Oklahoma Water Law Project
The Impact of *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board*

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Preface

After more than a decade of litigation, *Franco-American Charolaise v. Oklahoma Water Resources Board* came to an end in 1993 when the Supreme Court of Oklahoma issued its final opinion in the case. Yet, for two reasons, it is equally accurate to say that the *Franco* opinion is just the beginning. First, the *Franco* litigation itself continues in the administrative agencies and district courts of the State of Oklahoma and will apparently continue in litigation for years to come. Second, even once *Franco* itself is fully and finally resolved, the Supreme Court opinion from 1993 in *Franco* fundamentally changed Oklahoma water law. Consequently, Oklahoma water law faces years of additional legislative and judicial activity before Oklahoma will have a stable, well-defined body of water law.

In the 1993 *Franco* opinion, the Supreme Court of Oklahoma reinvigorated the riparian system of water rights. Thirty years earlier, through the passage of statutes in 1963, the Oklahoma legislature had attempted to convert the State of Oklahoma to a prior appropriation system of water rights. In 1993, the Supreme Court of Oklahoma declared that attempted conversion unconstitutional. By this decision in 1993, the State of Oklahoma became the first state west of the Mississippi river to reject the prior appropriation system of water rights, once legislatively adopted, since the Supreme Court of Texas reached a similar conclusion on different grounds in 1921.[1]

Obviously, the *Franco* opinion is of tremendous importance for Oklahoma water law. However, the precise impact of *Franco* is not known and cannot be known until future legislative enactments occur and until Oklahoma courts render decisions in future cases on real disputes between competing claimants for water rights. But while the precise impact of *Franco* cannot be known, thoughtful persons can discuss its meaning and anticipate its impact.

In 1994, Professor Drew L. Kershen, University of Oklahoma College of Law, received a grant from the Oklahoma State University Water Resources Research Institute to study the institutional and legal impact of *Franco*. In turn, Professor Kershen hired eight law students to conduct the study under his supervision. These eight students enrolled in a three-hour course on Oklahoma Water Law taught by Professor Kershen. Once the course ended, each student was assigned a sector of Oklahoma society which is likely to feel the impact of *Franco* in a direct way. Each student had the task of preparing a paper discussing the impact of *Franco* upon the sector of Oklahoma society assigned to the student. The students and Professor Kershen called their endeavor the Oklahoma Water Law Project.

This book publishes the results of this study of *Franco*. The book has three parts.

Part One presents the basic documents from the *Franco* litigation beginning with the application of the City of Ada for a prior appropriation permit for water made to the Oklahoma Water Resources Board (OWRB), through the judicial challenge to this permit brought by riparian landowners on the stream from which Ada would take the water, into the present on-going litigation upon remand to the Coal County District Court and the OWRB in light of the Supreme Court opinion rendered in 1993.

Part Two presents the student papers as chapters in this book. Each chapter discusses the potential and likely impact of *Franco* upon a particular sector of Oklahoma society that uses water. These eight

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1. Board of Water Eng'rs v. McKnight, 229 S.W. 301 (Tex. 1921). When the Texas legislature in 1967 made a second attempt to convert Texas from riparianism to prior appropriation, the Supreme Court of Texas upheld the conversion against constitutional attacks. *In re* Adjudication of Water Rights in the Upper Guadalupe River, 642 S.W.2d 438 (Tex. 1982); *In re* Adjudication of Water Rights in the Llano River Watershed of the Colorado River Basin, 642 S.W.2d 446 (Tex. 1982).

chapters address the following sectors: agriculture, reservoir management, municipal and rural water district water supplies, the regulatory agency (the OWRB), the possible takings and valuation issues from eminent domain or inverse condemnation, groundwater users, Tribal Nations, and the environmental community.

Part Three presents an annotated bibliography on Oklahoma Water Law and riparianism.

With the documents, the discussions, and the bibliography provided in this book, the students and Professor Kershen of the Oklahoma Water Law Project hope that all Oklahomans interested in Oklahoma water law will gain valuable insights about Oklahoma's water law at present and its possible directions in the coming years. The members of the Oklahoma Water Law Project fervently desire that this book will be useful to practicing attorneys, judges, legislators, administrators, academics, and all others who want to learn what the *Franco* decision means for Oklahoma water law.

While the students have put forth tremendous effort in their work, Professor Kershen acknowledges that assuredly the book contains shortcomings — mistakes in information, misinterpretations, or insufficient vision to anticipate the future. Professor Kershen shoulders these shortcomings because upon him rested the obligation to guide the students well in researching and writing their papers. The students deserve the credit; Professor Kershen deserves any blame.

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August 7, 1995

Part One: The Franco Documents

BEFORE THE OKLAHOMA WATER RESOURCES BOARD

STATE OF OKLAHOMA

IN THE MATER OF Stream Water Application of the City of Ada, 13th & Townsend, Ada, OK 74820, for 7842 acre-feet of water annually diverted from Bryds Mill Spring, Upper Clear Boggy Creek Watershed, tributary to Muddy Boggy River, at a diversion rate not to exceed 8,000 GPM for the purpose of Municipal use in the area served by Ada Municipal Water Supply in Pontotoc and Coal Counties, the point of diversion being located in the SE1/4 SW1/4 SW1/4 Sec. 34, Twp. 2N, Rge. 6EIM, Pontotoc County	)	File No. 80-107 Date Filed: 8-21-80 Stream System 1-04

FINDINGS OF FACT, CONCLUSIONS OF LAW & BOARD ORDER

This matter came on for hearing before the Oklahoma Water Resources Board ("Board"), October 7, 1980, Tesfai Ghermazien, Presiding Hearing Examiner, on the above captioned and described Stream Water application of the City of Ada ("Applicant"); Applicant appeared personally by representative and by legal counsel, Leonard Briley, City Manager, and Les Younger, City Attorney; protestants appeared personally and by legal counsel, George Braly, Mack Braly, F.E. Bateman and W.A. Cannon; and various other interested persons appeared personally.

Hearing was duly opened, witnesses were sworn and the Board proceeded to receive Applicant's presentation in support of the application. During the course of Applicant's presentation, it was revealed that Applicant's representative who had prepared certain written material and evidence presented by Applicant was not present and not available for examination respecting the written evidence offered. On Applicant's motion, the hearing was recessed and continued to December 18, 1980. Additionally, the Hearing Examiner requested Applicant to republish "Notice" in Coal County with a corrected legal description of the point of diversion, subject of the application, and protestants were advised to file a written protest as required by Board rule and regulation, if Protestant's desired to perfect recordation of their protests, objections or comments.

Hearing was reconvened December 18, 1980, witnesses were again sworn and the Board proceeded to receive continuation of matters presented by Applicant in support of the application. At the conclusion of Applicant's presentation, Protestants objected to the application on the following grounds:

1. That there is no unappropriated water available in the amount applied for, and that the proposed use would interfere with domestic and existing appropriative uses.

2. That part or all of the proposed use is for water that will be used outside of the stream basin wherein the water originates and thus any such appropriation should be subject to recall by any existing or prospective user within the stream system.

3. That the Applicant may or may not have the future need for the water depending on the status of the Applicant's ground water rights, thus the Board must defer the determination of this application until the status of the ground water rights of the Applicant is determined.

4. That the Oklahoma Water Resources Board should require the City of Ada to meter and report its diversion at the point of diversion at least on monthly basis.

5. That the Board should require the City of Ada to provide the diversion figures for the current year based upon the meter readings from the meter installed at the point of diversion before proceeding to entertain the Applicant's application.

In the written protest, Protestants asserted that the application was defective in that no notice was given to any of the downstream users who rights will be directly affected by the Applicant's application. Protestants withdrew this particular objection during the hearing and further advised that should the application be granted the Board needed to require Applicant to release a minimum stated amount of water each day to protect downstream domestic users.

After lengthy argument on Protestants assertion, Board proceeded to receive testimony, evidence and statements presented by Protestants. After the conclusion of all evidence, testimony and statement, the application was deemed submitted and the hearing was adjourned.

Since the hearing, the Board has receive over forty (40) letters from residents of the area served by the Applicant urging the Board to approve and grant the application.

FINDING OF FACT

Based upon a review and consideration of all relevant documents, exhibits, testimony, evidence and arguments presented, the Board makes, finds and determines the following findings of fact, all being as supported by the substantial and competent evidence presented:

1. Applicant's application was duly filed on the 21st day of August, 1980, and notice of publication of same and hearing thereon was perfected in accordance with the laws of the State of Oklahoma and the applicable Rules and Regulations of the Board.

2. Applicant is making application to appropriate and use 7,842 acre-feet of stream water annually, the same said appropriation to be from Bryds Mill Spring on Mill Creek, tributary to Clear Boggy Creek in the Muddy Boggy River Basin, at a diversion rate not to exceed 8,000 GPM and said diversion and intended use to be accomplished as set forth and described in Applicant's application No. 80-107 and accompanying testimony and exhibits.

3. Based upon the evidence, testimony and exhibits presented, the Board finds and determines that Applicant's intended use of the water, subject of Applicant's application, is Municipal Water Supply and further, that such intended use would constitute and is a beneficial use of said waters.

4. Based upon the evidence presented reflecting the present and reasonably projected population and other related municipal water supply usages and needs of the Applicant and the areas served by Applicant, Board finds and determines that the Applicant has a present and future need for the water subject of the application.

In connection with this finding and the related protest and objection of Protestant's Board acknowledges that Applicant has applications presently pending for prior ground water rights under 82 O.S. Supp. 1971, Sec. 1020.14, that is, ground water rights-of-use such as Applicant may have heretofore duly established under pre-existing (pre-1972) Oklahoma Ground Water Law. Board notes that the administrative proceedings incidental to Applicant's prior ground water rights claim have not yet been conducted and no administrative adjudication thereof has yet been made. The Board concludes that an adjudication of Applicant's prior ground water rights (if any) is not proper, appropriate or contemplated to be made within the scope and framework of the instant stream water application proceedings, and further, that the primary issue here relevant is that of Applicant's actual present and future need for the water, subject of the application (an issue determinable through the instant proceedings). Accordingly, Board concludes that Protestant's request that action on the instant application be deferred pending determination of Applicant's prior ground water rights is denied.

5. Based upon the evidence presented and a review and estimations made by the Stream Water Division of the Board, all of which are public files, records, data and information contained within the Board's files and records, officially noticed and made a part of the record herein, Board finds and determines that the average annual discharge that overflows to Mill Creek from Bryds Mill Spring as measured by the U.S.G.S. Gage NO. 07334200 is 5,650 acre-feet of water per year. Applicant during the hearing, used, on the average 3,488 acre-feet of water annually and the over flow to Clear Boggy Creek at Applicant's reservoir was estimated to be 682 acre-feet of water annually. Thus, Board finds and determines the yield of the Bryds Mill Spring is the summation of the above three figures which is 9,820 acre-feet of water per year. In connection with this finding and determination Board observes that the yield of Bryds Mill Spring could have been estimated more accurately and precisely if the water withdrawn by Applicant's had been metered at the point of diversion. However, for purposes of the instant proceedings, Board finds the figures and estimations presented by the evidence herein to be reasonable and acceptable respecting the issues presented and Board's review and consideration thereof.

Board finds and determines from the evidence presented that the appropriated water from Mill Creek is 416 acre-feet per year and Board has estimated the amount of water for downstream domestic users on Mill Creek and Clear Boggy Creek between its confluence with Mill Creek and Buck Creek to be 584 acre-feet of water annually. Thus, allowing 120 acre-feet of water annually for unavoidable losses, Board finds and determines that Applicant must pass and allow to flow through 1.55 cfs (1,120 acre-feet per year) of water at the point of diversion for downstream users.

Board finds that Applicant has a Vested Water Right (No. 59-157) in the amount of 3,360 acre-feet per year from Bryds Mill Spring. Thus, the Board concludes that the unappropriated water available for appropriation is the Bryds Mill Spring yield (9,820 acre-feet per year) less the amount required to satisfy downstream appropriative and domestic users (1,120 acre-feet per year) and less the amount of Applicant's Vested Right from Bryds Mill Spring (3,360 acre-feet per yea). Accordingly, Board concludes that the amount of water available for appropriation is 5,340 acre-feet of water per year and that accordingly, unappropriated water is, for purposes of Applicant's application, available in this lesser amount.

6. Based upon Finding of Fact No. 5 above, Board finds and concludes that Applicant's proposed use will not interfere with domestic or existing appropriative uses provided the application be approved

in the lesser amount of 5,340 acre-feet of water annually and provided Applicant allows an amount of not less than 1.55 cfs (1,120 acre-feet annually) of water to pass and flow through at and from Applicant's point of diversion.

7. Regarding protestants assertion that there is not unappropriated water available in the amount applied for and that the Applicant's proposed use would interfere with domestic and existing appropriative uses, Protestants's assertion is sustained in part and denied in part, all being as addressed and specified in the related factual findings numbered 5 and 6 above.

8. Regarding Protestant's assertion that the Board should require Applicant to provide the diversion figures for the current year based upon the meter readings from the meter installed at the point of diversion, Board finds that the totality of the evidence and exhibits presented by Applicant provides a sufficient and substantial basis for entertaining and adjudicating the relevant statutory issues and conditions incidental to the instant proceedings, and further, that the relevant issues presented are adjudicable under the evidence presented by all parties.

9. Protestants have urged that regardless of what action might be taken by the Board on the application, the Board should require Applicant to enter and report on at least a monthly basis Applicant's diversion at the point of diversion from the stream.

Premises considered and given the specific conditions, restrictions and limitations imposed herein and the purposes therefor, Board finds that the Applicant should be required to meter the water withdrawn at the point of diversion from the stream and to duly record same on a monthly basis specifying amount diverted under authority of the instant application and, separately, amounts diverted under authority of Applicant's 1959 Vested Water Right (No. 59-157). Applicant's metering and records, subject herein, shall be subject to reasonable inspection by the Board at any or all reasonable times, however, Applicant shall not be required to file such records or reports with the Board on a monthly basis. Applicant shall continue to annually report all annual stream water usage as currently provided under existing Board Rules, Regulations and Procedures. Board finds that annual reporting coupled with such reasonable inspections as the Board may conduct from time-to-time shall be sufficient for purposes of the instant application and Order.

10. Protestant's have urged that any appropriation as may be approved hereunder should be expressly made subject to recall by and for any existing or prospective users within the stream system, the same being upon the grounds that all or part of Applicant's intended use shall be outside the stream basis wherein the water originates as contemplated under 82 O.S. Supp. 1972, Sec. 105.12.

Board finds from the evidence presented that the basin area of origin subject herein is the Muddy Boggy River Basis, and further, that a portion of the area ultimately served by Applicant through its water supply distribution lines is beyond the boundaries of this basin. Applicant's corporate limits are partially within and partially beyond the boundaries of the designated basin of origin,. Boards further finds and observes, however, that Applicant's water supply storage facility and water treatment facility from which all of Applicant's water supply and use emanates for ultimate distribution to areas served by Applicant is within the basis area of origin. Further, the evidence presented reflects that Applicant has continuously utilized the subject water supply source at least from and since 1911 and indeed, Applicant's Vested Water Right from the same said source was re-established by application in 1959. Premises considered, Board concludes as a matter of law and fact that Applicant's application and use does not constitute a transportation of water for use outside the stream system wherein the water originates within the purpose, intent and meaning of 82 O.S. Supp. 1972, Sec. 105.12(4). Protestant's

urging that any appropriation as may be authorized herein be made subject to recall under Sec. 105.12 is denied.

CONCLUSIONS OF LAW

The Board finds, concludes, makes and enters the following conclusions of law:

1. Board possesses jurisdiction and authority to entertain and adjudicate the instant application and proceedings pursuant to 82 O.S. Supp. 1980, Secs. 105.1 et seq. with particular respect to Secs. 105.9 through 105.14 therein, and, 82 O.S. Supp. 1980, Sec. 1085.2.

2. Applicant has met and complied with the application filing requirements imposed under 82 O.S. Supp. 1972, Secs. 105.9 and 105.10 and applicable Board Rules, Regulations and Procedures.

3. Prior notice of the instant applicant and hearing thereon was given in compliance with 82 O.S. Supp. 1972, Sec. 105.11 and applicable Board Rules and Regulations and hearing thereon was held and conducted in compliance with 82 O.S. Supp. 1972, Secs. 105.11 and 105.12 and otherwise applicable laws of the State of Oklahoma.

4. As a matter of law and fact, Board finds and concludes, as it more specifically addressed in the factual findings above, that Applicant has established, met and complied with the conditions and requirements of 82 O.S. Supp. 1972, Sec. 105.12 for purposes of approval of the instant application and that Applicant's application for a regular permit may be approved and granted under said Sec. 105.12 subject to Board's finding and determination (a) that unappropriated water is available in the lesser amount of 5,340 acre-feet per year and (b) that Applicant pass and allow to flow through an amount of water not less than 1.55 cfs (1,120 acre-feet annually) at and from Applicant's point of diversion from the stream.

5. Based upon the factual findings herein and as provided under 82 O.S. Supp. 1972, Sec. 105.14, the instant application may be granted and approved upon Applicant filing an amended application applying for the lesser amount determined to be available for appropriation as required by and within the time allowed under said Section 105.14.

BOARD ORDER

IT IS, THEREFORE, THE ORDER OF THE BOARD, based upon a consideration and review of all matters presented and the findings, determinations and conclusions herein made and provided, that the instant application of the city of Ada (No. 80-107) may be and the same is hereby granted and approved and Applicant may and shall be issued a regular stream water permit authorizing Applicant's beneficial use of 5,340 acre-feet of water per calendar year from Bryds Mill Spring, Upper Clear Boggy Creek Watershed, tributary to Muddy Boggy River, all being as specified and described in Applicants application, subject to and contingent upon the following conditions:

(a) As set forth in Findings of Fact numbered 5 and 6 herein, Applicant shall release or allow to be released, pass and flow at and from Applicant's point of diversion at the stream an amount of water not less than 1.55 cfs for downstream uses and appropriators.

(b) As set forth in Finding of Fact numbered 9 herein, Applicant shall meter the amount of its appropriation and use at the point of diversion from the stream and shall record same on a monthly basis.

(c) In accordance with Finding of Fact number 5 and Conclusions of Law numbered 4 and 5 herein, Applicant must file an amended application for the lesser amount available for appropriation (5,340 acre-feet per calendar year) and upon doing so as required by law, Applicants amended application shall be approved by the Board at its next regularly scheduled Board meeting under authority of the within and foregoing Board Order.

Done this 14th day of April, 1981, in open and regular session by the Oklahoma Water Resources Board.

OKLAHOMA WATER RESOURCES BOARD

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Gerald E. Borelli, Chairman

IN THE DISTRICT COURT WITHIN AND FOR COAL COUNTY
STATE OF OKLAHOMA

FRANCO-AMERICAN CHAROLAISE, LTD., MACK M. BRALY and CLAUDIA M. BRALY, THREE B LAND & CATTLE COMPANY, F.E. BATEMAN, CHARLES BATEMAN, W. A. CANNON, GERALD DON STEWART, HERSHELL CHRONISTER, JESSE BERRIE, MRS. JOHN PRATER, and JACK DUNN,	)	
APPELLANTS,	)	
VS.	)	C-81-23
THE OKLAHOMA WATER RESOURCES BOARD and THE CITY OF ADA, OKLAHOMA,	)	
APPELLEES.	)	

FINDINGS OF FACTS, CONCLUSIONS OF LAW
and
J U D G M E N T

After Hearing, being fully advised in the premises, hearing oral argument and examining evidence, both oral and documentary; and studying the Written Briefs submitted, the Court finds:

FINDINGS OF FACT

1] That this is an Appeal to this Court pursuant to 75 O.S. 1977 §§ 318 et seq., from an Administrative Order of The Oklahoma Water Resources Board (OWRB). The city of Ada having made application for additional stream water rights from Byrd's Mill Creek and certain downstream riparian owners protesting the application; after which the OWRB granted said application in part and sustained the objections of the Protestants in part;

2] That this Court finds venue to be proper in Coal County under the 1977 revisions of 82 O.S.A. § 318 because the land and attached water rights owned by some of the Protestants are clearly located in Coal County and because some of the Appellants are residents of Coal County, which they allege are adversely affected by the contested Order of the OWRB, and because the Order of the OWRB itself purports to affect domestic water rights in Coal County; that the City of Ada and the OWRB filed Motions for Change of Venue from Coal County to Pontotoc County; the source of the water claimed by Ada is in Pontotoc County for which reason the City of Ada insists that venue is proper in the District Court of Pontotoc County, Ada, Oklahoma. However, this Court investigated its own jurisdiction and venue in the matter; heard arguments of counsel and received testimony on certain matters that relate to the proper venue in this case; that in viewing the record of appeal in this case, the Court finds that certain of the Protestants have substantial vested, appropriative and riparian water rights in Coal County, State of Oklahoma. These rights being attached to the Clear Boggy Stream System into which Byrd's Mill Creek flows.

In addition thereto, the Order of the OWRB purportedly affects or determines domestic water rights down to the junction of Buck Creek and Clear Boggy Stream, and upon examination by this Court of exhibits on record and pursuant to judicial notice, the court finds that this junction is inside Coal County.

