

58. *Blue Springs II*, 831 S.W.2d at 658; *Higday*, 469 S.W.2d at 865; CUNNINGHAM ET AL., *supra* note 46, § 7.5; Davis, *Water Quality*, *supra* note 53, at 492-93; Thomas, *supra* note 46, at 360. This should not be confused with the reasonable use rule of the riparian doctrine for surface watercourses and underground streams, discussed *supra* note 51. The similarity in nomenclature is often confusing to courts. Davis, *Water Quality*, *supra* note 53, at 493 & nn.641-42; Davis, *Permit Statutes*, *supra* note 46, at 440-41 & n.49; Thomas, *supra* note 46, at 360-62. *Hougan v. Milwaukee & St. P. R.R.*, 35 Iowa 558 (1872), was the first case to adopt this rule. See Davis, *Water Quality*, *supra* note 53, at 492 n.638. Because of the nomenclature problem, see *infra* note 66, *Bassett v. Salisbury Mfg. Co.*, 43 N.H. 569 (1862), is sometimes given credit for first enunciating this rule. See *Higday*, 469 S.W.2d at 865 n.4; CUNNINGHAM ET AL., *supra* note 46, § 7.5. But *Bassett* is more accurately credited with enunciating the comparative reasonableness rule. See *infra* note 63 and accompanying text.

59. Davis, *Water Quality*, *supra* note 53, at 492.

60. *Id.*

61. *Id.* at 493-94.

62. Davis, *Permit Statutes*, *supra* note 46, at 441-42.

63. Thomas, *supra* note 46, at 360. *Bassett v. Salisbury Mfg. Co.*, 43 N.H. 569 (1862), was the first case to enunciate this rule. CUNNINGHAM ET AL., *supra* note 46, § 7.5; Davis, *Water Quality*, *supra* note 53, at 494 n.646.

64. Davis, *Water Quality*, *supra* note 53, at 493; Thomas, *supra* note 46, at 360 n.23.

landowners' water supplies.⁶⁵ In this context, reasonableness relates more to the quantity of one landowner's use in comparison with the rights and needs of adjoining landowners.⁶⁶ The Restatement (Second) of Torts⁶⁷ adopts this approach, and lists factors that should be considered to determine if the use is "reasonable":

- (a) The purpose of the use,
- (b) the suitability of the use to the watercourse or lake,
- (c) the economic value of the use,
- (d) the social value of the use,
- (e) the extent and amount of the harm it causes,
- (f) the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other,
- (g) the practicality of adjusting the quantity of water used by each proprietor,
- (h) the protection of existing values of water uses, lands, investments and enterprises, and
- (i) the justice of requiring the user causing the harm to bear the loss.⁶⁸

The Restatement (Second) does not distinguish between surface watercourses and groundwater in the application of this rule.⁶⁹

C. *Missouri Groundwater Case Law*⁷⁰

*Springfield Waterworks Co. v. Jenkins*⁷¹ was the first Missouri case to deal with percolating groundwater in the context of a dispute between adjoining landowners. There, the plaintiff water company owned land

65. *Higday*, 469 S.W.2d at 866; Davis, *Water Quality*, *supra* note 53, at 493-94; Davis, *Permit Statutes*, *supra* note 46, at 441; Thomas, *supra* note 46, at 360.

66. *Higday*, 469 S.W.2d at 866; Davis, *Water Quality*, *supra* note 53, at 494; Thomas, *supra* note 46, at 360 & n.23. Because of the "balancing" or comparison approach it adopts, this rule is analogous to the reasonable use rule of the riparian doctrine for surface watercourses. See *supra* note 51 and accompanying text. This similarity adds more confusion to the nomenclature problem. See *supra* note 58 and accompanying text.

67. RESTATEMENT (SECOND) OF TORTS § 850A (1979).

68. *Id.*

69. *Id.* § 858 cmt. d. See also CUNNINGHAM ET AL., *supra* note 46, § 7.5 n.1.

70. For an excellent review of Missouri water law in general, see Peter N. Davis, *Missouri*, in 6 WATER AND WATER RIGHTS 237-49 (Robert E. Beck ed., 1991 & Supp. 1993).