3] That this application was filed by the City of Ada on August 21, 1980; thereafter being heard by the Hearing Examiner on December 18, 1980;

4] That Applicant requests the approval of the right to appropriate and use 7,842 acre feet of stream water per annum from Byrd's Mill Spring on Mill Cree, which is a tributary to Clear Boggy Stream, at a diversionary rate not exceeding 8,000 GPM;

5] That Applicant intends to use the water for municipal water supply purposes; such use being a beneficial water use in Oklahoma;

6] That the City presented evidence showing their annual need for water, at a point in time forty years hence, was in the approximate amount of 10,523 acre feet of water; that there was disputed evidence concerning the City's future population growth, and the manner and method by which this future growth was calculated, and this Court does not take lightly nor choose to interfere with the judgment made by an administrative agency which is charged with the duty of looking to the future to ascertain such vital needs for our Cities and the State of Oklahoma. Yet, it is not within this Court's province to weigh the evidence, but only to make a determination as to whether the findings made by the OWRB are supported by substantial and competent evidence. (75 OSA § 322.)

Therefore it is the finding of this Court that the future needs of the City of Ada for 10,523 acre feet of water is supported by substantial and competent evidence;

7] Further, that the City of Ada has pre-existing stream water rights for water from Byrd's Mill Spring in the amount of 3,360 acre feet;

8] The City of Ada claims ground water rights in Pontotoc County of 9,678 acre feet of water annually, pursuant to Application No. 59-158 filed in 1959 with the OWRB. The evidence and argument presented before the OWRB and made available to this Court as well, discloses that these rights so claimed are subject to some questioning from a legal standpoint. The Protestants declare they believe such rights are void or voidable. However, the City of Ada maintains before this Court that such rights are valid or irrelevant to the issues in their present application for stream water. Apparently the OWRB did not consider said rights or their impact or effect upon the needs of the City of Ada for water to meet their proposed stated future annual requirement for 10,523 acre feet of water.

Judicial notice is taken by this Court that unfortunately under the present Oklahoma Ground Water Law, and the law as it existed back in 1959, makes a final determination of water rights a very cumbersome, slow and uncertain procedure.

Further, from the evidence presented to this Court, it appears the City of Ada has not used its ground water rights under its 1959 application, (except for some pump testing on occasion), until in the summer of 1980 when substantial water was taken from certain of its wells, pursuant to the apparent authority of the 1959 application.

Therefore, if the City of Ada does have ground water rights to 9,678 acre feet of water, then the City of Ada does have in fact a water supply in the amount of:

	9,678 a.f.	ground water rights (wells)
plus	3,360 a.f.	prior stream water rights
	3,038 a.f.	Total water supply.
less	10,523 a.f.	Water needs for forty (40) years
	2,513 a.f.	Surplus,

leaving the City with a surplus in excess of its forty (40) year needs.

9] The Court further finds that from the evidence and records available, that the USGA has maintained a gauge of the discharge of water into the creek from the spring, which figures are of water that is not already diverted by the City of Ada and that the stream water records from Byrd's Mill Creek are most likely the most accurate or best stream water records available on any stream in the State of Oklahoma. When these water figures are added to the consumption figures maintained by the City of Ada, we have a fairly accurate water record of the stream flow of Byrd's Mill Creek and the parties have agreed that the average annual production of water from the spring is 9,820 acre feet of water. Therefore, as above noted, the City of Ada is entitled to divert and use 3,360 acre feet of water annually from this supply.

10] In addition thereto, there are prior appropriations of water from Byrd's Mill Creek, in an amount of 416 acre feet.

11] The calculations of total water available from Mill Creek as proposed by the OWRB, are as follows:

Line No.	Water in Acre Feet Annually	Description
1.	9,820	Total water production.
2.	less 3,360	Prior rights of Ada.
3.	less 416	Other prior rights of appropriation.
4.	less 584	Estimated Domestic rights down to Buck Creek.
5.	less 120	Unavoidable losses.
6.	NET 5,340	Water available for appropriation.

Then, the OWRB granted all of the 5,340 acre feet of water to the City of Ada.

According to the testimony of the City Manager of Ada and other witnesses, it indicated that the City was releasing into Mill Creek, during the dry season of 1980, at least 1,000,000 gallons of water daily. It was pointed out in oral argument that 1,000,000 gallons of water per day amounts to an exact total sum of that shown by lines 3, 4 and 5 above, or 1,120 acre feet.

The Table of Equivalents for Water Measurements, published by the OWRB, states that 1,000,000 gallons per day is precisely equivalent to 1,120 acre feet annually, or 1.55 cubic feet per second and the fact that the figures as to the amount of water that the City claims it was releasing into Mill Creek and the amount of water that the OWRB determined was required, causes the Court to question how this determination was arrived at, and in doing some calculations of his own, it appears to the Court that the OWRB presumably figured the 1,000,000 gallons per day (1,120 acre feet annually) was a sufficient water supply for the downstream needs for domestic water, appropriations and maintenance of instream flow; and then

that 120 acre feet was subtracted from the 1,120 acre feet, leaving the round figure of 1,000 acre feet, which was then apportioned between the known prior appropriations on the Mill Creek Branch, i.e., 416 acre feet, and left a balance of 584 acre feet as the arbitrary amount of water that would have to suffice for the domestic users downstream. The Court finds no evidence in the record of the hearing, nor anything in the proposed Order that would indicate any factual basis for any calculation as to the downstream domestic needs that would support the amount of water for domestic uses as stated in the Order of the OWRB.

The Court agrees that the OWRB is entitled to rely on its in-house expertise in deciding water matters as they stated in their oral argument, so long as the OWRB (and especially in cases of a serious and disputed nature) sets forth a factual basis for the exercise of such expertise and the results obtained thereby, so that the courts and interested parties can understand adequately that it is not an arbitrary exercise, but is logical and also rational.

It appears to the Court in the instant case that the OWRB made a determination as to how much water the City should release downstream, without making a concerted effort to calculate the downstream needs of domestic water users, then deducted some known water uses until they arrived at the 584 acre feet of water which they declared was sufficient for downstream domestic needs.

The evidence reflects that the City Manager estimated the City was turning downstream approximately 1,000,000 gallons per day; other evidence reflected estimates of more than twice that amount. The evidence further reflects that the City Manager did not check to determine if there was a stream flow more than a couple of miles downstream.

Considering this evidence, along with the testimony of the Protestants, that Byrd's Mill Creek is the only reliable dry weather stream in the area; that all the other streams and tributaries, with the exception of Sheep Creek and Canyon Creek of Clear Boggy, are wet weather streams, flowing only from run-off after a recent rain; the two exceptions, Sheep Creek and Canyon Creek both are spring fed, but are much smaller in size and not as reliable as Mill Creek, plus the fact they are tributaries of Clear Boggy and therefore contribute nothing to the flow in Mill Creek, we find it is beyond dispute that the principal source of water for dry weather stream flow in the Clear Boggy Stream in both Pontotoc and Coal Counties is Mill Creek, for the reason it is supplied by Byrd's Mill Spring.

Further, it appears equally clear that when the water flow in Mill Creek is not in excess of at least 1,000,000 gallons per day, (and possibly twice this amount or more), Clear Boggy will dry up in dry weather, and there is undisputed evidence of the Protestants that during the summer of 1980 while the City claims it was releasing at least 1,000,000 gallons per day (1.55 c.f.s or 1,120 acre foot per year), the stream bed in Clear Boggy went dry.

While this Court cannot weigh the evidence and substitute its judgment for that of the OWRB, likewise, the OWRB should not ignore competent evidence as presented.

The Order of the OWRB, on its face, states that they made no provision for domestic use below the junction of Buck Creek and Clear Boggy, yet there is an assumption that it would come from somewhere, which is contrary to the evidence.

Considering the calculations set forth hereinbefore on Page 3 of these Findings, it clearly appears that if everyone should take the water they are entitled to take under the proposed OWRB Order, there would be a zero stream flow, or trickle of water, in Mill Creek; whereas, heretofore there has been a flc wing stream even in dry weather with adequate water to maintain minimal instream flow and water for

domestic uses in Mill Creek, as well as the entire Clear Boggy Stream system as it travels through much of Pontotoc County and all of Coal County.

12] That expert testimony presented by the City of Ada, which was undisputed, was that approximately 80 to 85 percent of the City of Ada lies outside the Clear Boggy Steam System. Considering that fact in favor of the City and using the figure of 80 percent of the City of Ada as being outside the stream basin wherein the water sought to be appropriated originates; and the further fact that the City of Ada has extensive and valuable water facilities by which to transport their existing water from Byrd's Mill Creek to the City for use on a city-wide basis; and that a small portion of the City's water supply is used by several rural water districts, the Court finds that by reading the testimony and studying the available exhibits, maps, etc., it is apparent these rural water districts are located both inside and outside the stream basin of origin, but that since they are a small fraction of the City's total use, and since some of their water is also used outside the stream system of origin, their existence can have little influence upon the implications and admissions that 80 percent of the City of Ada does lie outside the stream basin of origin of the water sought to be appropriated in said application.

Further, the Court reasonably concludes that from the admitted fact that 80 percent of the City of Ada lies outside the basin of origin of the water, that approximately 80 percent of the water requested by the City of Ada will in fact be used by the City outside the basin of origin.

In that regard, nothing that has been presented to this Court in its hearing, nor in the records presented to this Court, or in the OWRB Order, disputes this logic.

It further appears to this Court that the City of Ada discharges all of its several million gallons of treated waste water per day into the South Canadian River Basin which is water that has its origin in the Clear Boggy Stream Basin and the record is silent regarding the fact that if the City should obtain additional stream water rights in the Clear Boggy Stream System, this water, after use by the City, would go anywhere else but into the South Canadian Stream Basin.

Argument was presented by the City of Ada and the OWRB that since the City's pumping plant is inside the stream basin of origin, all of the water should be considered to be water for use within the stream basin, but the court finds that this conclusion is not supported by the evidence.

The Protestants contend that the Hearing Examiner, after the Hearing before the OWRB, made an on-sight trip, talked with affected landowners and received a letter ex parte from a City of Ada witness which explained the testimony that had been given and that Protestants were not made aware of any of these events prior to the occurrence thereof.

THEREFORE, this Court concludes as follows:

CONCLUSIONS OF LAW

In reaching the conclusions hereinafter set forth, the Court has considered statutory and case law applicable as determined by this Court and additionally as cited by counsel herein, and specifically as follows:

1] That this Court may set aside, modify, reverse, or remand an Order of the OWRB pursuant to the Administrative Procedure Act, 75 O.S.A. § 322, providing the Court finds that the substantial rights of the Protestants have been prejudiced by the findings, inference, conclusions, or decisions of the OWRB, for reasons set forth in the statute.

2] The Statutes concerned with appropriation of water are 82 O.S. 1980 §§ 105.1, et. seq. and before granting an application, the OWRB must make a finding and determination as required by 82 O.S.A. § 105.12, as follows:

1. There is unappropriated water available in the amount applied for;

2. The applicant has a present or future need for the water and the use to which applicant intends to put the water is a beneficial use; and,

3. The proposed use does not interfere with domestic or existing appropriative uses.

4. In the granting of water rights for the transportation of water for use outside the stream system wherein the water originates, applicants within such stream system shall have a right to all of the water required to adequately supply the beneficial needs of the water users therein. The Board shall review the needs within such area of origin every five (5) years.

3] That the proper method for arrival at the amount of water available is as follows:

To first determine the prior downstream needs, including domestic needs, prior appropriations and prior vested rights, and existing riparian rights, if appropriate;

To secondly determine the total amount of water available;

Then to subtract the first figure from the second.

In this regard, when the OWRB determines that water is available, but in a less amount than that which has been applied for, the practice is to allow an amendment of the application to conform to the OWRB findings. In the instant case, the OWRB made a determination that there was water available in an amount of 5,340 acre feet which is less than the 7,842 acre feet applied for by the City of Ada, and therefore it is the conclusion of the Court that in this case the OWRB accepted and assumed that the figure offered by the City of Ada, of the amount of water that they were releasing into the stream, i.e. (1,000,00 gallons per day, or 1,120 acre feet per year, or 1.55 c.f.s.), was all that was required and the OWRB then allocated this amount of water between appropriations, stream losses and domestic uses, presenting these figures as if determined in accordance with the steps set forth above but cannot properly do so for the reason the allocation of water for domestic priorities is an arbitrary figure rather than a considered actual determination as to how much water is required to meet the first priority of domestic needs as the record is absent evidence to support the 584 acre feet of water allocated to domestic needs.

4] That there is a serious constitutional question, or problem, raised by the Protestants with regard to the arbitrary determination as above mentioned, which compounds the matter.

The Protestants have asserted that the Order of the OWRB has the actual effect of completely drying up Mill Creek in that if each person takes just the water he is entitled to take, the stream will necessarily be completely dry for all practical or useful purposes. This Court would agree with that except for those periods of time when it is raining and there is an active run-off. Further, this Court is personally aware that this stream herein involved in this application is a unique one in that it is known to carry a large volume of water on a year-round basis. The estimated total run-off in the Mill Creek Basin is only about one third of the total spring flow according to the exhibits that have been furnished to the Court on behalf of the City of Ada by and through their expert witnesses; once the run-off is gone, this stream has always had a continual flow because of its spring-fed source.

Elaborating further on the conclusions reached by the Court, the State of Oklahoma has had a long and confused water law history and the Court has made a thorough study of Rarick, Oklahoma Water Law, Stream and Surface in the Pre-1963 Period, 22 Okla. Law Rev. 1, at Page 1. The Court will not detail all the historical aspects, but will state that until 1963 Oklahoma had a fully recognized riparian water rights system, although it did somewhat conflict with the appropriation system which was seldom used; further, Oklahoma's riparian system ante dated the adoption of the appropriation system by some seven years in the pre-statehood era. (See Rarick Id., at 13 and 21.)

Riparian water rights have been generally recognized as vested rights. Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp., 259 P. 444 (Cal. 1927). Among other things these rights included:

> . . .the right of all to have the stream substantially preserved in its natural size, flow and purity, and protected from material diversion." Baker v. Ellis, 292 P.2d § 1037 (Okl. 1956) (Syllabus by the Court.)

Article II, Section 24 of the Oklahoma Constitution does not allow property rights to be taken without just compensation. Amendment V of the United States Constitution provides similar protection as applied to the States under the Fourteenth Amendment of the United States Constitution.

Oklahoma's stream water appropriation system is thus subject to constitutional question insofar as it purports to allow the City of Ada to take, by appropriation through the OWRB, water in such quantities as to interfere with the natural size of the flow of the stream by material diversion of water. This inherent constitutional infirmity of Oklahoma's attempt to modernize its water laws is even recognized by one of its drafters. See Rarick, Oklahoma Water Law, Stream and Surface, Under the 1963 Amendments, 23 Okla. Law Rev. 19 at Page 27.

This Court concludes that the constitutional complaint by the Protestants is well taken. The Protestants have not made a general challenge to the constitutionality of Oklahoma's stream water appropriations statutes, but do however assert that whatever power the State may have under its inherent police power to protect its waters from waste and to protect the general public under such powers, the exercise of such power cannot extend so far as to completely dry up what has historically been a substantial stream which flowed in dry weather, as well as in wet weather.

The property values of the riparian owners along such a reliable stream is inevitably greatly enhanced by the consistent stream flow, and by corollary, such values would be greatly diminished if the stream flow were to completely cease by virtue of upstream diversion.

This Court at this time is not required to determine how much stream flow is enough. The Protestants have merely asserted that a mere trickle of zero system flow is certainly not enough. With this assertion, this Court agrees. A Brief submitted by the OWRB states that the concept of continued instream flow is one that it "appreciates and acknowledges". In this case the OWRB has made provision for stream flow of 1,120 acre feet per year. However, that figure contemplates withdrawals by prior appropriations of 416 acre feet, withdrawals by domestic users of 584 feet and unavoidable losses of 120 acre feet.

This Court recognizes that there are two important and competing constitutional provisions in conflict in connection with the question herein.

There is no doubt the State of Oklahoma has benefitted widely from a rational use of its surplus waters.

Further, the necessity to use such waters is undoubted.

But, in this present case the Court is faced with an attempt to completely expropriate the historical normal flow or normal underflow from Mill Creek, and so far as this Court is able to determine, this question is one of first impression in the State of Oklahoma.

There are two other jurisdictions that have a history of a dual-riparian-appropriation water system, as does Oklahoma, and each of them have dealt with similar difficult questions. Both of those states, Nebraska and California, like Oklahoma, are blessed with areas of high rainfall, and cursed with arid or semi-arid regions. Therefore, it is not surprising that they all have both the riparian and appropriation systems. See generally, Hutchins, Water Law in Nineteen Western States, P.-200 ("Inter-relationships of the Dual Water Rights Systems").

Nebraska, by Court decision, had a riparian system since the 1890's, and had even recognized the right to appropriate water in earlier years. Dewsnup and Jensen, National Water Commission, A Summary-Digest of State Water Laws, 461.

Likewise, Nebraska, like Oklahoma, adopted some of its appropriation statutes from the Wyoming Code, Id. 462. Nebraska has thus been faced with a water law history which strongly resembles that of Oklahoma.

In Wasserburger v. Coffee, 141 NW 2d. 738 (Neb. 1966), that Court held that riparian rights attached to private lands prior to the adoption of its appropriation statutes were valid and superior to later appropriations. In this case the court very carefully noted the complexity of the questions and made note of its inability to "synthesize the two doctrines (i.e., riparian and appropriation) in one decision." Id., 745, and the Court limited its decision to the specific facts of that case which involved downstream claims for livestock water vs. upstream claims for appropriation.

United States v. Gerlach Livestock Co., 339 U.S. 725, is a still more pertinent case to the matters herein involved. In this case the landowners claimed an unusual riparian property right to the continued seasonal flooding of the San Joaquin River so that their riparian grasslands might be fruitful in an otherwise semi-arid region. These landowners claimed that their riparian rights survived even a California Constitutional Amendment in 1928, and that they were entitled to compensation from the Federal Government for deprivation of such right by construction of the Friant Dam and its attendant upstream appropriation of water. The Court of Claims sustained the landowners and upon Certiorari to that Court, the U.S. Supreme Court, in a lengthy Opinion, sustained the riparian claims of the landowners to compensation.

California, like Oklahoma, had an early dual riparian-appropriation water law. The United States Supreme Court noted that:

> "The adversaries in this case invoke rival doctrines of water law which have been in competition throughout California legal history. The claims are expressly based on common-law riparian-rights doctrines as declared by California courts. The United States on the other hand, by virtue of the Reclamation Act, stands in the position of an upstream appropriator for a beneficial use." Id, pp. 742, 743.

The Court then noted at length the fact that the changes in California Law purporting to restrict certain riparian remedies (injunctions) did not affect the landowners right to compensation:

> "...But withholding equitable remedies, such as specific performance, mandatory orders o injunctions, does not mean that no right exists. There may still be a right invasion of which

would call for indemnification. In fact, adequacy of the latter remedy is usually grounds for denial of the former.

[6] But the public welfare, which requires claimants to sacrifice their benefits to broader ones from a higher utilization, does not necessarily require that their loss be uncompensated any than in other takings where private rights are surrendered in the public interest. The waters of which claimants are deprived are taken for resale largely to other private land owners not riparian to the river and to some located in a different water shed. Thereby private lands will be made more fruitful, more valuable, and their operation more profitable. The reclamation laws contemplate that those who share these advantages shall, through water charges, reimburse the Government for its outlay. This project anticipates recoupment of its cost over a forty year period. No reason appears why those who get the waters should be spared from making whole those from whom they are taken. Public interest requires appropriation; it does not require expropriation. We must conclude that by the Amendment California unintentionally destroyed and confiscated a recognized and adjudicated private property right, or that it remains compensable although no longer enforceable by injunction." Id. P. 752, 753 (Emphasis added.)

California had, uniquely, recognized the right of inundation as a riparian right. Likewise, Oklahoma, like all other riparian states, had, as late as 1956, clearly recognized the right to continued stream flow as a proper riparian right. See Baker v. Ellis, supra.

The United States Supreme Court held that the riparian right to annual flooding must be retired by condemnation or acquisition before diversion could be valid. Gerlach, supra at 754.

Accordingly, this Court concludes that the right to completely or substantially dry up a normally flowing stream, in contravention of the long standing riparian law in Oklahoma, must be done by acquisition or condemnation.

So far as this Court knows, in Oklahoma, unlike California, there has never been a riparian right to flood waters or waters in excess of normal or reasonable stream flows. Thus, the appropriation of such waters, which the Court denotes as surplus waters, is not restrained by such considerations. Actual use of such waters by anyone, prior to the 1963 Water Law Amendments, would appear to be protected under the grandfather savings provision in those statutes.

However, the riparian owner, because of the mutual and correlative nature of his ownership with other riparian owners, was actually prevented from diverting the very thing - a reasonable minimal stream flow - that the City of Ada now seeks to acquire.

Such riparian rights, long recognized, cannot be disturbed, absent acquisition or condemnation.

If the City of Ada must have this water, from this particular stream, it can obtain such water by resorting to its power of eminent domain. After it has condemned such riparian rights as are necessary along the stream, it may then proceed, with the approval of the OWRB, to take and use so much of the water as it may desire, including the actual exhaustion of the stream.