71. 62 Mo. App. 74 (1895).

containing a spring from which the water was diverted into a reservoir for storage, and later sold to the city of Springfield.⁷² The defendants owned land adjoining the plaintiff's that contained two convergent springs which the defendants dammed to form a pond.⁷³ Plaintiff claimed that its spring was fed by an underground stream, which in turn was fed by the river previously created by the undammed convergence of defendants' springs.⁷⁴ Plaintiff further alleged that the defendants' frequent and unnecessary draining of the pond during the summer months reduced the water pressure to the point that no water seeped out to feed plaintiff's spring.⁷⁵

The court found the evidence insufficient to support the plaintiff's "underground stream" theory and therefore concluded that the riparian doctrine for surface watercourses did not apply to protect the natural flow.⁷⁶ The court thus turned to percolating groundwater rules.⁷⁷ The court ultimately held that the defendants, although retaining the right to maintain their dam and drain the pond for purposes of repair, were enjoined from draining the pond in the summer months "when [to do so] would result in material damage to the plaintiff."⁷⁸ This, the court said, was "not an unreasonable restraint."⁷⁹

The *Springfield Waterworks* court's summarization of the then-applicable groundwater rules⁸⁰ has been interpreted as applying the English absolute ownership rule.⁸¹ At least one Missouri court⁸² and one commentator,⁸³

72. *Id.* at 77.

73. *Id.* at 77-78.

74. *Id.* at 78.

75. *Id.*

76. *Id.* at 80.

77. *Id.*

78. *Id.* at 84.

79. *Id.*

80. The court stated:

[Percolating groundwater] is regarded as a part of the soil and to which an adjoining proprietor has no absolute or natural right, and to which he can acquire no prescriptive right. It belongs to the owner of the land, and its diversion or appropriation by him for the improvement or benefit of his estate can not be made the basis of complaint against him by anyone, however grievous the resulting injury may be.

Id. at 80 (citations omitted).

81. *Higday*, 469 S.W.2d at 868; Thomas, *supra* note 46, at 361.

82. *Higday*, 469 S.W.2d at 868.

83. Thomas, *supra* note 46, at 361 & n.27.

however, have since recognized that certain language⁸⁴ in *Springfield Waterworks* appears to adhere to the American reasonable use rule.

Missouri courts did not again have occasion to apply percolating groundwater rules⁸⁵ until *Higday v. Nickolaus*⁸⁶ in 1971. In *Higday*, the setting that gave rise to the controversy was very similar to *Blue Springs II*. The plaintiff-appellant owned 6,000 acres of land overlying the McBaine Bottom.⁸⁷ The city of Columbia (defendant-respondent) acquired⁸⁸ approximately 17.25 acres⁸⁹ upon which it began to build wells and a water treatment plant.⁹⁰ The McBaine Bottom recharged at a rate of 10.5 million gallons per day,⁹¹ while Columbia planned to withdraw 11.5 million gallons per day.⁹² For this reason the plaintiff-appellant brought suit seeking a

84. In refusing to strictly adhere to the rules quoted *supra* note 80, the court stated:

While it must be conceded that . . . the defendants must be regarded as the general owner of the surplus water flowing from their springs, such ownership is not without restrictions against the plaintiff, for it, by reason of its appropriation, has acquired a right thereto which can not be interfered with by a stranger, nor by the defendants, except for some beneficial use of the water or for the betterment of their land. The defendants can not obstruct or divert the water merely for the purpose of injuring the plaintiff.

To that extent the principle, "*Sic utere tuo*," etc., applies.

Springfield Waterworks, 62 Mo. App. at 82. *Sic utere tuo ut alienum non laedas* is a common law maxim meaning that one should use his own property in such a manner as not to injure that of another. BLACK'S LAW DICTIONARY 1380 (6th ed. 1991).

85. *Bollinger v. Henry*, 375 S.W.2d 161 (Mo. 1964), is sometimes mentioned in conjunction with this area of law, but it should be noted that *Bollinger* dealt with an artificial surface watercourse. *Id.* at 165. The court elected to decide the case consistent with the reasonable use theory of the riparian doctrine for surface watercourses. *Id.* at 166. As previously mentioned, *supra* note 51, this rule is virtually analogous to the comparative reasonableness rule for percolating groundwater. Furthermore, it is similar in nomenclature to the American "reasonable use" rule of percolating groundwater. These similarities may explain why *Bollinger* is often mentioned in discussions of percolating groundwater.