Absent such action on the part of the City of Ada, this Court determines that the OWRB must make specific provisions for continued instream flow in its calculations. To fail to do so is in violation of the noted constitutional provisions. This Court will not presume to tell the OWRB how to do this. As a matter of guidance only, and only with reference to the specific and somewhat unique facts before this Court, it is the Court's belief that the OWRB should consider making minimal provision for water flows that would be consistent with those times of little or no run-off during otherwise normal rainfall seasons, or possibly dryer than normal seasons, but excluding periods of drought. The OWRB, in order to apply

Oklahoma's appropriation statutes without constitutional impairment or property rights, should make provisions for stream flows in Mill Creek that approximate such amounts, which the Court, as a matter of convenience, can only describe as the normal flow or the normal underflow, yet this Court is hesitant to use these words as they may have meanings from other jurisdictions that might confuse their use here in reference to the specific facts of this case. However, these words are the most precise the Court can find at this moment.

The Court also notes that there are periods of time when there is run-off in Mill Creek. Neither the City of Ada, nor the OWRB has pursued the possibility of making provisions for extra-ordinarily large diversions during such periods, by providing storage, so that the riparian owner who has not the legal or economic power to so provide might be left with his rights substantially intact.

The Court notes that the rules of the OWRB and the Statutes make specific provisions for seasonal or temporary appropriations, even when there is otherwise no water available for appropriation. 82 O.S.A. § 105.13. The present case may be amenable to such diversions.

5] The City claims that it has a present and future need for the water applied for. As set out in Paragraph 8 of the Findings of Fact, if the City does, in fact, have ground water rights under its 1959 application, then the City cannot possibly show a need for the additional stream water as required by 82 Okl. Sta. Ann. § 105.12(2).

The OWRB has three choices when presented with this issue. It could have done any of the following:

a. Dismissed Ada's application, or continued it until the issues of the ground water rights were settled;

b. Entered an Order stating that the right of the City of Ada to any rights under its present application, 80-107, were conditional upon the outcome of the 1959 ground water application;

c. Proceeded upon the assumption that the OWRB may safely exclude from consideration some of the city's claimed pre-existing sources of water in a determination of the city's need for additional water.

The OWRB chose the third option, which the court finds is erroneous as a matter of law, and an arbitrary action. By proceeding as described in Provision c above, the OWRB needlessly encumbers the title, and clouds the title to water rights. This could lead to a waste of the state's precious water resources. This procedure is contrary to the legislative intent as expressed in Okl. Sta. Ann. 82 § 105.10 (2).

The OWRB attempted to do what the Statute commands it to do, that is determine the city's needs for additional water. However, the OWRB cannot rationally determine the city's need for more water until it has made inventory of how much water is already available to the city. This proposition requires the OWRB to take into account all sources of water claimed by the city. If that is impossible to do at the present because of legal confusion over the city's ground water rights, then it would appear that the OWRB would have to defer consideration of the city's application because of its inability to comply with the requirements of the Statute. However, a reasonable alternative, about which there could be no complaint, would be to make the water rights granted under the application determinable to the extent that the city perfects any ground water rights as a result of its 1959 application.

6] The Protestants complain that the OWRB did not specifically provide in the Order that the water was for use outside of the stream basin of origin and thus make it subject to recall for use in the stream basin under the provisions of 82 Okl. Stat. Ann. § 105.12 (4).

The OWRB, in its Brief and on oral arguments, argues that all of the water was for use inside the basin of origin, or else that the Statute was not meant to cover the present facts. As noted above in Paragraph 12 of the Findings of Fact, the Court finds the evidence clear and the implications of the evidence inescapable that at least 80% of the water applied for will be for use outside the basin of origin. The OWRB attempts to evade these facts and to construct legal fictions about the place of actual use of the water to be appropriated. Thus, the OWRB again had three choices as to what to do with the admitted fact that 80% of the City of Ada is outside the basin or origin.

Again, the OWRB could have:

a. Declared that all of the city's proposed use would be considered as being use outside the stream basin, since the majority of the city is outside the basin of origin;

b. Apportioned the water to be used outside and inside the stream basin upon an 80-20 basis;

c. Declared that all of the water was for use inside the stream basin, in spite of the fact that only 20% of the city is within the basin of origin.

The Court holds and concludes that the law requires the OWRB to apportion the water and because of the nature of the facts as discussed, the only reasonable way to do this is to hold that 80% of the water granted under this application is subject to recall by users in the basin of origin under the provisions of 82 O.S.A. § 105.12(4). To do otherwise is a clear error in the application of this statute to the facts of this case.

In making this decision, the Court has given due regard to the responsibility, and discretion of the OWRB to interpret new questions of law. The Court however feels that the OWRB's position on this question is contrary to the express statutory provision, and a reasonable interpretation of its intent.

7] The Protestants argue that the OWRB failed to take into account the users further downstream in granting this application. To the extent that domestic users below the junction of Buck Creek and Clear Boggy were not considered, the Court agrees with the Protestants and finds that the OWRB may not arbitrarily cut off consideration of domestic users further downstream, especially when the OWRB is considering the complete appropriation of all of the water from the only upstream tributary that is capable of sustaining the downstream domestic users in dry seasons. The OWRB has tried to get around this problem, or to overcome it, by relying upon the large wet weather run-off in the entire Clear Boggy Stream Basin.

It is true that during periods of rainfall large volumes of water flow through the Clear Boggy Basin, however, this reliance upon the run-off ignores the undisputed testimony that Mill Creek is, and always has been, the only dry weather source of water for the users below Buck Creek.

The OWRB further attempts to overcome these defects by asserting that their order makes any rights granted to the City of Ada contingent upon the preservation of downstream domestic uses. However, the Court finds and determines that such protection is not enough in those cases where the application is protested and there is a factual demonstration that the lower domestic users (and possibly appropriators) will suffer a routine or at least frequent dry stream bed in the dry seasons as a result of

the order of the OWRB. If the protection afforded by such provisions in the Board's orders were sufficient, there would never be any need for any domestic user to come and protest any hearing, because their rights would always be "protected" by the OWRB.

One of the problems with the position taken by the OWRB on this point is that the OWRB has already implied in its order that the domestic users below Buck Creek's junction with Clear Boggy are not affected by this application, since the OWRB refused to consider domestic users below the junction of Buck and Boggy in its calculations of water available from Byrd's Mill. This implication, if not corrected at this time, would probably force the downstream domestic users into unwanted litigation at some time in the future in spite of the assertions by the OWRB that domestic uses come first.

The Court is well aware that in times when water is needed to sustain life, or livestock, or gardens, the slow wheels of justice may provide no adequate remedy at all. Therefore, the rights of the downstream domestic users should be protected in an affirmative manner in the orders of the OWRB so as to minimize the potential necessity for any downstream domestic user to have to leave his county and go into another county and commence legal proceedings at a time of drought when emotions and tempers within a City may be high against one who lives downstream and is asserting his right to water his livestock as against the needs of inhabitants of a city.

The OWRB claims that by including in their orders a savings clause for domestic users, they thereby eliminate any claim of prejudice that such domestic users might raise. In light of the foregoing considerations, this argument is not well taken.

8] The Protestants claim that they were prejudiced by the fact that the hearing examiner received ex parte explanations of the testimony of the City's expert witness. The Protestants further claim that the secret field trip was prejudicial. As a general rule, such ex parte activities are highly suspect, and create a presumption of prejudice. See for example Price Brothers Co. v. Philadelphia Gear, 629 F.2d § 444 (6th Cir. 1980). The OWRB should have immediately informed the Protestants of the letter sent to the OWRB by the City's witness and asked them to respond.

The Court can well understand that such field trips as conducted by the OWRB are enormously helpful to the hearing examiner in a water dispute. However, there is little burden upon the hearing examiner to require him to notify parties to active litigation of his intention to make such an inspection and to arrange for them to follow along if they desire. The ends of justice, including the confidence of the public in administrative proceedings, are not well served by the trier of fact, or his employees, engaging in more or less secret and personal investigations of the issues to be decided.

Except for the other holdings in this case, the Court would consider a remand to the OWRB to determine if there was possibly any actual prejudice suffered by the Protestants. However, in light of the other holdings in this matter, the Court finds this to be unnecessary.

JUDGMENT

ACCORDINGLY, Judgment is entered as follows:

Under the provisions of the Administrative Procedure Act, 75 O.S.A. § 322, this Court may set aside, modify, reverse or remand an Order of the OWRB. This may be done if the Court finds that the substantial rights of the Protestants have been prejudiced by the findings, inferences, conclusions, or decisions of the OWRB, for reasons enumerated in the Statute.

IT IS THEREFORE HEREBY ORDERED THAT THIS MATTER BE MODIFIED IN PART, REVERSED IN PART, AND REMANDED to the OWRB for further consideration by that Agency of the matters set forth in this Opinion, and for its actions not inconsistent therewith;

THE OWRB IS ORDERED to make adequate provision for continued instream flow in Byrd's Mill Creek in a manner not inconsistent with the Findings of Fact and Conclusions of Law set forth in this Opinion;

THE OWRB IS ORDERED to set forth in its Order a factual basis for its determination of the amount of domestic water required by downstream users. In this connection, under the evidence in this case, the OWRB must consider those users further downstream than the junction of Buck Creek and Clear Boggy, and in this connection, the OWRB may well find that compliance with the requirement of continued instream flow in Mill Creek will also satisfy the requirements set forth in this paragraph.

THE ORDER OF THE OWRB IS MODIFIED BY THIS COURT as a matter of fact and law to require that 80% of any additional water granted to the Applicant is subject to recall by users within the basin of origin pursuant to the provisions of 82 O.S.A. § 105.12 (4). At some later time, when the facts, as presented in the hearing before the OWRB have substantially changed, then this matter may be subject to a redetermination. Explicitly stated, this aspect of this Application is res judicata until the Applicant can show a substantial actual change in the facts concerning the location of the usage of its water inside the stream basin.

DATED, SIGNED & ENTERED THIS THE 15th DAY OF OCTOBER, 1982.

LAVERN FISHEL
DISTRICT JUDGE

[Editor's Note: The Supreme Court of Oklahoma issued the following opinion on May 19, 1987. It is the first Franco opinion which was withdrawn on April 24, 1990. Reasearchers can locate this opinion in the Oklahoma Bar Journal or in the LEXIS database. This opinion is not in the WESTLAW database, nor the Pacific Reporter. Becasue this first Franco opinion was withdrawn, it has no precedential value. The first opinion is important, however, in understanding the sequence of developments in the Franco litigation and the ultimate outcome of the case.]

Franco-American Charolaise, Ltd., Mack M. Braly, and Claudia M. Braly, Three B. Land & Cattle Company, F. E. Bateman, W. A. Cannon, Gerald Don Stewart, Hershell Chronister, Jesse Berrie, Mrs. John Prater, and Jack Dunn, Appellees, v. The Oklahoma Water Resources Board, and the City of Ada, Oklahoma, Appellants

No. 59,310
Supreme Court of Oklahoma
LEXIS Slip Opinion, 58 Okla. Bar J. 1406 (May 19, 1987)
May 19, 1987, Filed
Withdrawn and New Opinion Substituted on April 24, 1990

PRIOR HISTORY: APPEAL FROM THE DISTRICT COURT OF COAL COUNTY, OKLAHOMA, Honorable Lavern Fishel, Trial Judge.

COUNSEL: George W. Braly, Mack Muratet Braly for appellees.

R. Thomas Lay for appellant, Oklahoma Water Resources Board.

Leslie Younger, Alvin D. Files, Joseph Rarick for appellant City of Ada.

R. Steven Horn for Amicus Curiae, Oklahoma Wildlife Federation, Inc.

Diana Pedicord for Amicus Curiae for Oklahoma Municipal League.

JUDGES: KAUGER, J., HODGES, SUMMERS, J.J., REIF, S.J. appointed in place of Simms, J. who disqualified, concur; OPALA, J. concurs by reason of stare decisis; WILSON, J., concurs in result; DOOLIN, C.J., HARGRAVE, V.C.J., LAVENDER, J., dissents.

OPINION: KAUGER, J.

The issues presented are: 1) whether ground water rights should be considered in the determination of the appropriation of stream water; 2) whether the proposed situs for the use of stream water lies outside the stream area of origin; 3) whether the use interferes with downstream domestic uses; and 4) whether unappropriated water is available. We find that ground water rights owned by the City of Ada must be included in order to calculate the City's present or future need for stream water; that the City's use of the water is outside the stream system of origin; and that the rights of downstream domestic, vested riparian and appropriative owners must be considered before the availability of unappropriated

water may be determined. The cause is remanded to determine whether any water is available for appropriation.

Byrd's Mill Springs (Spring), a principal source of Mill Creek, the supplier of the Clear Boggy Stream Basin, has been used as the source of Ada's municipal water system since 1911. Although Ada straddles two watersheds 15 % to 20 % of the City lies within the Clear Boggy Stream Basin, and 80 % to 85 % of the City is located within the South Canadian Stream Basin. In 1963, the Oklahoma Water Resources Board (OWRB) found that a prior use entitled the City to appropriate 3,360 acre feet per year of stream water from Byrd's Mill Spring.[1] After the City's need for water increased, on August 21, 1980, it applied to the OWRB for an additional 7,842 acre feet per year, projecting an annual need by the year 2020 for 10,523 acre feet. The City's application proposed transporting the additional appropriation via pipelines from the point of diversion at Byrd's Mill Spring to the City's municipal water reservoir. The protestants, riparian and appropriative owners of water rights in the Clear Boggy Stream System, objected to the additional taking alleging impairment of the flow of Mill and Clear Boggy Creeks, and asserting that although the City had released 1,120 acre feet of water a year into the Clear Boggy during 1980, the stream bed was often dry.

On August 7, 1980, the OWRB's hearing examiner considered the City's need for more water and the impact its appropriation would have on the downstream flow. At the hearing, the protestants argued that the City had acquired a surplus of water because of its 1959 application for ground water. The hearing examiner noted the 1959 application but found that it was irrelevant to the City's quest for additional stream water. The examiner determined that the Spring's yield was 9,820 feet per year; that the appropriated water from Mill Creek was 416 acre feet per year; that the estimated amount of water for the downstream domestic users on Mill Creek was 584 acre feet per year; that there was an unavoidable loss experienced of 120 acre feet per year; and that 3,360 acre feet had been previously appropriated to the City. Based on these figures, the examiner found 5,340 acre feet per year available for appropriation. The OWRB granted the additional 5,340 acre feet of stream water to the City; required the City to release at least 1,120 acre feet of water per year downstream; and ordered the City to meter and record the amount of appropriation from Byrd's Mill Spring on a monthly basis.

The protestants appealed from the administrative hearing to the district court of Coal County pursuant to the Administrative Procedures Act, 75 O.S. 1981 § 318. The trial court modified in part, reversed in part and remanded the cause to the OWRB for further consideration. The trial court found: 1) that because 80 % of the City is located outside the Clear Boggy-Mill Creek stream basin 80 % of the water was subject to recall by users located within the stream basin; 2) that because appropriations could dry up downstream tributaries OWRB could not arbitrarily fail to consider downstream domestic users; 3) that OWRB should monitor the amount of domestic water required by all downstream users; and 4) that OWRB should make specific provisions for continued in-stream flow in its calculations. The City and OWRB appealed.

I. ALL AVAILABLE WATER RIGHTS MUST BE CONSIDERED IN THE DETERMINATION OF THE PRESENT OR FUTURE NEED FOR STREAM WATER

The OWRB and the City argue that the trial court's finding that OWRB arbitrarily excluded consideration of the City's ground water rights in determining the City's present or future need for

1. One acre foot of water is that amount of water which it takes to cover one acre of land with one foot of water and contains 325,850 gallons of water. Oklahoma Water Resources Bd. v. Texas County, 711 P.2d 38, 62 (Okla. 1984) (Kauger, J. concurring).

additional stream water was erroneous. The protestants counter that 82 O.S. 1981 § 105.12[2] requires an inventory of all sources of water in determining the needs of the City.

The OWRB, relying on City of Albuquerque v. Reynolds, 71 N.M. 428, 379 P.2d 73, 75 (1963) contends that it lacked jurisdiction to consider and adjudicate ground water rights in a proceeding to allocate stream water. However, OWRB's argument is misconceived. The New Mexico Supreme Court refused to consider other water rights in a proceeding for a ground water permit because it found under New Mexico law that the state engineer was required to answer only two questions: whether there is unappropriated water; and whether appropriation from the source in question will impair existing water rights. New Mexico specifically refused to acknowledge that there were two substantive bodies of law governing stream and ground water.

Oklahoma statutes are different from New Mexico's. Not only must the OWRB determine whether there is available unappropriated water; it must also decide whether the applicant has present or future need for the water; whether the proposed use interferes with existing domestic or appropriative uses;[3] and whether the use is beneficial. Section 105.12 does not provide for the adjudication of ground water rights in a stream water proceeding. However, the statute does require OWRB to consider the applicant's present or future need for water from which it may be implied that an examination of the applicant's available water sources, including any ground water rights, must be considered, and that a unitary rationale regulates both stream and ground water.

The OWRB also relies on Eaton v. State Water Rights Board, 171 Cal. App.2d 409, 340 P.2d 722 (1959) for its assertion that the OWRB lacks jurisdiction to adjudicate ground water rights in a stream water proceeding. In Eaton, the petitioners applied for a permit to appropriate water but because there was no unappropriated water available, the California Water Board denied the application. Eaton is inapposite because revocation of permits to enable the return of previously appropriated water to the available resource pool is not an issue here.

The City may have other available sources including ground water rights with which to satisfy its claimed need for additional water. If there are two water sources available, allocation of stream water may well be conditioned on a prior appropriation of ground water. The OWRB should have determined ground water rights before finding that the City had a present and future need for stream water. The express policy of this state beneficially to use its water cannot be furthered if the OWRB's right hand does not know what its left hand is doing in the husbanding of the state's water resources.

The OWRB contends that in order for stream water to be "needed" the City must merely demonstrate its ability and intention to apply the water to reasonable beneficial use. A case involving pueblo rights, City of Los Angeles v. City of San Francisco, 14 Cal.3d 199, 123 Cal. Rptr. 1, 537 P.2d 1250 (1975) is the

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2. The requirements necessary for the approval of an application for stream water use are found in 82 O.S. 1981 § 105.12 which provides: "After the hearing on the application the Board shall determine from the evidence presented whether:

1. There is unappropriated water available in the amount applied for;

2. The applicant has a present or future need for the water and the use to which applicant intends to put the water is a beneficial use; and or existing

3. The proposed use does not interfere with domestic appropriative uses.

4. In the granting of water rights for the transportation of water for use outside the stream system wherein water originates, applicants within such stream system shall have a right to all of the water required to adequately supply the beneficial needs of the water users therein. The Board shall review the needs within such area of origin every five (5) years.

If so determined, the Board shall approve the application by issuing a permit to appropriate water. The permit shall state the time within which the water shall be applied to beneficial use. In the absence of appeal as provided by this act, the decision of the Board shall be final."

3. The requirements necessary for the approval of an application for stream water use are found in 82 O.S. 1981 § 105.12, see note 2, supra.

basis for OWRB's assertion that the City's right is superior to the right of riparian appropriators. The California court, citing Mexican law for its holding, found that because the pueblo could use as much of the stream water flowing through it as was necessary, pueblo rights were superior to those of riparian appropriators, and that Los Angeles as the pueblo's successor city inherited the same rights.

The pueblo doctrine has been recognized in California since at least 1909.[4] We are required to take judicial notice of the laws of other jurisdictions and we have no quarrel with the fact that successor pueblo municipalities may under Mexican and Spanish law enforce the pueblo water rights doctrine. However, after 1700, Oklahoma was peopled with nomadic plains Indians, not pueblo dwellers, and it has never followed the pueblo principle.

We find persuasive the only case we have found which is directly in point, City of San Antonio v. Texas Water Commission, 392 S.W.2d 200, (Tex. App. 1965) aff'd, 407 S.W.2d 752 (Tex. 1966). After the Texas court considered San Antonio's request for appropriation of stream water, it found that existing water rights would be impaired if the application were granted. Because the general policy of the State of Texas is to develop local water resources, the Court held that before granting an authorization to divert water, supplemental sources of supply must first be developed. The availability of alternative sources of water supply is a relevant consideration especially when the alternative source is in existence or an application to use the source is pending. An applicant who is able to satisfy its need at a reasonable cost from an alternative source (which for some reason is not available to others) should be required to develop the alternative source.[5] The City's available ground water rights must be considered in determining its present and future needs for stream water from the Clear Boggy Stream Basin.

II. THE PROPOSED USE IS OUTSIDE THE STREAM SYSTEM AREA OF ORIGIN

The OWRB and the City assert that the City's intended use is not a use outside the stream system area of origin and that 80 % of the water granted to the City by the OWRB is not subject to recall. The protestants defend the trial court's order asserting that even though 80-85 % of the City overlies the South

4. The pueblo doctrine provides that a Spanish or Mexican pueblo organized under the laws and regulations of Spain or Mexico acquired a prior and paramount right to the use of waters of rivers or streams passing through and over and under the surface of their allotted lands so far as was necessary for the pueblo or its inhabitants and that the pueblo had the right to distribute to the common lands and to the inhabitants of the pueblo the waters of a non-navigable on which the pueblo was situated. Under Mexican law agricultural settlements or pueblos located on public land had ipso facto a concession of the waters on the surrounding public lands so far as necessary for the general supply of the settlement. The pueblo right was superior to that of any riparian propriators because pueblo rights had been acquired on public land before there were any riparian propriators. Another way of defining pueblo right is that the priority of the right in a colonization pueblo to take all the waters of a non-navigable stream for the use of its inhabitants on an expanding scale necessary for the benefit of inhabitants was enforceable. The pueblo right doctrine was established as early as 1789 when the King of Spain established the town of Pictic in New Spain and gave the settlement preferred rights to all available water. The King decreed that thereafter the general plan followed and the foundation of the pueblo Pictic should be followed in the foundation of any new pueblos in California, Arizona, New Mexico and Texas. Cartwright v. Public Service Co. of New Mexico, 66 N.M. 64, 343 P.2d 654, 667-68 (1958).

The legal foundation of California's pueblo water right principle has been severely criticized by Hutchins, "Pueblo Water Rights in the West," 38 Tex. L. Rev. 748, 758 (1960) and in In Re Contests of the City of Laredo to the Adjudication, 675 S.W.2d 257, 270 (Tex. App. 1984); Los Angeles v. Pomeroy, 124 Cal. 597, 649-50, 57 P. 585, 604 (1899), in a divided decision, Justice Temple wrote:

"Unquestionably it was contemplated and hoped that at least some (pueblos) would so prosper as to outgrow the simple form of the rural village. It is in the nature of things that this might happen, and when it did, and the communal lands were required for house lots, we must presume that under Mexican or Spanish rule they could be so converted, and that, when the population increased so as to overflow the limits of the pueblo, such extension could be legally accomplished. Had this happened under Mexican rule, can it be doubted that the right vested in the pueblo would have been construed to be for the benefit of the population, however great the increase would be?"

Hutchins says:

"Thus this vitally important principle that has enabled great cities to monopolize the entire flows of streams, regardless of water developments thereon by others solely because the cities originated from primitive villages organized as pueblos was added to the jurisprudence of California as the result of a presumption."

5. Johnson and Kniffa, "Transbasin Division of Water," 43 Tex. L. Rev. 1035, 1047-48 (1965).

Canadian Stream Basin and that only 15-20 % lies in the Clear Boggy Stream Basin, the City will discharge several million gallons of water per day into the South Canadian Stream Basin resulting in irreparable permanent loss to the Clear Boggy.[6] The State of Oklahoma has adopted a statutory policy statement concerning use of surplus water noting that all the people of the State of Oklahoma have a primary interest in the orderly and coordinated control, protection, conservation, development and utilization of the appropriative water resources of this state. Surplus water is defined as unclaimed and unappropriated stream water.[7] Although the use of water is encouraged, use by persons residing outside the area of origination of the stream system is permitted only to the extent to which it is not required by persons residing in the area of origination.[8]

In 1890, the United States Congress enacted the Organic Act defining Oklahoma and Indian Territory and extending the general laws of the State of Arkansas as the governing body of laws for the citizens of Indian Territory.[9] Arkansas incorporated the common law of England,[10] including riparian rights.[11] Under the doctrine of riparian rights, a proprietor of land bordering upon a running stream is presumed to have a right to the full free and uninterupted waters of the stream.[12] In 1908, citing the common law, this Court held that one could not alter or obstruct the course of water flowing in a definite channel constituting a water course to the detriment of the riparian owner without liability for damages.[13] The

6. A municipality consumes an average of 30 % of its water and returns 70 % to be used again. Water in Oklahoma, p. IV-6 (Office of Community Affairs and Planning 1971).

7. Custer v. Missoula Public Service Co., 91 Mont. 136, 6 P.2d 131, 133-34 (1931).

8. The policy of the State is found in 82 O.S. 1981 § 1086.1 (A) (4) which provides in part:

"A. All of the people have a primary interest in the orderly and coordinated control, protection, conservation, development and utilization of the appropriative water resources of the state. The people residing within areas where waters originate benefit from the optimum development and utilization of water within the area of origin. The people in water deficient areas benefit by being able to use
excess and surplus waters. The policy of the State of Oklahoma is to encourage the use of surplus and excess water to the extent that the use thereof is not required by people residing within the area where such water originates. In order to maximize the alternatives available for the use and benefit of the public and water-user entities and for the general welfare and future economic growth of the state, it is therefore the purpose of this act to provide means for the expeditious and coordinated preparation of a comprehensive state water plan for submission to the Legislature, which shall contain a feasibility and cost study on the individual projects included within the Plan and on the state plan as well, providing for the acquisition, development and utilization of storage and transportation facilities for the excess and surplus appropriative water of this state, in accordance with the following principles:

...

4. Only excess and surplus water should be utilized outside of the areas of origin and citizens within the areas of origin have a prior right to water originating therein to the extent that it may be required for beneficial use therein; . . ."

9. The Organic Act of 1890, § 31 provides in pertinent part:

"That certain general laws of the state of Arkansas in force at the close of the session of the general assembly of that state of eighteen hundred and eighty-three, as published in eighteen hundred and eighty-four, in the volume known as Mansfield's Digest of the statutes of Arkansas, which are not locally inapplicable or in conflict with this Act or with any law of congress, relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory until congress shall otherwise provide, that is to say, the provisions of the said general statutes of Arkansas relating to . . . common and statute law of England, chapter twenty; . . ."

10. In 1884, Arkansas adopted the English Common Law which by that time included the riparian rights doctrine. In 1890 by the Organic Act the United States Congress imposed the law of Arkansas upon Indian Territory. In 1907, Indian Territory became a part of Oklahoma. The Okla. Const. art 2, §§ 23,24 require just compensation for the taking of private property. In 1910, Oklahoma adopted the equivalent of 60 O.S. 1981 § 60 prior to the 1963 amendments). Section 6634 of the 1910 Revised Laws provided:

"The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same."

11. Mansfield's Digest of the Arkansas Statutes, Chapter 20, § 566 (1884) provides:

"The common law of England, so far as the same is applicable and of a general nature, and all statutes of the British parliment in aid of or to supply the defect of the common law made prior to the fourth year of James the First (that are applicable to our own form of government), of a general nature and not local to that kingdom, and not inconsistent with the constitution and laws of the United States or the constitution and laws of this state, shall be the rule of decision in this state unless altered or repealed by the general assembly of this state."

See also, Harrell v. City of Conway, 224 Ark. 100, 271 S.W.2d 924, 927 (1954) which found that the riparian doctrine in Arkansas was of common law origin.

12. Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821, 823, 112 A.L.R. 1104, 1106 (1937).

13. Chicago, R.I. & P. Ry. Co. v. Groves, 20 Okla. 101, 93 P. 755, 759 (1908). See also, Rarick, "Oklahoma Water Law, Stream and

current Oklahoma law protects the rights of vested riparian owners who have followed the procedure to preserve his/her rights,[14] appropriators and domestic users. Therefore, Oklahoma towns and cities do not automatically possess exclusive rights superior to those of downstream vested riparian and appropriative owners.

The City's position is that even assuming, arguendo, the protestants have a clear-cut right to a free flowing stream, this right did not extend beyond the 1963 amendment to 60 O.S. 1981 § 60,[15] which confined riparian use to domestic uses and transformed stream water into public ownership. This argument fails to consider the rights vested for domestic purposes, for prior beneficial uses and water uses under separate appropriations, and for the rights which mineral owners may have to stream or ground water.[16] The statute specifically grants domestic users and vested riparian owners use of the of water as long as the natural vested flow of the stream is continued. In Ricks Exploration v. Oklahoma Water Resources Bd., 695 P.2d 498, 504-05 (Okla. 1984), the Court discussed 60 O.S. 1981 § 60 at length. It held that:

"Public law will not be interpreted as legally destroying private rights by inference. Absent some clear statutory mandate, we are powerless to strike down a valuable right cognizable at common law merely upon an inference sought to be drawn from a public law statute. When a statute is susceptible of more than one construction, it must be given that which makes it free from constitutional doubt rather than one which would make it fraught with fundamental law infirmities. Where vested rights are acquired under existing laws, there is no branch of government which may take them away except by due process of law. The due process clause of our constitution, Art. 2 § 7, Okl. Const., prevents state authority from depriving an individual of property without just compensation. Conduct of an administrative body acting in its adjudicative capacity constitutes state action within the meaning of the due process clause. If we were to espouse the Board's view, we would be subjecting private rights to destruction by a public body without any compensation."

The state's water policy closely tracks the doctrine of riparian ownership and recognition of riparian rights as delineated in 60 O.S. 1981 § 60 is woven throughout Title 82 dealing with water and water rights. Riparian ownership is not common to the citizens at large but exists as an incident of ownership of land which is contiguous to and bordering on the water.[17] Landowners cannot be deprived of their rights by non riparian owners for private water utilization nor can they be deprived for public use without just compensation. After it is established that a particular parcel of land lies adjacent to a body of water, the question arises as to how much of the land is truly riparian. Generally, riparian use is limited to the natural watershed of the stream from which it was taken.[18] The rationale behind confining riparian rights

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Surface in the Pre-1963 Period," 22 Okla.L.Rev. 1, 14 (1969).

14. See 82 O.S. 1981 § 105.2.

15. Title 60 O.S. 1981 § 60 provides in pertinent part:

"The owner of the land owns water standing thereon, or flowing over or under its surface but not forming a definite stream. The use of groundwater shall be governed by the Oklahoma Ground Water Law. Water running in a definite stream, formed by nature over or under the surface, may be used by him for domestic purposes as defined in Section 2(a) of this act, as long as it remains there, but he may not prevent the natural flow of the stream or of the natural spring from which it commences its definite course, nor pursue nor pollute the same, as such water then becomes public water and is subject to appropriation for the benefit and welfare of the people of the state, as provided by law; . . . "

16. See 82 O.S. 1981 § 105.2 which governs the right to use water and which establishes priorities.

17. Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821, 823, 112 A.L.R. 1104, 1106 (1937).

18. In Re Adjudication of Upper Guadalupe River, 625 S.W. 2d 353, 361 (Tex. App. (Tex. 1982); Hudson v. West, 47 Cal. 2d 823, 1981), aff'd., 642 S.W.2d 438 306 P.2d 807, 809-10 (1957); Harrell v. City of Conway, 224 Ark. 100, 271 S.W.2d 924, 927 (1954); Purcellville v. Potts, 179 Va. 514, 19 S.E. 2d 700, 703, 141 A.L.R. 633 (1942); Sayles v. City of Mitchell, 60 S.D. 592, 245 N.W. 390-91 (1932). See also Annot., "Waters: Right of Municipality, as Riparian Owner, to Use of Water for Public Supply," 141 A.L.R. 639 (1942); Ziegler, "Water Use Under Common Law Doctrines," Water Resources and the Law 51, 56 (1958).

to lands bordering the stream within the watershed is that the unconsumed water will return to the stream and that because rainfall feeds the stream, the land is entitled to the use of the water.[19]

In Baker v. Ellis, 292 P.2d 1037, 1039 (Okla. 1956) we were presented with a conflict between two riparian owners. One wanted to dam the spring-fed creek which threatened the flow of the water downstream. There was evidence that the water retained by the dam would escape into the earth and never return to the original basin. The court held that all existing circumstances and conditions including the size and character of the stream, the quantity of the water appropriated, and the potential danger of permanent loss of the source of supply must be considered to decide injury to riparian rights.[20] Although Baker dealt with riparian right, the analysis is applicable to the use of stream Water outside the basin because Oklahoma statutory water law draws heavily from the common law riparian rights doctrine.

The OWRB failed to consider the effect of transferance and release of appropriated water into another basin on the riparian owners. Nevertheless, OWRB's order reflects a more accurate estimate of the annual yield of the spring could have been obtained by metering the water at the point of diversion. Because the vested riparian owners and domestic users are entitled to have substantial preservation of the stream including natural size, flow, purity and protection against material diversion,[21] the vested riparian owners should receive an accurate measurement of the water diverted. Contrasted with subsequent claims, an appropriator of water deserves exclusive use of the water to the extent of the appropriation without diminution or material alteration in quantity or quality.[22] Because we find the City's appropriation to be a use outside the basin, we remand this cause to the OWRB for a more accurate estimate of the annual yields of Byrd's Mill Springs and for a determination of the effect that a permanent loss of water would have on vested riparian and appropriative users. If the OWRB determines that surplus water is available, the City's appropriation may be permitted subject, of course, to review every five years by the OWRB.[23]

III. THE AMOUNT OF WATER TAKEN BY DOMESTIC USERS, RIPARIANS AND APPROPRIATORS IN THE ADJACENT DOWNSTREAM COUNTY MUST BE CONSIDERED IN CALCULATING POSSIBLE INTERFERNCE WITH EXISTING USES

According to 82 O.S. 1981 § 105.2(A), any vested riparian may take stream water for domestic use from wells on his/her premises.[24] The OWRB ignored the needs of domestic or vested riparian users or appropriators past the junction of Buck Creek and Clear Boggy Creek in the adjacent downstream county. The OWRB objects to the trial court's finding that the City's proposed use would interfere with downstream domestic users and to the requirement that OWRB figure the amount of water necessary to meet domestic downstream needs past the junction of Buck Creek and Clear Boggy Creek. Domestic use includes consumption of water for household purposes, watering domestic animals and irrigation of the

19. Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P. 978, 980 (1907).

20. See also, Rarick, "Oklahoma Water Law, Stream and Surface in the Pre-1963 Period," 22 Okla. L.Rev.1, 17-8 (1969).

21. Baker v. Ellis, 292 P.2d 1037, 1039 (Okla. 1956).

22. See note 2, supra. See also, Rogers v. Nevada Canal Co., 60 Colo. 59, 151 P. 923, 927 (1915); E. Cooper, Aqueduct Empire, Ch. 25, 407-08 (The Arthur H. Clark Co. 1968).

23. Stream water like ground water may be transported outside the basin. Ground water may be transported if waste will not occur. Oklahoma Water Resources Bd. v. Texas County, 711 P.2d 38, 42 (Okla. 1984). Stream water may be used outside the basin if surplus water is available.

See 82 O.S. 1981 § 105.12, note 2, supra.

24. Title 82 O.S. 1981 § 105.2(A) provides:

"A. Beneficial use shall be the basis, the measure and the limit of the right to the use of water; provided, that water taken for domestic use shall not be subject to the provisions of this act, except as provided in Section 5. Any person has the right to take water for domestic use from a stream to which he is riparian or to take stream water for domestic use from wells on his premises. Water for domestic use may be s ored in an amount not to exceed two (2) years' supply. The provisions of this act shall not apply to farm ponds or gully plugs which are not located on definite streams and which have been constructed under the supervision and specifications of the Soil and Water Conservation Districts."

total of three acres of land.[25] Domestic users have a statutory remedy under 82 O.S. 1981 § 105.5 for interference with their right to use water.[26] Neither the record nor OWRB's rules reflect the reasons for neglecting to complete this essential calculation. This critical omission ignores the obvious intent of 82 O.S. 1981 § 105.11[27] which requires every applicant to notify both the county at the point of diversion and the adjacent downstream county of its intention to appropriate stream water. The adjacent county, Coal County, was not notified of the application for appropriation of water by the City. The statutes § 105.5, 105.11 are in pari materia, and when construed together they express legislative intent that domestic downstream users and the county at the point of diversion are on an equal footing within the meaning of the statute.[28] Although the legislature only. requires notification to the adjacent downstream users, the stream system involved includes portions of Pontotoc, Johnston, Hughes, Pittsburg, Atoka, Bryan, Choctaw counties and all of Coal county.[29]

The vested rights of the riparian owners and appropriators in Coal County also must be considered. Although riparian owners are in many ways the alter ego of the domestic user, riparian use is not restricted by statute as are domestic uses. The condition for riparian utilization of water is that the use must be reasonable and non-injurious to other users.[30] Prestatehood uses are protected by 82 O.S. 1981 § 105.2[31] and possess priority for water use. Title 82 O.S. 1981 § 105.12[32] requires the OWRB to find that

25. The definition of domestic use is provided in 82 O.S. 1981 § 105.1(B):

"B. In this act, unless the context clearly indicates otherwise, 'domestic use' means the use of water by a natural individual or by a family or household for household purposes, for farm and domestic animals up to the normal grazing capacity of the land and for the irrigation of land not exceeding a total of three (3) acres in area for the growing of gardens, orchards and lawns."

26. Title 82 O.S. 1981 § 105.5 provides:

"Any person having a right to the use f water from a stream as defined by this act or Section 60 in Title 60 of the Oklahoma Statutes whose right is impaired by the act or acts of another, or others, may bring suit in the district court of any county in which any of the acts complained of occurred. Provided, however, that nothing herein contained shall be construed to empower district courts to recognize rights to use the water of a stream unless such rights have heretofore been established pursuant to this act or are claimed under Section 60 in Title 60 of the Oklahoma Statutes. Provided, however, that the Attorney General shall intervene on behalf of the state in any suit for the adjudication of rights to the use of water if notified by the Board that the public interests would be best served by such action."

27. Notice of application, 82 O.S. 1981 § 105.11, provides:

"Upon the filing of an application which complies with the provisions of this act and the rules and regulations established thereunder, the Board shall instruct the applicant to publish, within ninety (90) days after the filing of the application, a notice thereof, at the applicant's expense, in a form prescribed by the Board in a newspaper of general circulation in the county of the point of diversion, and in a newspaper of general circulation published within the adjacent downstream county and any other counties designated by the Board once a week for two (2) consecutive weeks. Such notice shall give all the essential facts as to the proposed appropriation, among them, the places of appropriation and of use, amount of water, the purpose for which it is to be used, name and address of applicant and the time and when the application will be taken up by the Board for consideration. In case of failure to give such notice in accordance with the rules and regulations applicable thereto within the time required, or if such notice is defective, the priority of application shall be lost; however, if proper notice shall be given within thirty (30) days after the Board has given him notice of his failure to give effective and proper notice, the application shall thereafter carry the original date of filing, and shall supersede any subsequent application to the same source of water supply. Any interested party shall have the right to protest said application and present evidence and testimony in support of such protest."

See also, the Oklahoma Water Resources Rule 635.2 promulgated April 10, 1979.

28. Redwine v. Baptist Medical Center of Oklahoma, 679 P.2d 1293, 1296 (Okla. 1983); DeGraffenreid v. Iowa Land & Trust Co., 20 Okla. 687, 95 P. 624, 639 1983); (1908).

29. The Oklahoma Water Resources Board, Rule 125 (1982) provides:

"STREAM SYSTEM is the drainage area of a watercourse or series of watercourses which converge in a large watercourse the boundaries of which have been defined and which has been designated by the Board as a stream system."

30. Smith v. Stanolind Oil & Gas Co., 197 Okla. 499, 172 P.2d 1002, 1005 (1946); Martin v. British American Oil Producing Co., 187 Okla. 193, 102 P.2d 124, 126 (1940).

31. The priority is found in 82 O.S. 1981 § 105.2(B)(1):

"B. Priority in time shall give the better right. From and after the date of June 10, 1963, the following priorities for the use of water and no other shall exist:

1. Prestatehood uses. Priorities to the quality of water put to beneficial use prior to November 15, 1907, to the extent to which the priority has not been lost in whole or in part pursuant to Section 16 when the same shall have been perfected as provided by this act and rules and reg ilations adopted by the Board. Such said priorities shall date from the initiation of the beneficial use."

32. The requirements necessary for the approval of an application for stream water use are found in 82 O.S. 1981 § 105.12, see note 2,

the appropriation will not interfere with either domestic or existing appropriative uses following the riparian rights doctrine. The OWRB's finding that water is available to the City for appropriation is rendered suspect by the failure to calculate the volume of water consumed in the adjacent downstream county. Therefore, the OWRB is directed to determine the amount of water being used in Coal County by domestic users, vested riparian owners and appropriators, and to determine whether any water is actually available for appropriation. If there is water available, the needs of the stream system must be reviewed every five years to prevent the impairment of the vested riparian owners, domestic users and appropriators rights.

AFFIRMED IN PART; REVERSED IN PART

HODGES, SUMMERS, J.J., REIF, S.J. appointed in place of Simms, J. who disqualified, concur; OPALA, J., concurs by reason of stare decisis; WILSON, J., concurs in result; DOOLIN, C.J., HARGRAVE, V.C.J., LAVENDER, J., dissents.

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supra.

[Editor's Note: In the legislative session in the year following the 1987 Franco opinion, the Oklahoma legislature passed legislation in direct response to the statutory interpretations rendered in that opinion. The following statutory amendments show the additions and deletions that the Oklahoma legislature enacted in response to the 1987 Franco decision.]