86. 469 S.W.2d 859 (Mo. Ct. App. 1971).

87. *Id.* at 861.

88. The land at issue was "acquired" from the plaintiff "by threat of condemnation." *Id.* at 862. As such, condemnation proceedings were never actually implemented to purchase the land.

89. The actual amount of acreage that Columbia intended to acquire was in dispute. *Id.* at 862 n.1. For purposes of comparison (and for purposes of deciding the case in *Higday*) this is irrelevant.

90. *Id.* at 862.

91. *Id.*

92. *Id.*

declaratory judgment that Columbia's proposed use would violate the American "reasonable use" rule of percolating groundwater because it was not related to the beneficial ownership of the land from which it was taken, and therefore Columbia should be enjoined from undertaking that use.⁹³

After expressly rejecting the English absolute ownership rule,⁹⁴ the *Higday* court first appeared to adopt the American "reasonable use" rule,⁹⁵ but it then declared that a determination of what was a reasonable use depended upon a comparison and balancing of competing uses.⁹⁶ Such an approach is generally considered by commentators to be that of the comparative reasonableness rule.⁹⁷ Furthermore, the *Higday* court referred to the Missouri Supreme Court's pronouncements in *Bollinger v. Henry*⁹⁸ regarding the reasonable use rule of the riparian doctrine for surface watercourses,⁹⁹ and said that it "believe[d] the same rule should apply to subterranean percolating waters."¹⁰⁰ The court noted that unifying the legal standard by which water disputes are settled for both surface and groundwater would accomplish two objectives: (1) it would allow "existing water resources [to] be allocated most equitably and beneficially among competing users, private and public";¹⁰¹ and (2) it would "give recognition to the established interrelationship between surface and groundwater."¹⁰²

Higday was the only Missouri decision prior to *Blue Springs II* to specifically discuss percolating groundwater in the context of a dispute between adjoining landowners. The comparative reasonableness rule as applied in *Higday* was approvingly referred to in 1979, however, when the

93. *Id.* The trial court had dismissed the plaintiff's petition for failing to state a justiciable controversy or a claim upon which relief could be granted. *Id.* at 861. The appellate court's discussion of groundwater law was thus geared toward settling this issue.

94. *Id.* at 869. See also Thomas, *supra* note 46, at 361.

95. *Higday*, 469 S.W.2d at 866. See also Thomas, *supra* note 46, at 362.

96. *Higday*, 469 S.W.2d at 866-67, 869.

97. See Davis, *Water Quality*, *supra* note 53, at 494; Davis, *Permit Statutes*, *supra* note 46, at 441; and Thomas, *supra* note 46, at 362.

98. 375 S.W.2d 161 (Mo. 1964). See *supra* note 85 for an explanation of this case.

99. See *supra* note 51 and accompanying text.

100. *Higday*, 469 S.W.2d at 869.

101. *Id.*

102. *Id.* With the recent decision by the Missouri Supreme Court in *Heins Implement Co. v. Missouri Highway & Transp. Comm'n*, 859 S.W.2d 681 (Mo. 1993), all Missouri waters are now subject to the same comparative reasonableness rule. *Heins* adopted this rule for situations involving diffused surface waters, which had previously been governed in Missouri by the modified common enemy doctrine. *Id.* at 690-91.

Missouri Court of Appeals for the Southern District decided *Ripka v. Wansing*.¹⁰³

Although the case dealt with a surface watercourse, the *Ripka* court cited both *Bollinger* and *Higday* for the proposition that Missouri had apparently adopted what it described as the "reasonable use" theory.¹⁰⁴ In reality, the *Ripka* court was discussing the comparative reasonableness rule,¹⁰⁵ and said that if Missouri had not adopted this rule it should, because it "appears to be more flexible and promotes the most beneficial use of water resources."¹⁰⁶ This handful of cases represents the basis of Missouri percolating groundwater law, and provides the legal framework for reaching the instant decision.

IV. THE INSTANT DECISION

Essentially, the court's opinion (and CDA's and CWC's arguments) focused on resolving two questions raised but not addressed in *Blue Springs I*: "Whether Missouri allows subsurface water rights to be separated from the fee, or whether CWC owns a compensable interest in the condemned property."¹⁰⁷ In support of an affirmative answer to either of these questions, CDA and CWC made two alternative contentions: (1) CWC's water rights represented a separate estate, distinguishable from CDA's estate in the land, and therefore separate compensation should have been awarded;¹⁰⁸ and (2) damage to each of their interests exceeded damages to the whole estate, thus requiring separate valuation.¹⁰⁹

CDA and CWC first argued that water rights should be treated similarly to mineral rights,¹¹⁰ which can be severed into an estate separate from the fee.¹¹¹ When mineral rights are so severed, the undivided fee rule for ascertaining condemnation compensation¹¹² is modified by the separate

103. 589 S.W.2d 333 (Mo. Ct. App. 1979).

104. *Id.* at 335.

105. *Id.* The court said that "[t]he 'reasonable use' theory allows each riparian proprietor to make a reasonable use of the water for any purpose, providing that the use does not cause harm or damage to the reasonable uses of others." *Id.* (citations omitted). The court then determined the reasonableness by analyzing the factors listed in the Restatement (Second) of Torts § 850A. *Id.*

106. *Id.*

107. *Blue Springs I*, 684 S.W.2d at 49.

108. *Blue Springs II*, 831 S.W.2d at 657.

109. *Id.* at 659-60.

110. *Id.* at 657.

111. *A.P. Green Refractories Co. v. Duncan*, 659 S.W.2d 19, 21 (Mo. Ct. App. 1983).

112. See *supra* Part III (A) for an explanation of this rule.

valuation exception.¹¹³ The court rejected this argument, concluding that the groundwater at issue in the instant case and mineral deposits in general should be distinguished, and therefore the exception did not apply.¹¹⁴

To support this conclusion, the court examined the nature and characteristics of percolating groundwater and the evolution of the common law with regard to it.¹¹⁵ Specifically, the court stressed the transition from a rule of absolute ownership to Missouri's recognition, under the comparative reasonableness rule followed in *Higday*,¹¹⁶ that a proprietary interest in groundwater is only usufructuary.¹¹⁷ Landowners do not own the water in an absolute sense, they merely own the right to use the water,¹¹⁸ and even this right is limited by the concurrent exercise of the same right held by adjoining landowners.¹¹⁹

113. See *supra* Part III (A) for an explanation of this exception.

114. *Blue Springs II*, 831 S.W.2d at 657.

115. *Id.* at 657-58.

116. Consistent with common practice, see *supra* notes 58 and 66, the *Higday* court labeled this the "reasonable use" rule. *Higday v. Nicholaus*, 469 S.W.2d 859, 866 (Mo. Ct. App 1971).

117. The *Higday* court summarized the comparative reasonableness rule as follows:

Generally, the rule of reasonable use is an expression of the maxim that one must so use his own property as not to injure another—that each landowner is restricted to a reasonable exercise of his own rights and a reasonable use of his own property, in view of the similar rights of others. . . . As it applies to percolating ground water, the rule of reasonable use recognizes that the overlying owner has a proprietary interest in the water under his lands, but his incidents of ownership are restricted. It recognizes that the nature of the property right is usufructuary rather than absolute as under the English rule.

Higday, 469 S.W.2d at 866 (citations omitted). "Usufruct" is defined as "[t]he right of using and enjoying and receiving the profits of property that belongs to another, and a 'usufructuary' is a person who has the usufruct or right of enjoying anything in which he has no property interest." BLACK'S LAW DICTIONARY 1544 (6th ed. 1991). For purposes of this analysis, then, water must be viewed as being partially owned by the public at large, and the comparative reasonableness rule can be thought of "as a way of managing a partial public good, closely analogous to the management of other environmental resources with public-good characteristics." Carol M. Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEGAL STUD. 261, 266 (1990).

118. *Blue Springs II*, 831 S.W.2d at 658.