WATER AND WATER RIGHTS--STREAM WATER AND
GROUNDWATER USE--SCENIC RIVER AREAS
OKLA. SESS. LAWS, 41st LEGISLATURE
2ND SESSION (1988)

CHAPTER 203
SB NO. 354

AN ACT RELATING TO PROPERTY AND WATERS AND WATER RIGHTS: AMENDING 60 O.S. 1981, SECTION 60 AND 82 O.S. 1981, SECTIONS 105.2, 105.12, 105.23, 105.27, 926.6, 1020.6, AS AMENDED BY SECTION 1, CHAPTER 128, O.S.L. 1982 AND 1452, AS AMENDED BY SECTION 1, CHAPTER 33, O.S.L. 1986 (82 O.S. SUPP. 1987, SECTIONS 1020.16 AND 1452), WHICH RELATE TO OWNERSHIP OF WATER, WATER RIGHTS AND STREAM WATER USE: DELETING CERTAIN LANGUAGE; CLARIFYING LANGUAGE; MODIFYING CERTAIN USES; SETTING FORTH CERTAIN RIPARIAN RIGHTS; PROVIDING FOR SUPERSEDENCE OF COMMON LAW BY CERTAIN STATUTES; PROVIDING THAT PERMITS TO APPROPRIATE WATER ISSUED AFTER A CERTAIN DATE ARE PRESUMED VALID; RECOGNIZING CERTAIN VESTED RIPARIAN RIGHTS; REQUIRING CONSIDERATION OF ALTERNATIVE SOURCES OF STREAM WATER IN GRANTING APPLICATIONS; PERMITTING CONSIDERATION OF GROUNDWATER; PROHIBITING APPLICATION FOR TRANSPORTATION OF WATER OUTSIDE OF STREAM SYSTEM FROM INTERFERING WITH CERTAIN USES WITHIN THE STREAM SYSTEM; PROVIDING FOR APPROVAL OF PERMIT; REQUIRING CERTAIN FINDINGS; STATING THAT DECISION OF BOARD FINAL IN THE ABSENCE OF APPEAL; SETTING PRIORITY OF APPLICATIONS WITHIN A STREAM SYSTEM; REQUIRING BOARD TO REVIEW WATER SUPPLY IN AREA OF ORIGIN TO DETERMINE CERTAIN NEEDS AND USES; STATING REVIEW SHALL NOT BE USED TO REDUCE WATER QUANTITY PREVIOUSLY AUTHORIZED FOR USE; SUBJECTING CERTAIN PERMITS TO LOSS OR FORFEITURE; ALLOWING CERTAIN WATER USERS TO USE WATER FOR PURPOSES OTHER THAN THOSE APPROPRIATED; MODIFYING BOARD'S AUTHORITY TO INSPECT WORKS UNDER CONSTRUCTION; MODIFYING CERTAIN HEARING PROCEDURES; REQUIRING CERTAIN HEARINGS TO BE CONDUCTED PURSUANT TO CERTAIN PROVISIONS OF THE ADMINISTRATIVE PROCEDURES ACT; PROVIDING FOR FINAL ORDER TO BE SUBJECT TO JUDICIAL REVIEW PURSUANT TO THE ADMINISTRATIVE PROCEDURES ACT; REQUIRING PERSONS DRILLING CERTAIN WELLS TO BE LICENSED; PROVIDING FOR FORFEITURE OF BOND UNDER CERTAIN CONDITIONS; EXCLUDING CERTAIN PORTION OF BIG LEE'S CREEK FROM SCENIC RIVER AREA DESIGNATION TO ALLOW DAM TO BE CONSTRUCTED AT CERTAIN ELEVATION; REQUIRING WATER RESOURCES BOARD TO MAKE CERTAIN DESIGNATION AND CLASSIFICATIONS TO ACCOMPLISH SUCH ACTION; AND DECLARING AN EMERGENCY.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 60 O.S. 1981, Section 60, is amended to read as follows:

Section 60. A. The owner of the land owns water standing thereon, or flowing over or under its surface but not forming a definite stream. The use of groundwater shall be governed by the Oklahoma ~~Ground Water~~ Groundwater Law. Water running in a definite streams, formed by nature over or under the surface, may be used by ~~him~~ the owner of the land riparian to the stream for domestic ~~purposes~~ uses as defined in Section ~~2(a) of this act, as long as it remains there~~ 105.1 of Title 82 of the Oklahoma Statutes, but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, not pursue nor pollute the same, as such water then becomes public water and is subject to appropriation for the benefit and welfare of the people of the state, as provided by law; Provided however, that nothing contained herein shall prevent the owner of land from damming up or otherwise using the bed of a stream on his land for the collection or storage of waters in an amount not to exceed that which he owns, by virtue of the first sentence of this section so long as he provides for the continue natural flow of the stream if an amount equal to that which entered his land less the uses allowed ~~in this act~~ for domestic users and for valid appropriations made pursuant to Title 82 of the Oklahoma Statutes; provided further, that nothing contained herein shall be construed to limit the powers of the Oklahoma Water Resources Board to grant permission to build or alter structures on a stream pursuant to Title 82 of the Oklahoma Statutes to provide for the storage of additional water the use of which the landowner has or acquires by virtue of this act.

B. All rights to the use of water in a definite stream in this state are governed by this section and other laws in Title 82 of the Oklahoma Statutes, which laws are exclusive and supersede the common law.

SECTION 2. AMENDATORY 82 O.S. 1981, Section 105.2, is amended to read as follows:

Section 105.2 A. Beneficial use shall be the basis, the measure and the limit of the right to the use of water; provided, that water taken for domestic use shall not be subject to the provisions of this act, except as provided in Section ~~5~~ 105.5 of this title. Any person has the right to take water for domestic use from a stream to which he is riparian or to take stream water for domestic use from wells on his premises. Water for domestic use may be stored in an amount not to exceed two (2) years' supply. The provisions of this act shall not apply to farm ponds or gully plugs which are not located on definite streams and which have been constructed under the supervision and specifications of the Soil and Water Conservation Districts.

B. Priority in time shall give the better right. From and after the date of June 10, 1063, the following priorities for the use of water and no other shall exist:

1. Prestatehood uses. Priorities to the quantity of water put to beneficial use prior to November 15, 1907, the to extent to which the priority has not been lost in whole or in part pursuant to Section ~~16~~ 105.16 of this title when the same shall have been perfected as provided by this act and rules and regulations adopted by the Board. Such said priorities shall date from the initiation of the beneficial sue.

2. Spavinaw, Grand, North Canadian, Blue and North Boggy adjudications. Priorities decreed to exist in adjudication brought in pursuance of this act where such adjudications have been initiated prior to the date of June 10, 1963, to the extent to which these priorities have not been lost in whole or in part pursuant to Section ~~16~~ 105.16 of this title. Such said priorities shall be dated as of the date assigned to them in the respective adjudication decrees.

3. Spavinaw, Grand, North Canadian, Blue and North Boggy Rivers - Applications prior to June 10, 1963. Priorities based upon applications for appropriations where the same shall have been perfected heretofore under the law heretofore applicable to the extent to which the priority has not been lost in

whole or in part pursuant to Section ~~16~~ 105.16 of this title. Such said priorities shall be dated as of the date of the application therefor.

4. All other applications. Priorities based upon applications for appropriations to the extent the priority has not been lost in whole or in part pursuant to Section ~~16~~ 105.16 of this title where the same shall be perfected after June 10, 1963, as provided by this act and rules and regulations adopted by the Board pursuant thereto. Such said priorities shall date from the date of application for the priority. Any permit to appropriate water issued by the Board from and after June 10, 1963, is hereby presumed to be valid and in full force and effect to the extent not lost on whole or in part due to nonuse, forfeiture or abandonment, pursuant to this title.

5. Federal withdrawals. Priorities based on the withdrawal of water by the United States pursuant to Section ~~29~~ 105.29 of this title to the extent to which the priority has not been lost in whole or in part through nonutilization as provided by the said section or pursuant to Section ~~16~~ 105.16 of this title. Such said priorities shall vest in the users of said water as of the date of notification given pursuant to Section ~~29~~ 105.29 of this title.

6. Poststatehood - Non applicant uses. Priorities based upon present beneficial use prior to June 10, 1963, and initiated on or subsequent to November 15, 1907, to the extent to which the priority has not been lost in whole or in part pursuant to Section ~~16~~ 105.16 of this title where the same has been perfected as provided by this act and rules and regulations adopted by the Board pursuant thereto. Such said priorities as to each quantity of water shall date from the initiation of the beneficial use of that quantity of water. Provided, however, that no priority based solely upon this paragraph 6 shall take priority over priorities which bear a priority date earlier than the effective date of June 10, 1963, and which arise by virtue of compliance with the provisions of the first five paragraphs of this subsection.

7. Soil Conservation Service sediment pools. Priorities based upon beneficial use of that portion of the water designated by the Soil Conservation Service engineers as necessary for the sediment pool where landowners have granted easements without compensation for upstream flood control impoundments under the sponsorship of Soil and Water Conservation Districts prior to June 10, 1963, to the extent to which the priority has not been lost in whole or in part pursuant to Section ~~16~~ 105.156 of this title when the same shall have been perfected as provided by this act and rules and regulations adopted by the Board. Such said priorities shall date from the date of the grant of the easement. Subsequent to June 10, 1963, those landowners who shall grant easements for such upstream flood control impoundments may acquire a priority for beneficial use of that water designated as the sediment pool by complying with ~~subsection B, 4~~ paragraph 4 of subsection B of this section.

C. When any person might claim a priority under more than one of the numbered paragraphs of subsection B of this section, he may elect which paragraphs shall control his priority date. Nothing in this provision shall be construed to prohibit his electing different priorities under one or more of the paragraphs of subsection B of this section for different quantities of water.

D. From and after June 10, 1063, the only riparian rights to the use of water in a definite stream, except water taken for domestic use, are those which have been adjudicated and recognized as vested through the proceedings under 82 O.S. Supp. 1963, Sections 5 and 6, orders of the Oklahoma Water Resources Board entered thereunder which became final, and those decreed to exist in the Spavinaw, Grand, North Canadian, and Blue and North Boggy adjudications, all to the extent such rights have not been lost, in whole or in part, due to nonuse, forfeiture or abandonment, pursuant to this title.

SECTION 3. AMENDATORY 82 O.S. 1981, SECTION 105.12, is amended to read as follows:

Section 105.12 A. After the hearing on the application the Board shall determine from the evidence presented whether:

1. There is unappropriated water available in the amount applied for;

2. The applicant has a present or future need for the water and the use to which applicant intends to put the water is a beneficial use. ~~; and~~. In making this determination, the Board shall consider the availability of all stream water sources and such other relevant matters as the Board deems appropriate, and may consider the availability of groundwater as an alternative source:

3. The proposed use does not interfere with domestic or existing appropriative uses~~.~~; and

4. If the application is for the transportation of water for use outside the stream system wherein the water originates, the proposed use must not interfere with existing on proposed beneficial uses within the stream system and the needs of the water users therein. In making this determination, the Board shall utilize the review conducted pursuant to subsection B of this section.

If so determined, and subject to subsection B of this section, the Board shall approve the application by issuing a permit to appropriate water. The permit shall state the time within which the water shall be applied to beneficial use. In the absence of appeal as provided by the Administrative Procedures Act, the decision of the Board shall be final.

~~4.~~ B. In the granting of water rights for the transportation of water for use outside the stream system wherein water originates, pending applications to use water within such stream system shall first be considered in order to assure that applicants within such stream system shall have ~~a right to~~ all of the water required to adequately supply ~~the~~ their beneficial ~~needs of the water users therein~~ uses.

The Board shall review the needs within such area of origin every five (5) years to determine whether the water supply is adequate for municipal, industrial, domestic, and other beneficial uses.

C. The review conducted pursuant to subsection B of this section shall not be used to reduce the quantity of water authorized to be used pursuant to permits issued prior to such review. Such permits, however, remain subject to loss, in whole or in part, due to nonuse, forfeiture or abandonment, pursuant to this title.

~~If so determined, the Board shall approve the application by issuing a permit to appropriate water. The permit shall state the time within which the water shall be applied to beneficial use. In the absence of appeal as provided by this act, the decision of the Board shall be final.~~

SECTION 4. AMENDATORY 82 O.S. 1981, Section 105.23, is amended to read as follows:

Section 105.23 Any appropriator of water, including but not limited to one who uses water for irrigation, may use the same for other than the purposes of which is was appropriated, or may change the place of diversion, storage or use, in the manner and under the conditions prescribed for the transfer of the right to use water for irrigation purposes in Section ~~22~~ 105.22 of this title.

SECTION 5. AMENDATORY 82 O.S. 1981, Section 105.27 is amended to read as follows:

Section 105.27 If the Board shall, in the course of its duties, find that any works used for storage, diversion or carriage of water are unsafe and a menace to life and property, it shall at once notify the owner or his agent, specifying the changes necessary and allowing a reasonable time for putting the works in safe condition. Upon the request of any party, accompanied by the estimated cost of inspection, the Board shall cause any alleged unsafe works to be inspected. If they shall be found unsafe by the Board, the money deposited by such party shall be refunded and the fees for inspection shall be paid by the owner of such works; and, if not paid by him within thirty (30) days after the decision of the Board, shall be a lien against any property of such owner, to be recovered by suit instituted by the district attorney of the county at the request of the board. The Board may, when necessary, inspect any works ~~under construction~~ for the storage, diversion or carriage of water and require any changes necessary to secure their safety; provided, that any works constructed by the United States, or by its duly authorized agencies, shall not be subject to such inspection while under the supervision of officers of the United States. Provided, that liens provided for in this section shall be superior in right to all mortgages or other encumbrances, except ad valorem tax liens, placed upon the land and the water appurtenant thereto or used in connection therewith.

SECTION 6. AMENDATORY 82 O.S. 1981, Section 926.6 is amended to read as follows:

Section 926.6 A. In order to effectuate a comprehensive program for the prevention, control and abatement of pollution of the waters of this state, the Board is authorized to group such waters into classes according to their present and future best uses for the purpose of progressively improving the quality of such waters and upgrading them from time to time by reclassifying them, to the extent that is practical and in the public interest. Standards of quality for each such classification consistent with best present and future use of such waters may be adopted by Board and from time to time modified or changed.

B. Prior to classifying waters or setting standards or modifying or repealing such classifications or standards, the Board shall conduct public hearings for the consideration, adoption or amendment of the classification of waters and standards of purity and quality thereof, shall specify the waters concerning which a classification is sought to be made or for which standards are sought to be adopted and the time, date, and place of such hearing~~; provided said hearing shall be held in the area affected. Such notice~~ Notice of such hearing shall be published in accordance with the Administrative Procedures Act~~; Title 75 of the Oklahoma Statutes; in the area affected~~ and shall be mailed at least twenty (20) days before such public hearing to the chief executive of each ~~political subdivision of~~ municipality and county in the area affected and shall be mailed to all affected holders of permits obtained under Section ~~4~~ 926.4 of this title and such other persons ~~as the Board has reason to believe may be affected by~~ that have requested notice of hearings on such classification and the setting of such standards.

C. The ~~adoption of~~ standards of quality of the waters of the state and classification of such waters or any modification or change thereof shall be ~~effectuated by an order of the Board which shall be published in accordance~~ adopted and otherwise comply with the Administrative Procedures Act. ~~; Title 75, of the Oklahoma Statutes, in the area affected.~~

In classifying waters and setting standards of water quality or making any modification or change thereof, the Board shall announce a reasonable time for persons discharging water into the waters of the state to comply with such classifications or standards unless such discharges create an actual or potential hazard to public health.

Any discharge in accord with such classification or standards shall not be deemed to be pollution.

SECTION 7. AMENDATORY 82 O.S. 1981, Section 1828.6, is amended to read as follows:

Section 1020.6 Once such hydrologic survey has been completed and the Board has set a tentative maximum annual yield for the basin or subbasin, the Board shall call and hold hearings at centrally located places within the area of the basin or subbasin. Prior to such hearings being held, the Board shall make copies of such hydrologic survey available for inspection and examination by all interested persons and, at such hearings, shall present evidence of the geological findings and determinations upon which the tentative maximum annual yield has been based. Any interested party shall have the right to present evidence in support or opposition thereto. The hearings shall be conducted pursuant to Article II of the Administrative Procedures Act.

After such hearings are completed, the Board shall then proceed to make its final determination as to the maximum annual yield of water which shall be allocated to each acre of land overlying such basin or subbasin by issuing a final order containing findings of fact and conclusions of law, which order shall be subject to judicial review pursuant to Article II of the Administrative Procedures Act. The Board may, in subsequent basin or subbasin hearings, and after additional hydrologic surveys, increase the amount of water allocated but shall not decrease the amount of water allocated.

SECTION 8. AMENDATORY 82 O.S. 1981, Section 1020.16, as amended by Section 1, Chapter 128, O.S.L. 1982 (82 O.S. Supp. 1987, Section 1020.16), is amended to read as follows:

Section 1020.16 A. All persons engaged in the commercial drilling on groundwater wells, monitoring wells, or observation wells ~~for fresh groundwater~~ in this state ~~must~~ shall make application for and become licensed with the Board and file with the State of Oklahoma a bond ~~with the State of Oklahoma~~ of not less than Five Thousand Dollars ($5,000.00) conditioned upon compliance with all laws of this state and rules and regulations of the Board and providing for forfeiture of the sum necessary to obtain such compliance.

B. Before any person or firm licensed ~~water well driller~~ hereunder shall commence the drilling of any well, he shall file with the Board such data or information as the Board may by rule or regulation require. After completion, said driller shall file a completion report showing such data as the Board may require together with a log of the well and pumping test data if applicable.

SECTION 9. AMENDATORY 82 O.S. 1981, Section 1452, as amended by Section 1, Chapter 33, O.S.L. 1986 (82 O.S. Supp. 1987, Section 1452), is amended to read as follows:

Section 1452. (a) The Oklahoma Legislature finds that some of the free-flowing streams and rivers of Oklahoma possess such unique natural scenic beauty, water conservation, fish, wildlife and outdoor recreational values of present and future benefit to the people of the state that it is the policy of the Legislature to preserve these areas for the benefit of the people of Oklahoma. For this purpose there are hereby designated certain "scenic river areas" to be preserved as a part of Oklahoma's diminishing resource of free-flowing rivers and streams.

(b) The areas of the state designated as "scenic river areas" shall include:

(1) The Flint Creek and the Illinois River above the 650-foot elevation level of Tenkiller Reservoir in Cherokee, Adair and Delaware Counties;

(2) The Barren Fork Creek in Adair and Cherokee Counties from the present alignment of Highway 59 West to the Illinois River;

(3) The Upper Mountain Fork River above the 600-foot elevation level of Broken Bow Reservoir in McCurtain and LeFlore Counties:

(4) Big Lee's Creek, sometimes referred to as Lee Creek, located in Sequoyah County, above the 420-foot MSL elevation, excluding that portion necessary for a dam to be built in the State of Arkansas with a crest elevation of no more than the 620-foot MSL elevation. The Oklahoma Water Resources Board shall make such classification, designations or adjustments to Oklahoma's water quality standards as required to allow the impoundment of water by said dam; and

(5) Little Lee's Creek, sometimes referred to as Little Lee Creek, located in Adair and Sequoyah Counties, beginning approximately four (4) miles east-southeast of Stilwell, Oklahoma, and ending at its conjunction with Big Lee's Creek approximately two (2) miles southwest of Short, Oklahoma.

(c) The term "scenic river area" as used in this act is defined as the stream or river and the public use and access areas located within the area designated.

FRANCO-AMERICAN CHAROLAISE, LTD., MACK M. BRALY, AND CLAUDIA M. BRALY, THREE B LAND & CATTLE COMPANY, F.E. BATEMAN, CHARLES BATEMAN. W.A. CANNON, GERALD DON STEWART, HERSHELL CHRONISTER, JESSE BERRIE, MRS. JOHN PRATER and JACK DUNN, Appellees v. THE OKLAHOMA WATER RESOURCES BOARD AND THE CITY OF ADA, OKLAHOMA, Appellants

No. 59,310
Supreme Court of Oklahoma
1990 Okla. LEXIS 48
April 24, 1990, Decided and Filed

JUDGES: MARIAN P. OPALA, V.C.J., HODGES, WILSON, KAUGER and SUMMERS, JJ., concur; LAVENDER, J., and REIF, S.J. (sitting by designation in lieu of SIMMS, J., who certified his disqualification), concur in part and dissent in part; HARGRAVE, C.J., and DOOLIN, J., dissent.

OPINION: ORDER GRANTING REHEARING; WITHDRAWING THE COURT'S MAY 19, 1987 OPINION HEREIN AND REPLACING IT WITH THE OPINION PROMULGATED THIS DAY

Marian P. Opala, Acting Chief Justice

Rehearing addressed to the court's May 19, 1987 opinion is granted. That opinion is withdrawn and substituted in its place is the opinion by Opala, V.C.J., promulgated this day. Today's substituted opinion is subject to rehearing process under Rule 28, Rules of the Supreme Court of Oklahoma, 12 O.S. Supp. 1984, Ch. 15, App. 1.

[Editor's Note: The opinion which follows is the final, second, official Franco opinion. The opinion which follows is the opinion which carries precedential value and sets forth the Supreme Court resolution of the Franco dispute, subject to future litigation on remand.]

FRANCO-AMERICAN CHAROLAISE, LTD., MACK M. BRALY and CLAUDIA M. BRALY, THREE B LAND & CATTLE COMPANY, F. E. BATEMAN, CHARLES BATEMAN, W. A. CANNON, GERALD DON STEWART, HERSHELL CHRONISTER, JESSE BERRIE, MRS. JOHN PRATER and JACK DUNN, Appellees, v. THE OKLAHOMA WATER RESOURCES BOARD and THE CITY OF ADA, OKLAHOMA, Appellants

No. 59,310
Supreme Court of Oklahoma
855 P.2d 568; 1990 Okla. LEXIS 49
April 24, 1990, Filed;
This Opinion Substituted by Court for Withdrawn Opinion of May 19, 1987

PRIOR HISTORY: ON APPEAL FROM THE DISTRICT COURT, COAL COUNTY, OKLAHOMA, Lavern Fishel, Trial Judge.