119. *Higday*, 469 S.W.2d at 866. See *supra* note 117 and accompanying text. <https://scholarship.law.missouri.edu/mlr/vol59/iss1/15>

The court quoted extensively from a Florida Supreme Court case¹²⁰ that it found persuasive.¹²¹ In that case, a landowner's right in underlying groundwater was held to inhere in the usufruct of the water, and not in the corpus of the water itself.¹²² Therefore, a usufructuary right is not "a constitutionally-protected property right in the water beneath the property, requiring compensation for the taking of the water when used for a public purpose"¹²³ except when "the property has been rendered useless for certain purposes."¹²⁴

Because a landowner can only convey a right of user and not the water itself, the *Blue Springs II* court concluded that "water is not severable from the land through or under which it flows."¹²⁵ This distinguishes water from mineral deposits.¹²⁶ Thus, the court rejected CDA's and CWC's argument "that judgment should have been entered for the land's value in favor of CDA and for the water rights in favor of CWC."¹²⁷

Having failed on the severance issue, CDA and CWC next contended that the property should not have been appraised using the undivided fee rule,¹²⁸ instead, the separate valuation exception¹²⁹ should have been employed.¹³⁰ Under this exception, CDA and CWC maintained that evidence of the separate value of the water would have been admissible, regardless of the severance issue.¹³¹ The court applied the *Higday* comparative reasonableness rule to the facts of the instant case to reject this argument.¹³²

Noting that the Atherton Bottoms aquifer constantly recharged,¹³³ the court analyzed Blue Springs' proposed use in quantitative terms. Although

120. *Village of Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663 (Fla.), *cert. denied*, 444 U.S. 965 (1979).

121. *Blue Springs II*, 831 S.W.2d at 658.

122. *Tequesta*, 371 So. 2d at 667.

123. *Id.* at 672.

124. *Id.* at 668. As an example, the court noted a situation in which there has been a diversion of water to such an extent that the land becomes unsuitable for cultivation. *Id.* at 669.

125. *Blue Springs II*, 831 S.W.2d at 659.

126. *Id.* The *Tequesta* court made the same distinction. *Tequesta*, 371 So. 2d at 667-68. The instant court noted an additional distinction: mineral deposits are typically finite, while water is replenished. *Blue Springs II*, 831 S.W.2d at 659.

127. *Blue Springs II*, 831 S.W.2d at 657.

128. *See supra* Part III(A) and notes 37-38.

129. *See supra* Part III(A) and notes 39-40.

130. *Blue Springs II*, 831 S.W.2d at 659.

131. *Id.*

132. *Id.*

133. *Id.*

Blue Springs planned initial withdrawals of 10 million gallons per day, it estimated that this use could increase to 20 million gallons per day.¹³⁴ This quantity of withdrawals would not deplete the total water supply, nor would withdrawals of 100 million gallons per day, a fact to which CDA's and CWC's expert conceded.¹³⁵

Given that CDA's and CWC's beneficial use of the water under CDA's land would not be impaired by Blue Springs' withdrawals,¹³⁶ the comparative reasonableness rule was not violated,¹³⁷ therefore there were no current, direct damages to CDA's remaining land or to CWC's interest.¹³⁸ Furthermore, the court considered and rejected¹³⁹ CDA's and CWC's complaint that Blue Springs' use would diminish water quality and thus would affect potential future water sales.¹⁴⁰ The court recited a list of facts¹⁴¹ that led it to conclude that the potential damages complained about by CDA and CWC were too remote and speculative.¹⁴² Without current direct damages, and because future consequential damages were too speculative, the separate valuation rule for condemnation appraisal could not be triggered.¹⁴³

134. *Id.*

135. *Id.*

136. *Id.*

137. The court quoted a passage from *Higday* to implicitly reach this conclusion. *Id.* The passage said that "an overlying owner, including a municipality, may not withdraw percolating water and transport it for sale or other use away from the land from which it was taken if the result is to impair the supply of an adjoining landowner to his injury." *Higday*, 469 S.W.2d at 866 (citations omitted).

138. *Blue Springs II*, 831 S.W.2d at 659.

139. *Id.* at 659-60.

140. *Id.* at 659.

141. *Id.* at 659-60. Specifically, the court noted that "CWC had no wells, pipes, distribution lines or a treatment plant. It had no potential customers. It was by no means an established business enterprise." *Id.*

142. *Id.* at 660.

143. *Id.* at 659-60. CDA and CWC also argued that another exception to the undivided fee rule, the primary purpose rule, should apply. *Id.* at 660. Given that Blue Springs had condemned the land, and not just the water rights, *id.*, the court easily dismissed CDA's and CWC's invocation of this exception. *Id.*

Failing on all their previous arguments, CDA and CWC finally argued that the trial court misapplied the unitary rule by excluding the testimony of three of their expert witnesses: David Craig, William Davis Jr., and Keith Wilson. *Id.* The court explicitly disagreed, concluding that "[t]he jury heard extensive evidence about the water under the land. The only evidence excluded from the jury's consideration was the water's commercial value." *Id.* It then explained exactly why the testimony of each expert would have been improper, *id.* at 660-61, and thus was correctly excluded.

Two additional contentions of error by CDA and CWC (regarding evidence submitted

<https://scholarship.law.missouri.edu/mlr/vol59/iss1/15>

Inasmuch as the court concluded that water rights are not severable from the land,¹⁴⁴ and because Blue Springs would not impair CDA's and CWC's beneficial use of the water in violation of the comparative reasonableness rule,¹⁴⁵ the court held that all evidence regarding the severance of water rights and the water's separate value was properly excluded¹⁴⁶ and affirmed the trial court's decision.¹⁴⁷

V. COMMENT

The instant case is noteworthy in two distinct, interrelated aspects: (1) it confirms Missouri's adoption of the comparative reasonableness rule for percolating groundwater allocation disputes, even though the court labels it the reasonable use rule; and (2) it declares that water is not severable from the land under or through which it flows, because the overlying landowner does not own the water in an absolute sense, but only owns the right to use the water.

Although the affirmation of the comparative reasonableness rule is basically a reassertion of *Higday*, its instant application yields an opposite result, and its implications for the characterization of percolating groundwater rights is a complete conceptual departure from statements made in *Higday*.

In *Higday*, because Columbia's proposed use would have exceeded the aquifer's recharge rate, the court strongly hinted that it would violate the comparative reasonableness rule.¹⁴⁸ For this reason, the dismissal of the plaintiff-appellant's petition was reversed and the case was remanded to the trial court.¹⁴⁹ The *Higday* court then commented on possible remedies for the alleged violation, presumably as guidance to the trial court and plaintiff-appellant. It suggested that should Columbia's use be found to violate the comparative reasonableness rule the plaintiff would be entitled to relief.¹⁵⁰ Although it acknowledged that an injunction was one possible remedy, the *Higday* court said, in very definite and leading language, that this result should not necessarily follow because "[f]ew things are more vital or of such surpassing importance to the public well-being than the assurance of a wholesome water supply."¹⁵¹ It continued, however, saying "[s]hould the

by Blue Springs at trial) were dismissed by the court as lacking merit. *Id.* at 662.

144. *Id.* at 659.

145. *Id.*

146. *Id.* at 659-60.

147. *Id.* at 662.

148. *Higday*, 469 S.W.2d at 870.

149. *Id.* at 872. See also *supra* note 93 and accompanying text.

150. *Higday*, 469 S.W.2d at 871-72.

151. *Id.* at 871.

trial court adjudge injunctive relief for plaintiffs appropriate, it would be well within its discretion to condition the imposition of that restraint upon the exercise by the City within a reasonable time, of its power of eminent domain to acquire the water rights it has been violating."¹⁵² This is the crux of the conceptual departure of *Blue Springs II*, because the *Higday* court implicitly assumed that water rights are independently condemnable, and thus severable from the overlying land.¹⁵³

A. *The Conceptual Departure from Higday*

In the instant case, the uncontested evidence established that Blue Springs' proposed use, current and projected, would not even begin to deplete the water supply; therefore, the court found that the comparative reasonableness rule would not be violated. This is not inconsistent with the rule's application in *Higday*. *Blue Springs II* departs from *Higday*, however, in its characterization of the extent or nature of percolating groundwater rights, and the possible remedies for violation of the comparative reasonableness rule.

Because the comparative reasonableness rule embodies a usufructuary right attached to the land rather than a distinct property right, water is not severable from the land under or through which it flows—in other words, water rights follow the land. This gives rise to at least three implications.

(1) A municipality wishing to acquire a water supply need only condemn (and therefore only pay compensation for) land overlying an aquifer to receive full rights of user to withdraw the water.

(2) An overlying landowner has no separately condemnable property estate in the corpus of the water itself, therefore (s)he cannot convey such right to a second party. In the instant case, this led to a rejection of CWC's claim for separate compensation for its water rights, which could only be equal to or less than CDA's. In *Higday*, this would negate the court's suggestion that Columbia could condemn the plaintiff's water rights that it would violate. This is so because if Columbia acquired full rights of user when it obtained the land (regardless of whether condemnation was originally

152. *Id.* at 872.