In an appeal from an Oklahoma Water Resources Board order granting the City of Ada's amended application to appropriate stream water from Byrd's Mill Spring, Pontotoc County, the trial court made findings of fact and conclusions of law. The relevant conclusions of law for consideration of this appeal are:

1. The exercise of the State's police power to protect waters from waste and to protect the general public cannot extend to abrogate the riparian right to the normal flow or the normal underflow of the stream.

2. The riparian right, long recognized, cannot be disturbed absent acquisition or condemnation.

3. To properly calculate the amount of stream water available for appropriation, the Oklahoma Water Resources Board must subtract downstream domestic needs, prior appropriations, prior vested rights and existing riparian rights from the total amount of water available.

4. In determining the City of Ada's need for stream water, the Oklahoma Water Resources Board must consider all water sources claimed by the City of Ada and grant the appropriation determinable upon the City of Ada's perfection of claimed rights to 9,678 acre feet[1] of groundwater per year.

5. Under the provisions of 82 O.S.1981 § 105.21(4), all of the water appropriated by the City of Ada to be used out of the basin of origin (80%) is subject to recall by users in the basis of origin.

6. Downstream domestic users below the junction of Buck and Boggy Creeks should be protected in the Oklahoma Water Resources Board's calculation of water available for an appropriation.

1. 82. O.S. 1981 § 105.28 defines an acre foot as "the amount of water upon an acre covered one foot deep, equivalent to forty-three thousand five hundred sixty (43,560) cubic feet."

TRIAL COURT'S ORDER ON APPEAL FORM THE AGENCY AFFIRMED IN PART AND REVERSED IN PART; CAUSE REMANDED WITH DIRECTION.

COUNSEL: George W. Braly, Mack M. Braly, Messrs. Braly and Braly, Tulsa, Oklahoma, For Appellees.

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R. Steven Horn, Tulsa, Oklahoma, For Amicus Curiae Oklahoma Wildlife Federation, Inc.

Diane Pedicord, Sue Ann Nicely, Oklahoma City, Oklahoma, For Amicus Curiae Oklahoma Municipal League.

Steven E. Moore, Diane Goldschmidt, Oklahoma City, Oklahoma, For Amicus Curiae Oklahoma Gas and Electric Company

Jay M. Galt, Messrs. Looney, Nichols, Johnson & Hayes, Oklahoma City, Oklahoma, For Amicus Curiae Oklahoma Rural Water Association.

Robert D. Allen, Thomas Scott Jones, For Amicus Curiae City of Oklahoma City and the Oklahoma City Municipal Improvement Authority.

Robert H. Anderson, Oklahoma City, Oklahoma, For Amicus Curiae McGee Creek Authority.

JUDGES: OPALA, V.C.J., HODGES, WILSON, KAUGER and SUMMERS, JJ., concur; LAVENDER, J., and REIF, S.J. (sitting by designation in lieu of SIMMS, J., who certified his disqualification), concur in part and dissent in part; HARGRAVE, C.J., and DOOLIN, J., dissent.

OPINION: OPALA, J.

This appeal challenges the constitutionality of the 1963 amendments to Oklahoma's water law insofar as the amendments regulate riparian rights.[2] The case also raises a first-impression question about the interpretation of the requirements for perfecting an appropriative right under 82 O.S. 1981 § 105.12.[3] We affirm the trial court's findings of fact, holding that they are supported by substantial evidence.[4] The questions of law tendered for our resolution are:

1. What is the nature of the riparian right under Oklahoma common law?

2. To what extent did the 1963 amendments abrogate the common-law riparian right?

3. Are the 1963 amendments constitutional when measured by Art. 2, § 24 Okl. Const.?

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2. 60 O.S. 1981 § 60 (now codified at 60 O.S. 1981 § 60). For the text of the statute which includes the 1963 amendments, see this text accompanying infra note 16.

3. For the text of the statute, see infra note 57.

4. Magnolia Pipe Line Company v. Cowen, Okl., 477 P.2d 848, 850 [1970]. Appellant, Oklahoma Water Resources Board, argues nat the trial court reweighed the evidence in contravention of the standard for judicial review of administrative determination. 75 O.S. 1981 § 322. We disagree. The trial court held the Board's findings were unsupported by evidence and hence arbitrary.

4. Does 82 O.S. 1981 § 105.12(2) require consideration of an applicant's available groundwater in determining its need for stream water?

5. Does 82 O.S. 1981 § 105.12(4) require that an out-of-basin appropriation be granted subject to recall by in-basin riparian owners and appropriative users?

We hold that the Oklahoma riparian owner enjoys a vested common-law right to the reasonable use of the stream. This right is a valuable part of the property owner's "bundle of sticks" and may not be taken for public use without compensation.[5] We further hold that, inasmuch as 60 O.S. 1981 § 60, as amended in 1963, limits the riparian owner to domestic use and declares that all other water in the stream becomes public water subject to appropriation without any provision for compensating the riparian owner, the statute violates Art. 2 § 24, Okl.Const.

In addition, we declare that the California Doctrine of stream water rights,[6] which recognizes riparian and appropriative rights as coexistent, is the prevailing law in Oklahoma; that the Oklahoma Water Resources Board [OWRB] may, in its discretion, find that an applicant for an appropriation has a need for stream water without regard to any claimed or perfected groundwater sources; that a perfected appropriative right is a vested right which may not be permanently divested except for nonuse after notice and hearing but is subject to senior appropriative rights and reasonable riparian uses during shortages; and that in the future a riparian owner seeking an appropriation of stream water must be deemed to have voluntarily relinquished his riparian rights in that stream water except for those preserved under the statute for domestic uses.

A. STATEMENT OF THE FACTS

Mill Creek is a spring-fed dry weather creek in the Upper Clear Boggy watershed within the Muddy Boggy River Basin. Byrd's Mill Spring flows directly into Mill Creek which in turn flows into Clear Boggy Creek. Clear Boggy Creek is joined by Buck Creek and flows downstream as Clear Boggy Creek where it joins Muddy Boggy Creek to form the Muddy Boggy River. The latter is a tributary of the Red River. In 1980 the area experienced a severe drought and the stream bed in Clear Boggy Creek went dry. In August of 1980 the City of Ada [City] made application, pursuant to 82 O.S. 1981 § 105.9, to increase its appropriation of water from Byrd's Mill Spring from 3,360 acre feet per year to 11,202 acre feet per year to meet a projected annual need of 10,523 acre feet per year by the year 2020. The City straddles two watersheds with approximately 80 percent in the South Canadian Stream Basin and 20 percent in the Clear Boggy Stream Basin. Riparian owners and in-basin appropriators objected to the City's application for additional stream water. The OWRB determined that the average yield of Byrd's Mill Spring is 9,820 acre feet per year. Prior appropriations, including that of the City and some appellee riparian owners, total 3,776 acre feet per year. Allowing 584 acre feet to supply domestic needs down to Buck Creek and 120 acre feet for unavoidable loss, the OWRB found the amount available for appropriation was 5,340 acre feet, 2,502 acre feet less than the 7,842 acre feet requested by the City. The City amended its application to conform to the finding. The OWRB then granted all 5,340 acre feet available for appropriation to the City, requiring the City to release at least 1,120 acre feet of water per year downstream. The OWRB order also required the City to meter and record monthly the amount of water taken from Byrd's Mill Spring. In-basin riparian owners and appropriators appealed from the administrative decision to the District Court, Coal County.[7]

5. Our holding today rests on independent and adequate state grounds. See Michigan v. Long, 463 U.S. 1032, 1041, 103 S. Ct. 3469, 3476, 77 L.Ed.2d 1201 [1983].

6. See infra note 15.

7. The terms of 75 O.S. 1981 § 318 provide for district court review of agency decisions.

B. COMMON-LAW AND STATUTORY AUTHORITY AFFECTING WATER RIGHTS

The Organic Act of 1890[8] n8 extended England's common law over Indian Territory. The same year the Territorial Legislature adopted a statute declaring the nature of water rights in the Territory:

"The owner of land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature over or under the surface may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same."[9]

This codification of the common-law riparian doctrine of water rights remained the law in Oklahoma until legislative adoption of the 1963 amendments.

In 1897 the legislature provided for the appropriation of the ordinary flow or underflow of stream water for the irrigation of arid sections of the State.[10] The statute protected the riparian owner from the appropriation of the ordinary flow of the stream without the riparian owner's consent except by condemnation.[11] In 1905 the provision protecting the riparian right was omitted.[12] It was reinstated in 1909, then finally eliminated in 1910.[13] In 1925 the legislature added a provision recognizing the priority of all beneficial uses of water initiated prior to statehood.[14]

Since 1897, both the common law and the statutes have operated in Oklahoma to confer riparian and appropriative rights. Though these rights have coexisted in the State for almost 100 years, they are theoretically irreconcilable.[15] n15 The common-law riparian right extends to the reasonable use of the stream or to its natural flow, depending on the jurisdiction; the appropriative right attaches to a fixed amount. The last riparian use asserted has as much priority as the first; the appropriator who takes first has the senior right. In 1963 the legislature attempted to reconcile the two doctrines. The amendments, shown in italics, are as follows:

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8. The Organic Act of 1890, 26 U.S. Stat. at Large, § 31, provided for the adoption of Chapter 20 of the Mansfield's Digest of the Statutes of Arkansas, which included the common law, as the rule of decision in Indian Territory. As stated in McKennon v. Winn, 1 Okl. 327, 33 P. 582, 585 [1893], the people who settled Indian Territory on April 22, 1889, also brought with them the principles and rules of the common law recognized by the American courts. In 1889 an act of Congress creating a United States District Court for Indian Territory gave the court authority to apply the common law in the adjudication of cases within its jurisdiction. Finally, in 1893 the
Territorial Legislature adopted the common law, originally placed at St. 1893, § 3874, and now codified at 12 O.S. 1981 § 2. The riparian right was a part of the English and American common law that came to be extended over the State. See infra note 26.

9. Terr. Okla. Stat. § 4162 [1890].

10. Sess. Laws of Terr., Okl., ch. 19, art. I, §§ 1-21, pp. 187-195 [1897].

11. See supra note 10 at 188.

12. Sess. Laws of Terr., Okl., ch. 21, art. I, §§ 1-56, pp. 274-301 [1905].

13. Okla. Comp. Laws § 3918 [1909]. See 1 Okl.Rev. Laws § 3636, note 1 [1910] (provision with reference to "claims initiated prior to the passage of this act" was eliminated as having spent its force).

14. Sess. Laws of Okla., ch. 76, § 1 [1925] provides:

"Beneficial use shall be the basis, the measure and the limit of the right to the use of water, and all waters appropriated for irrigation purposes shall be appurtenant to specified lands owned by the person claiming the right to use the water, so long as the water can be beneficially used thereon. Priority in time shall give the better right. Provided, that in all cases of claims to the use of water initiated prior to November 15, 1907, the right shall relate back to the initiation of the claim and beneficial use of such water. All claims to the use of water initiated thereafter shall relate back to the date of receipt of an application therefor in the office of the state engineer, subject to compliance with the provisions of this chapter and the rules and regulations established thereunder."

15. This dual system of water rights is known nationally as the "California Doctrine" and at one time was the rule in all West Coast states and the tier of the Great Plains from North Dakota to Texas. Only California and Nebraska retain it. Most dual-system states have since · dopted the appropriation doctrine as controlling all rights to stream water. See generally 5 Waters and Water Rights § 421 [R. Clark ed. 1972] and F. Trelease, Water Law infra note 27 at 11-13 (discussing the water law of other states).

"The owner of the land owns water standing thereon, or flowing over or under its surface but not forming a definite stream. The use of groundwater shall be governed by the Oklahoma Ground Water Law. Water running in a definite stream, formed by nature over or under the surface, may be used by him for domestic purposes as defined in Section 2(a) of this Act, as long as it remains there, but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same, as such water then becomes public water and is subject to appropriation for the benefit and welfare of the people of the state, as provided by law; Provided however, that nothing contained herein shall prevent the owner of land from damming up or otherwise using the bed of a stream on his land for the collection or storage of waters in an amount not to exceed that which he owns, by virtue of the first sentence of this section so long as he provides for the continued natural flow of the stream in an amount equal to that which entered his land less the uses allowed in this Act; provided further, that nothing contained herein shall be construed to limit the powers of the Oklahoma Water Resources Board to grant permission to build or alter structures on a stream pursuant to Title 82 to provide for the storage of additional water the use of which the land owner has or acquires by virtue of this act."[16]

Companion statutes limit riparian domestic use to household purposes, to the watering of domestic animals up to the land's normal grazing capacity, and to the irrigation of land not exceeding a total of three acres.[17] The riparian owner may also store a two-year supply for domestic use.[18] In addition, the 1963 amendments provided a validation mechanism as a method for protecting pre-existing beneficial uses, including those of the riparian owner and pre-existing appropriators. All subsequent rights to the use of stream water, except for riparian domestic uses, are to be acquired by appropriation.[19] The stream's natural flow is considered public water and subject to appropriation. The riparian owner may not assert his (or her) common-law right to the use of stream water other than for the domestic uses.[20]

C. THE NATURE OF THE COMMON-LAW RIPARIAN RIGHT

Riparian rights arise from land ownership, attaching only to those lands which touch the stream. A riparian interest, though one in real property, is not absolute or exclusive; it is usufructuary in character and subject to the rights of other riparian owners.[21] A riparian right is neither constant nor judicially quantifiable in futuro.[22]

Under the natural flow doctrine, the riparian owner is entitled to have the water of the stream flow in its natural channel without diminution or alteration.[23] The riparian owner has the right to the natural benefits of the stream irrespective of his need to put the water to use even if he suffers no tangible harm by a diminution of the stream. The natural flow doctrine, which prevents any consumptive use, was early modified to allow for "natural" or domestic uses such as bathing, drinking, gardening, and stock watering.

16. Now codified at 60 O.S. 1981 § 60. See Rarick, Oklahoma water Law, Stream and Surface Under the 1963 Amendments, 23 Okla.L.Rev. 19 [1970] (discussing the legislative history and effect of the amendments).

17. 82 O.S. 1981 § 105.1(B).

18. 82 O.S. 1981 § 105.2(A).

19. See 82 O.S. 1981 § 105.2 et seq. See also Talley v. Carley, Okl., 551 P.2d 248, 249 [1975], where we noted that the 1963 amendments set forth a "comprehensive method for establishing water priorities" and applied the amendments to settle a dispute between riparian appropriators.

20. 60 O.S. 1981 § 60. The 1988 amendments to Oklahoma water law expressly provide that the common law's riparian right is abrogated. Okl.Sess.L. 1988, ch. 203, § 1. See text infra notes 59-61 for discussion of the application of the 1988 amendments to the instant case.

21. See generally 1 Water and Water Rights § 51 et seq. [R. Clark ed. 1967].

22. Smith v. Stanolind Oil & Gas Co., 197 Okla. 499, 172 P.2d 1002, 1006 [1946].

23. The common-law maxim is aqua currit et debet currere, ut currere solebat (water runs, and ought to run, as it has used to run). Black's Law Dictionary, p. 95 [1979]. See also Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781, 790 [1903] (insofar as it held that the appropriations doctrine had abrogated the common-law riparian right, Hathaway was overruled in Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738, 743 [1966]).

Because the natural flow doctrine when "pressed to the limits of its logic enabled one to play dog-in-the-manger"[24] and fostered waste, the majority of American courts have expressly adopted the reasonable use doctrine.[25] An Ohio court first espoused the reasonable use doctrine in 1832.[26] Its adoption was influenced by the rule that the riparian owner's remedy for interference with water rights was trespass on the case, an action requiring material injury. If the plaintiff can show no injury, the riparian owner's use is "reasonable" even though the normal flow of the stream is diminished.[27]

This court first declared its adherence to common-law doctrine of riparian rights in Chicago, R.I.&P. Ry. Co. v. Groves.[28] The issue there was whether the defendant-railroad could obstruct a well-defined channel causing flood waters to back up on the plaintiff's land. The court held that the riparian owner has the right to the stream's continuous flow as it has been accustomed to run and that no one can obstruct its course to the riparian owner's injury without being liable for damages.[29] This court's consistent requirement of injury to the plaintiff is in line with its later express adoption of the reasonable use doctrine in Broady v. Furray.[30] In Furray, a natural obstruction of sediment created a water impoundment on the defendant's property. The plaintiff complained that seepage from the impoundment was ruining his crops. This court affirmed the nisi prius determination that the plaintiff's fishing resort would be damaged more by the removal of the obstruction than the defendant was harmed by its presence. The opinion states that the plaintiff and the defendant, qua riparian owners, had reciprocal rights and each has a right to the reasonable use of the stream.[31] Seven years later in Martin v. British American Oil Producing Co.,[32] n32 though using some language consistent with the natural flow doctrine, we held that a riparian owner may use the stream water as long as the use is reasonable and does not tend to injure or damage other riparian owners. The reasonableness of use was deemed a question for the jury.

"Natural flow" language has been used by this court when the plaintiff challenged an obstruction causing too much water in the stream to the plaintiff's injury.[33] But a careful reading of our decisions involving the taking of water from a stream reveals that, even when the natural flow doctrine is mentioned in dicta, the reasonable use doctrine is actually applied. In Smith v. Stanolind Oil & Gas Co.[34] we allowed Stanolind, a lessee of a riparian owner, to diminish the flow of the natural stream as long as Stanolind left water sufficient for domestic use and for approximately 45 head of cattle. We quoted with approval from a Vermont decision:

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24. United States v. Gerlach Live Stock Co., 339 U.S. 725, 751, 70 S.Ct. 955, 968, 94 L.Ed. 1231, 1249 [1950].

25. Restatement (Second) of Torts § 850 Appendix, 22-23 [1982] and 7 Water and Water Rights § 611 at 36-42 [R. Clark, ed. 1976]. Though the natural flow doctrine is espoused in many American cases, Clark insists that no jurisdiction actually applies it. 5 Water and Water Rights § 424 at 285. Appellee riparian owners point to the common law of Arkansas, made applicable to Indian Territory through the Organic Act of 1890, supra note 8, as a source of their vested right to the natural flow of the stream. Yet, Arkansas never adopted the natural flow doctrine and expressly rejected it in 1955 for the reasonable use theory. Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129, 133 [1955].

26. Cooper v. Hall, 5 Ohio 321, 324 [1832]. Weil and Clark argue that the riparian right of the common law was not received in England until 1833. By then, American courts had already adopted both the natural flow doctrine in Tyler v. Wilkinson, 24 Fed. Cas. 472 [C.C.R.I. 1827] and the reasonable use doctrine in Cooper v. Hall, supra. Weil, Waters: American Law and French Authority, 33 Harv.L.Rev. 133 [1919] and 7 Waters and Water Rights § 610 et seq. [R. Clark, ed. 1976). See also U.S. v. Gerlach, supra note 24 at 745. But cf. Maass and Zobel, Anglo-American Water Law: Who Appropriated the Riparian Doctrine? 10 Public Policy 109 [1961].

27. See Restatement (Second) of Torts § 850 [1979].

28. 20 Okl. 101, 93 P. 755, 759 [1908].

29. Supra note 28. See also Miller v. Marriott, 48 Okl. 179, 149 P. 1164, 1165 [1915] and Chicago, R.I.&P. Ry. Co. v. Morton, 57 Okl. 711, 157 P. 917, 920 [1916].

30. 163 Okl. 204, 21 P.2d 770, 771 [1933].

31. Broady v. Furray, supra note 30.

32. 187 Okl. 193, 102 P.2d 124, 126 [1940].

33. See cases in supra note 29.

34. 197 Okl. 499, 172 P.2d 1002, 1004 [1946].

"The fact that such orators [plaintiffs in chancery] were taking the water to their non-riparian lands did not per se make their use unreasonable. But that fact together with the size and character of the stream, the quantity of water appropriated, and all the circumstances and conditions, might make their use unreasonable. The stream might furnish enough to supply this unreasonable use of the defendants and the reasonable demands of the orators [plaintiffs in chancery], in which case the latter could not be heard to complain. The mere fact that the defendants reduce the natural flow of the stream would not be decisive . . . . " [Emphasis added.][35]

We said that the accepted rule allows a riparian owner the right to make any use of water beneficial to himself as long as he does not substantially or materially injure those riparian owners downstream who have a corresponding right.[36] In Baker v. Ellis,[37] a case relied on by the trial court in holding that the natural flow doctrine controls the case at bar, we affirmed a decree granting a permanent injunction against the defendant's construction of a dam which threatened the supply of water to a downstream riparian owner. Though the court noted that the defendant was about to stop the stream "where the water, left alone, would run as it ought to run, and was used to run from time immemorial," we carefully added that the defendant could still properly use the water even impounding some as long as he does not cause substantial damage to the plaintiff.[38]

Mindful of these decisions and of the co-existence of appropriative with riparian rights in this state since 1897, we hold that the modified common-law[39] riparian right to the reasonable[40] use of the stream is the controlling norm of law in Oklahoma.[41] We further hold that, consistently with the California Doctrine, the statutory right to appropriate stream water coexists with, but does not preempt or abrogate, the riparian owner's common-law right.

D. THE CONSTITUTIONAL QUESTION

The issue here is whether the legislature can validly abrogate the riparian owner's right to initiate non-domestic reasonable uses in stream water without affording compensation. Art. 2, § 24, Okl. Const. provides in part: "Private property shall not be taken or damaged for public use without just compensation. Such compensation, irrespective of any benefit from any improvements proposed shall be ascertained by a board of commissioners of not less than three freeholders, in such a matter as may be prescribed by law."

35. Supra note 34 at 1005-1006 (quoting Lawrie v. Silsby, 82 Vt. 505, 74 A. 94, 96 [1909]).

36. Supra note 34 at 1005.

37. Okl., 292 P.2d 1037 [1956].

38. Baker v. Ellis, supra note 37 at 1037-1039.

39. See 12 O.S. 1981 § 2 which reads in part: "The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma . . . ."

40. Reasonableness is a question of fact to be determined by the court on a case-to-case basis. actors courts consider in determining reasonableness include the size of the stream, custom, climate, season of the year, size of the diversion, place and method of diversion, type of use and its importance to society (beneficial use), needs of other riparians, location of the diversion on the stream, the suitability of the use to the stream, and the fairness of requiring the user causing the harm to bear the loss. See Restatement (Second) Torts § 850A [1979].

41. The adoption of the reasonable use doctrine has been effected without constitutional implications. The United States Supreme Court has stated that the adoption of the English common-law riparian doctrine "is far from meaning that patentees of a ranch on the San Pedr are to have the same rights as owners of an estate on the Thames" and that the adoption of the common law is merely the adoption of a general system of law. Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339, 345, 29 S.Ct. 493, 495, 53 L.Ed. 822 [1909].

Private property protected by Art. 2, § 24 includes "easements, personal property, and every valuable interest which can be enjoyed and recognized as property."[42] Further, In Oklahoma Water Resources Board v. Central Oklahoma Master Conservancy District,[43] we held:

"A 'vested right' is the power to do certain actions or possess certain things lawfully, and is substantially a property right. It may be created by common law, by statute or by contract. Once created, it becomes absolute, and is protected from legislative invasion. . ." [Emphasis added].

Therefore, the common-law riparian right to use stream water, as long as that use is reasonable, has been long recognized in Oklahoma law as a private property right.[44]

The general rule is that the legislature may restrict the use of private property by exercise of its police power for the preservation of the public, health, morals, safety and general welfare without compensating the property owner.[45] In Phillips Petroleum Co. v. Corporation Com'n[46] this court defined the permissible exercise of police power:

[T]he police power is usually exerted merely to regulate the use and enjoyment of property by the owner, or, if he is deprived of his property outright, it is not taken for public use, but rather destroyed in order to promote the general welfare . . . . " [Emphasis added.]

Therefore, in C. C. Julian Oil & Royalties Co. v. Capshaw[47] we declared that the legislature could regulate a landowner's use and enjoyment of natural resources to prevent waste and infringement on the rights of others. Thus, a statutory regulation of the methods to be used in extracting hydrocarbons was a constitutional exercise of police power where none of the hydrocarbons was taken for public use. Then, in Frost v. Ponca City[48] we held that in the interest of health and safety, the city could exercise its police power to restrict the plaintiff's right to capture hydrocarbons underlying his property, but the city could not remove the hydrocarbons and sell them without compensating the plaintiff.

We, therefore, hold that the 1963 water law amendments are fraught with a constitutional infirmity in that they abolish the right of the riparian owner to assert his (or her) vested interest in the prospective reasonable use of the stream. The riparian owner stands on equal footing with the appropriator. His ownership of riparian land affords him no right to the stream water except for limited domestic use.

This case must be remanded for the trial court's determination of the issue whether the appellee-riparian owners' claim to the use of the stream flow for the enhancement of the value of the riparian land, for recreation, for the preservation of wildlife, for fighting grass fires, and for lowering the body temperature of their cattle on hot summer days is reasonable.

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42. Graham v. City of Duncan, Okl., 354 P.2d 458, 461 [1960].

43. Okl., 464 P.2d 748, 755 [1969] (Emphasis added).

44. E.g. Atchison, T. & S.F. Ry. Co. v. Hadley, 168 Okl. 588, 35 P.2d 463, 465 [1934].

45. C.C. Julian Oil & Royalties Co. v. Capshaw, 145 Okl. 237, 292 P. 841 [1930] (Syllabus 3).

No one argues here that the taking of stream water by the 1963 amendments is not done for a valid public purpose as required by Art. 2 § 24, Okl.Const. See Delfeld v. City of Tulsa, 191 Okl. 541, 131 P.2d 754 [1943]. The purposes underlying the 1963 amendments are summarized in the statute, 82 O.S. 1981 1086.1(B), as follows:

"B. The exercise of the powers granted by this act are in all respects for the benefit of the people of the state, for the increase of their commerce and prosperity and for the improvement of their health and living conditions. The primary purpose governing all exercise of powers hereunder shall be to maximize and not to minimize the alternatives available to all citizens, municipalities and other water-user entities in acquiring water for beneficial use."

46. Okl., 312 P.2d 916, 921 [1956] (quoting 29 C.J.S. § 6); see also Mattoon v. City of Norman, Okl., 617 P.2d 1347, 1349 [19[illegible]].

47. Supra note 45 at 847.

48. Okl., 541 P.2d 1321, 1324 [1975].

The OWRB argues the 1963 amendments are a permissible exercise of the police power just as a zoning ordinance would be. That contention is inapposite when, as here, the use of stream water is not just restricted but is taken for public use.

Although the 1963 water law amendments provided a mechanism for a riparian owner to "perfect" all beneficial uses initiated prior to the legislation, that mechanism falls short of protecting the riparian owner's common-law appurtenant right. The mechanism is constitutionally inadequate first of all because the full sweep of the riparian right is much broader than the validation mechanism could ever shield. The heart of the riparian right is the right to assert a use at any time as long as it does not harm another riparian who has a corresponding right. Further, yesterday's reasonable use by one riparian owner may become unreasonable tomorrow when a fellow riparian owner asserts a new or expanded use. After the 1963 amendments, the riparian owner who wants to expand a use or assert a new use may do so only as an appropriator. His use is not judged by its reasonableness but only by its priority in time.

Furthermore, the validation mechanism attempted to forever set in stone the maximum amount of stream water the landowner, as a riparian owner, can use. Any use asserted by the landowner, as an appropriator, is either denied because no water is available or is given a lower priority than all other uses, including those of appropriators who are non-riparian to the stream. It matters not that the riparian owner's use is reasonable when compared with prior uses. This result is antithetical to the very nature of the common-law riparian right, which places no stock in the fact of past use, present use, or even non-use.

The 1963 legislation is also constitutionally inadequate because it fell short of an express abrogation of a riparian owner s common-law right. We held in Ricks Exploration Co. v. Oklahoma Water Resources Board[49] that public law will not be interpreted as legally destroying private rights by inference. Until the recent 1988 amendments to our water law, the riparian owner was never given express notice by the legislature that his use would be limited in the future to that validated under the 1963 amendments. By then, the time for "perfection" under the validation mechanism had passed.

In preserving today the riparian right from its infirm legislative abrogation, we do not disestablish the appropriative right. California and Nebraska, which still maintain the dual regime of water rights,[50] protect appropriative rights, prior reasonable uses of the riparian owner and prospective reasonable uses of the riparian owner. In U.S. v. Gerlach Live Stock Co.[51] the United States Supreme Court, interpreting California law, held that the plaintiff's use of even the normal overflow of the stream for irrigation purposes was reasonable, and therefore, compensable.

The asserted riparian use must, of course, be reasonable. Therefore, in a later case, Joslin v. Marin Municipal Water District,[52] the California Supreme Court held that the plaintiffs' use of the normal flow of the stream for the purpose of accumulating rock, sand and gravel for their rock and gravel business was not a reasonable use. The court, which ruled that the plaintiffs had a compensable interest only in the reasonable use of the flow of the water, balanced the plaintiffs' use against the need to preserve the state's water supply and the constitutional mandate preventing waste and unreasonable use.

Upon remand, should the trial court find that any or all of the riparian owners' asserted uses of the stream for their claimed purposes is unreasonable, such uses do not fall under the mantle of

49. Okl., 695 P.2d 498, 504 [1984].
50. See supra, note 15.
51. Supra note 24 at 754-755.
52. 67 Cal.2d 132, 60 Cal Rptr. 377, 429 P.2d 889, 898 [1967].

constitutionally protected property rights. On the other hand, should the trial court find that an asserted riparian use of the stream is reasonable, the right to a flow sufficient to supply the riparian owners' reasonable use must be preserved in the owners.

On remand the trial court shall separately determine the reasonableness of each of the riparian owners' asserted uses, applying the factors discussed earlier.[53] One use may be found reasonable while another is not. We make no conclusion as to the reasonableness of any of the riparian owners' asserted uses.

To assure that the state's resources are put to the most reasonable and beneficial use, we adopt the approach of the Supreme Court of Nebraska in Wasserburger v. Coffee.[54] Wasserburger holds that the rights of the riparian owner and the appropriator are to be determined by relative reasonableness. On remand, the trial court shall balance the riparian owners' uses against those of the City, with due consideration to be given all the factors listed earlier in this opinion.

The OWRB shall approve the City's appropriation only if it finds there is surplus water after providing for 1) all prior appropriations; 2) all riparian uses perfected under the 1963 amendments; 3) all riparian domestic uses, 4) all riparian uses approved as reasonable on remand and 5) all anticipated in-basin needs.[55] In its calculation, the OWRB must take into account the last riparian owner and the last appropriator on the stream and maintain the minimum flow[56] necessary to allow for diversion by these users. We affirm the trial court's ruling that all downstream domestic uses below the junction of Buck and Boggy Creeks and above its junction with Muddy Boggy Creek must be considered to determine the water available for appropriation.

E. GRANTING THE APPROPRIATION

1. The Consideration of Other Sources of Water

The next issue for review is whether the OWRB must consider the City's claim to groundwater when determining its need to appropriate stream water. Title 82 § 105.12(2) requires the OWRB to determine whether the applicant has a present or future need for the water.[57] The trial court ruled the OWRB must

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53. See supra note 40. In determining whether the riparian owners use of streamwater to preserve wildlife is reasonable, the trial court should consider that uncaptured wildlife is the property of the state under 29 O.S. 1981 § 7-204. The trial court should also consider the right of the riparian owner to fish in riparian waters and the right of the landowner to capture wildlife on his property. Other courts have held that a riparian owner's use of stream water for recreational purposes is reasonable. E.g. Taylor v. Tampa Coal Co., 46 So.2d 392 [Fla. 1950]; Hoover v. Crane, 362 Mich. 36, 106 N.W.2d 563 [1960]; Bach v. Sarich, 74 Wash. 2d 575, 445 P.2d 648 [1968]; Scott v. Slaughter, 237 Ark. 394, 373 S.W.2d 577 [1964]; Sturtevant v. Ford, 280 Mass. 303, 182 N.E. 560 [1932].

54. 180 Neb. 149, 141 N.W.2d 738, 743 [1966].

55. For a discussion of the appropriation statute's provision for in-basin needs see text infra notes 71-73.

56. Since we hold here that the reasonable use doctrine, not the natural flow doctrine, is controlling, the OWRB shall maintain a flow in the stream sufficient to supply the riparian owners' reasonable use which may or may not be the "natural flow." For example, should the trial court find the riparian owners' use of the stream for the preservation of wildlife is a reasonable use, the OWRB shall maintain a flow in the stream sufficient to support wildlife. The OWRB need not allow for a flow in the stream in excess of the amount needed to supply the reasonable use. In holding that the riparian owners' right to the natural flow of the stream must be preserved by the OWRB in granting an appropriation, the trial court did not presume to dictate to the OWRB how much water should be left in the stream. For guidance only, the trial court suggested that the OWRB "consider making minimal provisions for water flows consistent with times of little runoff during normal rainfall seasons, or possibly dryer than normal seasons, but excluding periods of drought." Likewise, we will not presume to tell the OWRB how much water must be left in the stream to supply each reasonable use.

57. Before the 1988 amendments [Okl.Sess.L. 1988, ch. 203 § 3], 82 O.S. 1981 § 105.12 provided as follows: "After the hearing on the application the Board shall determine from the evidence presented whether:

1. There is unappropriated water available in the amount applied for;
2. The applicant has a present or future need for the water and the use to which applicant intends to put the water is a beneficial use; and
3. The proposed use does not interfere with domestic or existing appropriative uses.

consider the City's claim to groundwater sources in assessing whether the City indeed has a need for the water it seeks to appropriate. The 1988 amendments to our statutory water law address this issue by adding the following clarifying language to 82 O.S. 1981 § 105.12:

A. After the hearing on the application the Board shall determine from the evidence presented whether:

1. There is unappropriated water available in the amount applied for;

2. The applicant has a present or future need for the water and the use to which applicant intends to put the water is a beneficial use. In making this determination, the Board shall consider the availability of all stream water sources and such other relevant matters as the Board deems appropriate, and may consider the availability of groundwater as an alternative source; [amendments in italics; deletions noted][58]

The title of the Act that embodies the 1988 amendments expresses a purpose to clarify the language of she statute. We hold that by the language added to 82 O.S. 1981 § 105.12(2) the legislature intended to explain the 1963 amendments rather than to amend them. In so doing the legislature expressed its intent to apply the added language in § 105.12 retroactively from the effective date of the 1963 amendments.[59]

Furthermore, we held in American Ins. Ass'n v. Industrial Com'n[60] that:
"[u]nless there be present on review some property or liberty interest which requires that we apply to the accrued or vested rights in controversy the law in force at a fixed point in time that is anterior to its most recent change, an amendment of controlling statutory law between nisi prius and appellate decisions compels the appellate court to apply the latest version of the pertinent law."[61]

Because the legislature has intervened following our initial consideration of this case and before our final disposition and because the legislature expressed an intent to clarify the 1963 amendments and to apply the language added by 82 O.S.Supp. 1988 § 105.12, we are now compelled to retroactively apply the legislature's latest version of the pertinent law. No vested property or liberty interest requires an opposite conclusion.

Conforming to the legislative clarification of § 105.12(2), we reverse the trial court's holding that the OWRB must consider all sources of water claimed by the City in determining the City's need for stream water. Pursuant to the statute, the OWRB must consider the availability of other stream water sources but, in its discretion, may consider the availability of groundwater sources in determining the City's present and future need for stream water. The legislature's interpretation of § 105.12(2)[62] is consistent with the state's policy recognizing groundwater as a limited and dwindling supply which should not be depleted needlessly.[63]

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4. In the granting of water rights for the transportation of water for use outside the stream system wherein water originates, applicants within such stream system shall have a right to all of the water required to adequately supply the beneficial needs of the water users therein. The Board shall review the needs within such area of origin every five (5) years. If so determined, the Board shall approve the application by issuing a permit to appropriate water. The permit shall state the time within which the water shall be applied to beneficial use. In the absence of appeal as provided by this act, the decision of the Board shall be final."

58. Okl.Sess.L. 1988, ch. 203 § 3.

59. See In re Bomgardner, Okl., 711 P.2d 92, 95 [1985] (Presumption that legislature intended statute to be applied only prospectively is rebuttable).

60. Okl., 745 P.2d 737, 740 [1987].

61. American Ins. Ass'n v. Industrial Com'n, supra note 60, quoting Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc., 404 U.S. 412, 414-415, 92 S.Ct. 574, 575-576, 30 L.Ed.2d 567 [1972] and Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 282-283, 89 S.Ct. 518, 526, 21 L.Ed.2d 474 [1969].

62. Okl.Sess.L. 1988, Ch. 203, § 3 (codified as 82 O.S.Supp. 1988 § 105.12A(2)).

63. See Oklahoma Water Resources Board v. Texas County Irr. and water Resources Ass'n., Inc., Okl., 711 P.2d 38, 56 [1984] (Kauger,

Of course, an initial finding by the OWRB that allowing the appropriation would impair vested appropriative or riparian uses or prejudice future in-basin needs, as revealed by the last five-year study, makes the availability of other sources a moot issue. The OWRB must then deny the application regardless of whether the City has other available water sources. On the other hand, if there is surplus stream water available and if the City will apply it to a beneficial use, granting the appropriation may provide the applicant with the most economic water source and prevent the escape of surplus stream water into an adjacent state.[64]

Some, if not all, appellee-riparian owners have perfected appropriative rights in the same stream in which they are now claiming riparian rights. For almost 100 years, Oklahoma law has permitted riparian owners to "have their cake and eat it too". Under their riparian right riparian owners may assert a reasonable use any time and obtain a priority over pre-existing uses -- both riparian and appropriative. Under the rubric of appropriative rights the riparian owners have a priority which can never be disestablished by later appropriations. We, therefore, hold that in the future a riparian owner who applies for an appropriation in stream water must be deemed to have voluntarily relinquished his riparian rights in that stream water, except for those preserved under the statute for domestic uses. Because of its significant constitutional implication, the principle of relinquishment we announce today shall be applied prospectively from the date mandate herein is issued.[65]

F. RECALL OF THE APPROPRIATION

The final issue for our resolution is whether 82 O.S. § 105.12(4) requires the OWRB to grant an out-of-basin appropriation subject to recall (permanent divestment) by in-basin appropriators. This issue implicates both constitutional considerations and statutory interpretation. The maxim "first in time, first in right"[66] is a fundamental feature of the common-law appropriation doctrine codified at 82 O.S. 1981 § 105.2(B). The senior appropriator has priority over the junior appropriator when water supply is insufficient for all. In times of shortage the junior appropriator must stop diverting all or a portion of his appropriated amount until the supply again exceeds that required by senior appropriators. Though the appropriation is considered a vested property right and is not subject to permanent divestment except for nonuse,[67] that right is always subject to the rights of senior appropriators. The junior appropriator takes with notice of those prior rights. This state's appropriation statutes give the appropriator the right to bring suit when his right to use water is wrongfully impaired by another.[68] The OWRB may also institute legal proceedings to enjoin the wrongful diversion and file criminal complaints against the wrongdoers.[69] Under the statute, the only instance when an appropriator is subject to permanent divestment is for failure to beneficially use the water.[70]

In addition to this first-in-time, first-in-right limitation on all appropriations, the out-of-basin appropriator is faced with Oklahoma's statutory preference for in-basin use:

J., concurring).

64. See 82 O.S. 1981 § 1086.1A.(3) which declares Oklahoma's statutory policy that encourages the use of surplus stream water.

65. See Harry R. Carlile Trust v. Cotton Petroleum, Okl., 732 P.2d 438, 445-446 [1986].

66. Qui prior est tempore, potior est jure. See generally Weil, waters: American Law and French Authority, supra note 26.

67. The Supreme Court of Nebraska held that a statute setting a maximum which could be appropriated for irrigation was unconstitutional insofar as it divested an appropriator of a vested right in a specific amount of water which had been previously applied to beneficial use. Enterprise Irr. Dist. v. Willis, 135 Neb. 827, 284 N.W. 326, 330 [1938].

68. 82 O.S. 1981 § 105.5.

69. 82 O.S. 1981 § 105.20.

70. 82 O.S. 1981 § 105.17. To satisfy the requirements of due process of law, the statute provides for notice and hearing before the divestment can be effective. 82 O.S. 1981 § 105.18.

Only excess and surplus water should be utilized outside of the areas of origin and citizens within the areas of origin have a prior right to water originating therein to the extent that it may be required for beneficial use therein.[71]

The OWRB is directed by 82 O.S. 1981 § 105.12[72] to review the needs within the area of origin every five years. Applicants within the stream system shall have all of the water required to supply their beneficial needs revealed by the study. The trial court held that, according to the statute's declared preference for in-basin use, all of the City's appropriation which is to be used outside the basin of origin (80%) is subject to recall by users within the basin of origin. Subsequently, the legislature clarified its declared preference for in-basin use and limited its sweep as follows: the preference applies only 1) when out-of-basin and in-basin applications for an appropriation are pending before the OWRB at the same time and 2) when future in-basin needs are revealed by the last five-year review made prior to the granting of an application.[73] The 1988 clarifying language expressly provides that the five-year review is not to be used to reduce a previously authorized appropriation.[74]

Therefore, in keeping with the most recent text of § 105.12(4)[75] and in keeping with the common-law prior appropriations doctrine, we reverse the ruling of the trial court and hold that any appropriation granted to the City on remand is to be treated as a vested right that is not subject to permanent divestment by subsequent in-basin appropriators. The latter appropriators take subject to temporary divestment by all prior appropriators, even those outside the basin of origin. Likewise, the City's appropriation is subject to temporary divestment by senior appropriators, in or out of the basin of origin, in times of shortage.

Notwithstanding the statutory rule that controls in-stream appropriators, all riparian owners enjoy a vested interest in the prospective reasonable use of the stream, which interest is not subject to prior appropriations. To the extent that § 105.12 fails to preserve that interest, we hold it violative of Art. 2, § 24, Okl.Const. Should a riparian owner assert his (or her) vested right to initiate a reasonable use of the stream and should the water in the stream be insufficient to supply that owner's reasonable use, we hold that the appropriator with the last priority must either release water into the stream sufficient to meet the riparian owner's reasonable use or stop diverting an amount sufficient to supply the riparian owner's reasonable use until there is water sufficient to satisfy both interests. This temporary divestment is similar to that required under the appropriation doctrine when a shortage of water impairs a senior appropriation. The described scenario should indeed be a rare occurrence, except perhaps in times of severe drought, if the OWRB conducts a thorough study of future in-basin needs every five years and denies all applications for appropriations which threaten those needs.