153. Lastly, the court suggested that should Columbia fail to exercise its condemnation powers, the "plaintiffs would still have available to them a remedy in the nature of an inverse condemnation for any damage caused by the City's unreasonable use." *Id.* An inverse condemnation is "brought in cases where there was a trespassory, though unintended, interference with the landowner's property rights—e.g., . . . where road construction or repair activity causes flooding of nearby land, the deposit of unwanted soil on nearby land, or the sliding or erosion of nearby land." CUNNINGHAM ET AL., *supra* note 46, § 9.1 (footnotes omitted).

employed) it could not thereby acquire additional or greater rights, even by condemning more land.¹⁵⁴

(3) Other than the compensation arising from the physical taking of the land itself, the only liability that will accrue to a condemnor is that which arises from a violation of the comparative reasonableness rule for percolating groundwater. A municipality that is found to be violating this rule, however, will be liable to *all* adjoining landowners whose uses are being impaired, not just to those landowners from whom the municipality acquired land.

B. Alternative Remedies

Contrary to *Higday*, a municipality could not condemn the water rights of an adjoining landowner without also condemning the land. Therefore, under *Blue Springs II*, what remedies are available to a plaintiff when a municipality has been found to be violating the comparative reasonableness rule?

The court in *Higday* presented many reasons why it believed that, under the rule, "it may be more equitable to deny injunctive relief than to grant it."¹⁵⁵ It is not so clear, however, that the *Blue Springs II* court shared this belief, for it expressly said that "Blue Springs may withdraw groundwater for the benefit of its citizens *so long as* the withdrawals do not interfere unduly with CDA's and CWC's beneficial use."¹⁵⁶ Therefore, injunctive relief cannot be ruled out as a remedy, and this is probably doubly true should the dispute arise between two private parties.

Higday also contemplated relief in the form of inverse condemnation.¹⁵⁷ It should be noted that inverse condemnation would require injury to the land itself, not just diminution in adjoining landowners' water supply. Of course, the diminution in the water supply could cause injury to the land.¹⁵⁸

Finally, the suggestion in *Higday* that Columbia could counteract an injunction by condemning the water rights of the plaintiffs and paying

154. Theoretically, however, it could eliminate the possibility of future complaints by purchasing/condemning all land over the aquifer. Undoubtedly, this would not be an economically viable alternative.

155. *Higday*, 469 S.W.2d at 871. Most of the reasons given seem to parallel the determinative factors listed in Restatement (Second) of Torts § 850A. See *supra* text accompanying note 68.

156. *Blue Springs II*, 831 S.W.2d at 659 (emphasis added). The emphasized language is arguably durational, and implies that the court would enjoin Blue Springs' use or perhaps merely limit the quantity withdrawn.

157. See *supra* note 153 and accompanying text.

158. See *Tequesta*, 371 So. 2d at 669.

appropriate compensation¹⁵⁹ is akin to the payment of monetary damages. After *Blue Springs II*, if a landowner is found to be violating the comparative reasonableness rule, are monetary damages still an option? It appears so, although no guidance is given on how these damages would be calculated. Furthermore, because *all* adjoining landowners would stand on equal footing against the landowner in violation, this might entail prohibitively great expense.¹⁶⁰

VI. CONCLUSION

Given the general paucity of Missouri case law in the area of percolating groundwater, the instant decision will surely shed some light on how Missouri courts will analyze these types of issues in the future. Furthermore, its holding that water is not severable from the land under or through which it flows represents a conceptual departure from the last Missouri decision in this area of water law. Finally, although *Blue Springs II* does clarify what property rights must be condemned by a municipality seeking a water supply, it offers little guidance on what remedies are available to a landowner when an adjoining landowner violates the comparative reasonableness rule.

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159. Presumably this avenue of relief is not open after the instant decision.

160. Commentators suggest that this high cost would be beneficial because it would promote the highest and best use of the water, in that those users who stand to make the greatest profits could afford to "buy off" the other water users. *See generally* Donald R. Levi, *Highest and Best Use: An Economic Goal for Water Law*, 34 MO. L. REV. 165 (1969).