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71. 82 O.S. 1981 § 1086.1.

72. Supra note 57.

73. Okl.Sess.L.1988, ch. 203 § 3. Pertinent amendments are in italics with deletions noted:

B. In the granting of water rights for the transportation of water for use outside the stream system wherein water originates, pending applications to use water within such stream system shall first be considered in order to assure that applicants within such stream system shall have all of the water required to adequately supply their beneficial therein uses.

The Board shall review the needs within such area of origin every five (5) years to determine whether the water supply is adequate for municipal, industrial, domestic, and other beneficial uses.

C. The review conducted pursuant to subsection B of this section shall not be used to reduce the quantity of water authorized to be used pursuant to permits issued prior to such review. Such permits, however, remain subject to loss, in whole or in part, due to nonuse, forfeiture or abandonment, pursuant to this title.

74. See text accompanying supra notes 59 - 61 (discussing the retroactive application of the 1988 clarifying language to the case at bar).

75. Supra note 72 (codified as 82 O.S. § 105.12(B) and (C)).

Nothing in today's pronouncement precludes the OWRB from granting, as authorized by 82 O.S. 1981 § 105.13, seasonable permits allowing increased use and storage of stream water in times of heavy runoff during rainy seasons.

TRIAL COURT'S ORDER ON APPEAL FROM THE AGENCY IS AFFIRMED IN PART AND REVERSED IN PART; CAUSE REMANDED WITH DIRECTIONS.

CONCUR BY: LAVENDER (In Part); REIF (In Part)

DISSENT BY: LAVENDER (In Part); REIF (In Part); HARGRAVE

DISSENT: REIF, S.J., concurring in part and dissenting in part:

I wish to state that I join the views expressed by Justice Lavender. In writing separately, I do not propose to improve upon his analysis and conclusions. Rather, I offer this brief statement because I once held the general viewpoint of the majority opinion that a riparian has a vested right to initiate any reasonable use at any time.

Admittedly, the hallmark of riparian law has been the settling of controversies caused by new uses conflicting with established uses. The courts were called upon to weigh the competing interests (and others that may be affected) and determine or define what constituted a reasonable use at a given point in time. Established uses had to accommodate and sometimes yield to new ones, because the law treated "the right" of riparians to the use of the waters of a stream as a qualified and not an absolute right of property. Martin v. British American Oil Producing Co., 187 Okla. 193, 102 P.2d 124 (1940).

Such give and take, however, suggested to me that the riparian right was as fluid as the water it represented and, indeed, expanded or contracted based upon changing conditions and needs. It also suggested to me that the critical element has not been "the right" but the power by which adjustments have been made over time and at any given time. Although such power has been most commonly exercised by the courts, it is not exclusively within the ambit of judicial power to weigh competing interests, to define or refine legal rights, and furnish remedies and other means to protect such rights. The legislature unquestionably has such power as well.

The 1963 legislation under consideration represented legislative weighing of the competing interests to stream water in Oklahoma, effectively defined reasonable use that might thereafter arise to be domestic use, and provided for appropriation of "unused" stream water after protecting existing reasonable riparian uses and prospective domestic uses. In addition, it provided a comprehensive system to review, manage and regulate the use of stream water. This has furnished a much more viable approach to addressing and protecting the multitude of interests and needs than the ad hoc approach of riparian litigation.

In my analysis, the legislature did nothing more in 1963 than the courts have been doing for decades: define the scope of reasonable use by a riparian. In doing so, it is not beyond the exercise of power to circumscribe uses as of a particular point in time. In Smith v. Stanolind Oil & Gas, 197 Okla. 499, 172 P.2d 1002 (1946), the court refused to disturb injunctive relief that restrained an up-stream use only insofar as it impaired an existing domestic and livestock use of the downstream plaintiffs. The court rejected the plaintiffs' argument that they should have received protection for increased and future uses, as well.

Prospective or future uses by riparians have not been recognized or treated as "vested" any more than the riparian right itself has been treated as an absolute right of property. Accordingly, I cannot agree that

such future or prospective uses were untouchable by the 1963 legislation or that the legislature impaired or abrogated a protected right in limiting such future/prospective uses to domestic uses.

LAVENDER, J., Concurring in Part; Dissenting in Part:

I must respectfully dissent from that part of the majority opinion holding the 1963 legislative amendments to our State's stream water law unconstitutional under the guise the amendments effected a taking of property without just compensation in violation of OKLA. CONST. art. 2, § 24. In reaching this result the majority makes several errors.

Initially, it misperceives that future, unquantified use of stream water by a riparian is a vested property right that can only be limited or modified pursuant to judicially mandated common law factors that were generally used to decide piecemeal litigation between competing riparians in water use disputes. Secondly, it misinterprets the plain and unambiguous legislation at issue and it fails to recognize that even assuming a vested property right is at issue, such rights in natural resources like water, may be subject to reasonable limitations or even forfeiture for failure to put the resource to beneficial use. Thirdly, its analysis of the law as to what constitutes a taking of private property requiring just compensation is flawed. In my view the majority errs in such regard by failing to view the legislation as akin to zoning regulation, which although may limit a riparian's open-ended common law right to make use of the water to benefit his land and thereby effect the value of his land, does not deprive him of all economic use of his land or absolutely deprive him of water. The lack of water to a riparian, if it occurs, is caused by his own neglect or inaction by years of failure either to put the water to beneficial use or failure to gain an appropriation permit from the Oklahoma Water Resources

Board (OWRB) for uses being made prior to passage of the 1963 amendments or uses made or sought to be made between passage of the amendments and the City of Ada's appropriation at issue here. This mistake of the majority is particularly egregious because it wholly ignores the virtually admitted fact that neither riparians or appropriators own the water they are being allowed to use. All of the people in this State own the water and that ownership interest by the legislation before us is merely being channeled by the Legislature, for the benefit of those owners (i.e. the people), to those uses deemed wise.

The majority has failed to consider persuasive case law from the highest courts of other jurisdictions upholding analogous legislation over similar attacks and pronouncements of the United States Supreme Court which lead me to conclude the legislation on its face is constitutional. The majority finally seems to confuse public fundamental and preeminent rights in the streams of this State, protected through the public trust doctrine, as being the private property of landowners (riparians) owning land adjacent to the stream waters in Oklahoma.

In place of the statutory scheme drafted by the Legislature after years of study and debate the majority acts as a super-legislature by rewriting the water law of this State in accord with its views of prudent public policy, something neither this Court or any court has the power to do.[1] The foundation of this judicial "legislation", relying as it does on the so-called California Doctrine, is illusory at best because the majority ignores pronouncements from the California Supreme Court which has itself recognized the common law doctrine of unquantified future riparian use of stream water is not a vested right, even in the face of a California constitutional provision specifically interpreted to protect it, when it may impair the promotion of reasonable and beneficial uses of state waters and, in effect, constitute waste of the resource.[2]

1. See Toxic Waste Impact Group, Inc. v. Leavitt, 755 P.2d 626, 630 (Okla. 1988).
2. In Re Waters of Long Valley Creek Stream System, 25 Cal. 3d 339, 599 P.2d 656, 661, 158 Cal. Rptr. 350, f.n.3 (Cali. 1979). In said

Instead of striking down the 1963 amendments I would hold the amendments to 60 O.S. 1961, § 60 and the comprehensive stream water laws enacted contemporaneously therewith constitutional and that such laws did not facially constitute a taking of private property of riparian landowners without just compensation. I believe the legislation was enacted by the Legislature in the exercise of its police power and, at most, the amendments placed certain lawful limitations on the doctrine of riparian rights or simply defined what reasonable use consists of in the case of a riparian landowner.

In order to understand the erroneous nature of the majority opinion it is first necessary to understand the "property" right of riparians it purportedly protects and the central rationale given for holding the 1963 water law amendments unconstitutional. The "property" interest is supposedly the prospective or future reasonable use of stream water. The opinion posits that this unquantified prospective or future use is a vested right. Although the majority discusses preexisting water uses by riparians (i.e. uses initiated prior to passage of the 1963 amendments), as I read the opinion, it is the effect the legislation had on future use which is the basis for finding constitutional infirmity. In my view such future use was never a vested property interest inuring to the benefit of a riparian such that if it was changed or modified as accomplished by the 1963 stream water laws just compensation was due for a taking of property. Furthermore, even assuming future use could be considered a vested property interest under Oklahoma law prior to passage of the 1963 amendments the Legislature had the authority, without providing a mechanism for compensation, to provide that the unexercised "right" to use water at some unspecified time in the future could be limited to domestic use because continuous nonuse of water was determined by the Legislature to be wasteful and injurious to a comprehensive State plan regulating the beneficial use of such a valuable resource and, thus, subject to forfeiture or limited to those uses, in addition to domestic use, for which an appropriation was sought and granted by the OWRB.

Appellees have asserted in this case essentially two bases for their supposed property right. They assert this interest is to have some minimal flow (or the natural flow) in the stream system at issue or to be allowed, without compliance or regard to the statutory scheme, to initiate a non-domestic use of the water at some unspecified time in the future. The majority correctly determines that the natural flow arguments of Appellees are meritless under our case law, but then turns around and gives to riparians the opportunity to gain this minimal or natural flow under the auspices they have a protectible property right to make a reasonable use of the stream in the future. What the majority has failed to recognize is that the Legislature had the authority to modify or limit this common law doctrine without running afoul of the just compensation provision of our Constitution or the United States Constitution.[3] The majority also fails to understand the import of the reasonable use doctrine as it existed in Oklahoma prior to passage of the 1963 stream water law amendments and that the State for the benefit of all the people owned the waters at issue in this case and had plenary control over their disposition. In my view only preexisting uses (i.e. uses initiated prior to passage of the amendments and subject to validation thereunder) can be said to be property in any real or actual sense. Such uses the majority admits were subject to validation under the 1963 amendments. As to any common law claim to use an unquantified amount of water in the future such open-ended claim was lost or forfeited because it was determined to be wasteful by the Legislature and was properly limited to domestic use. Furthermore, riparians, just as other potential future water users, may obtain their future needs of water in addition to domestic use by applying for an appropriation

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case the California Supreme Court said:

Appellant also asserts that these common law cases disclose his future right to an unquantified amount of water has become "vested." The assertion is without merit. As discussed post, riparian rights are limited by the concept of reasonable and beneficial use, and they may not be exercised in a manner that is inconsistent with the policy declaration of article X, section 2 of the [California] Constitution. Thus, to the extent that a future riparian right may impair the promotion of reasonable and beneficial uses of state waters, it is inapt to view it as vested. (emphasis added)

3. The just compensation provision of the United States Constitution is found at U.S. CONST. amend. V. It applies to the actions of states through incorporation in U.S. CONST. amend. XIV.

under our water laws. If the water is not then available it is their own inaction or neglect which deprives them of water and not action of the State under the involved legislation. In effect, all the legislation at issue did was to put water users in this State on an equal footing (except for a statutory preference in favor of riparian domestic use) and provide a statewide unitary system for the acquisition of water rights. To further demonstrate the errors made by the majority I will next outline the history of water law in the Western United States and in Oklahoma specifically and then set forth a detailed analysis of the 1963 amendments.

Currently there are three major systems of water rights acquisition in the world. These are the riparian rights system, the prior appropriation system and the system of administrative disposition of water use rights.[4] The prior appropriation system in its present form is mainly managed as an appropriation-permit system and is, thus, in actuality a type of administrative disposition system.[5] This case is concerned with the riparian and appropriation-permit systems and their status in Oklahoma both historically and today.

The appropriation doctrine is prevalent in the Western United States and it is generally recognized its impetus in the region can be traced to the practices and customs of gold miners in California in the mid-nineteenth century.[6] In that there was little or no organized government in the early years of the California gold rush the miners implemented a system of water rights roughly parallel to rules utilized to govern acquisition and holding of mining claims.[7] The principle was based on priority of discovery and diligence in working the mining claim and consequently priority for one who began work to utilize the water in working the claim, assuming reasonable diligence in putting the water to actual use. Practically, the prevalence of the doctrine in the Western United States is due to the relative arid nature of the region and a desire to quantify water rights in the hopes of better controlling what has been thought to be scarce water resources.

A central feature of the doctrine is priority of right to the use of a definite amount of water.[8] Our early case law acknowledged the general law in this area as "first in time, first in right", in other words, the one first putting the water to use or who first began work to divert the water from a stream, assuming reasonable diligence in putting it to actual use, had a better right to the supply of water so used over subsequent in time users when shortage or insufficient supply existed.[9] It was not necessary that an appropriator own land adjacent to the stream.

The riparian doctrine has historically been characterized in two main ways. The majority correctly names these characterizations as the natural flow doctrine and the reasonable use doctrine. Generally, the natural flow doctrine was that each owner of land on a running stream had a right to the ordinary flow of the water running along or over his land and the water could be taken only for domestic purposes, e.g. for family use, livestock and gardening.[10] The doctrine is commonly referred to as the English rule and its primary focus is in maintaining the stream in its natural state. The doctrine was early modified by the reasonable use doctrine or American rule for the main reason it prohibited or severely restricted many uses to which a stream could be put, particularly heavily consumptive uses, such as irrigation. It also gave

4. L.A. TECLAFF, WATER LAW IN HISTORICAL PERSPECTIVE at 6 (1985). The administrative disposition system is handled in various ways throughout the globe. An over-view of these various systems can be found in Chapter I of Teclaff's work.

5. Id.

6. 1 R. CLARK, WATER AND WATER RIGHTS § 15.1 at 60-61 (ed.1967).

7. Id. at § 18.1(C), p. 77.

8. Id. at § 51.6-51.7, pp. 295-298.

9. Gates v. Settlers' Milling, Canal & Reservoir Co., 19 Okl. 83, 91 P. 856, 858 (Okla. 1907). In such case this Court proceeded t apply the general rule of law concerning prior appropriation doctrine in the Western states.

10. 1 R. CLARK, supra note 6, § 51.1 at 288-290; See also Harris v. Brooks, 225 Ark. 436, 283 S.W. 2d 129, 132-133 (Ark. 1955).

an unfair advantage to those at the mouths of streams because such landowners were practically the only ones that could utilize the water for other than domestic purposes.

The central theme of the reasonable use doctrine was that a riparian could make a reasonable use of the water for other than domestic purposes as long as the use did not injure another riparian owner.[11] n11 Neither under this theory or the natural flow doctrine was the landowner considered to own the water. His rights in it were at most a usufructuary interest, in other words he had the right to use the water while it was passing over or next to his land.[12]

In Oklahoma both the appropriation and riparian doctrines were partially recognized early in our development toward statehood. In 1890 the first Legislature of the Territory of Oklahoma enacted a provision adopted from the Dakota Territory dealing with the issue of water rights. The provision provided as follows:
The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same. (emphasis added)[13]

This provision remained unchanged through statehood until its modification by the 1963 amendments, particularly the changes embodied in 60 O.S. Supp. 1963, § 60. As I view the provision it recognized by the emphasized portion that a riparian, although granted an ownership interest in water upon his land not forming a definite stream, did not own any of the water forming a definite stream. Consistent with the common law nature of the riparian doctrine the riparian's interest was recognized as usufructuary, i.e. a right to use.

The first legislative embodiment of the appropriation doctrine was passed in 1897 by the Territorial Legislature.[14] At such point in time present day Oklahoma was essentially divided into two halves, a western part, Oklahoma Territory and an eastern part, Indian Territory.[15] The 1897 law allowed for appropriation of the ordinary flow or under flow of every running stream, flowing river and the storm or rain waters thereof within those portions of Oklahoma Territory wherein irrigation could be beneficially utilized. These waters were declared in the first section of the statutory scheme to be the property of the public. Protection was afforded to riparians to the extent such flows were not to be diverted without the consent of the riparian owner, except by condemnation as provided in the statutory scheme.[16] The legislation further provided that even after an appropriation was granted the riparian owner could still use the water for domestic purposes.[17]

A more comprehensive pre-statehood statutory scheme was passed in 1905 and the provision protecting the riparian right to the ordinary flow of any stream was not contained in the legislation.[18] By this

11. 1 R.CLARK, supra note 6, § 16.2 at 67-69.
12. Id. at § 16.1, pp. 66-67.
13. Terr. Okla. Stat. § 4162 (1890).
14. Sess. Laws of Okla. Terr., Ch. 19, Art. I, §§ 1-21, pp. 187-195 (1897).
15. For the exact boundaries of the Oklahoma Territory and Indian Territory refer to 26 U.S. Stat. at Large, § 1 (Oklahoma Territory) and 26 U.S. Stat. at Large, § 29 (Indian Territory). Oklahoma Territory had been carved out of what had previously been a part of Indian Territory by the Organic Act of 1890, 26 U.S. Stat. at Large, §§ 1-44. Appellees land is in a portion of Oklahoma that was still Indian Territory at the time of passage of 1897 appropriation statute.
16. Sess. Laws of Okla. Terr., Ch. 19, Art.I, § 2, pg. 188.
17. Id. at § 10, pp. 190-191.
18. Sess. Laws of Okla. Terr., Ch. 21, Art.I, §§ 1-56, pp. 274-301 (1905).

legislation the Territorial Legislature recognized that "beneficial use shall be the basis, the measure, and the limit of the right to the use of water. . . ."[19] As I view this early pre-statehood legislation the most important principle espoused therein is it recognized, consistent with the general doctrine in the Western States, that beneficial use would be the overriding factor in determining who had the right to the use of the water.

The next legislation in relation to appropriation was promulgated in 1908 and it was the first passed by the State Legislature to be effective in all of Oklahoma, in other words what had formerly been divided into Indian and Oklahoma Territories.[20] The legislation, like its 1905 counterpart, recognized the overriding principle that beneficial use would be the overriding factor in who had the right to use water. In 1909 another provision concerning appropriation was passed which was a mixture of the 1897 and 1905 schemes.[21] The 1910 Revised Laws of Oklahoma contain provisions only of the 1905 territorial scheme.[22] In 1925 the Legislature promulgated a provision recognizing the priority of all beneficial uses of water which had been initiated prior to statehood and, again, that beneficial use would be the basis, the measure, and the limit to the use of water.[23]

In addition to the legislative embodiments of water law outlined above this Court has decided numerous cases between riparian landowners or those claiming under them. Although as noted the majority correctly posits that this Court recognized the reasonable use doctrine in deciding these cases, rather than the natural flow doctrine as argued by Appellees, the majority fails to recognize the true effect of these decisions. Rather than exhibiting some protection for an open-ended "right" to make a use of an unquantified amount of water at an unspecified time in the future, it is my view the cases when viewed in proper perspective only stand for the proposition that a riparian, as against a competing riparian, had to show some material or substantial impairment of his own right to use water or imminent threat to such right before the judicial machinery would supply relief for any interference. In other words, only interference with use of the water would entitle the riparian to judicial intervention and protection was never afforded for any future or prospective use upon which the majority bases its constitutional decision.[24]

Other cases such as Markwardt v. City of Guthrie,[25] protected a lower riparian owner when a city used a waterway to discharge its sewage therein. Markwardt allowed recovery for damages in a nuisance action against the city when pollution caused the water to be unusable. The plaintiff in said case had diverted water from the stream to build a reservoir which was used to water livestock and irrigate crops. The reservoir also had an abundance of fish. The plaintiff sold butter, milk, vegetables and fish, all a result of water used from the reservoir which had been diverted from the stream. In yet other cases a riparian owner was allowed to recover damages when his land or crops were damaged by a lower riparian owner damming up a water course and thereby throwing the water in excessive amounts upon the lands of an upper riparian.[26] There is also the case of Atchison, T. & S. F. Ry. Co. v. Hadley,[27] purportedly relied

19. Id. at § 1, pg. 275.

20. Okla. Gen. Stat., Ch. 37, §§ 3455-3516 (1908). The 1905 Territorial act would have been in force immediately after statehood in the entirety of the State (Oklahoma became a state on November 16, 1907 by Proclamation of Statehood executed by President Theodore Roosevelt) prior to the passage of the 1908 legislation by virtue of the last provision of § 13 of the Enabling Act of 1906, 34 U.S. Stat. at Large, §§ 1-22, which provided that the laws in effect in Oklahoma Territory would extend over the entire State, until changed by the Legislature.

21. Comp. Laws Okla., Ch. 54, §§ 3915-3982 (1909).

22. Rev. Laws. Okla. Ann., Vol. I, Ch. 40, §§ 3636-3688 (1910).

23. Sess. Laws of Okla., Ch. 76, § 1 (1925).

24. See Smith v. Stanolind Oil & Gas Co., 197 Okl. 499, 172 P.2d 1002 (Okla. 1946) (lessee of riparian owner allowed to take water from a stream and diminish its flow as long as the water left was sufficient for a lower riparian's domestic use and for approximately 45 head of cattle); Baker v. Ellis, 292 P.2d 1037 (Okla. 1956) (permanent injunction upheld against defendant's construction of a dam which threatened the supply of water to a downstream riparian owner who utilized the water for stock purposes).

25. 18 Okl. 32, 90 P. 26 (Okla. 1907).

26. Miller v. Marriott, 48 Okl. 179, 149 P. 1164 (Okla. 1915).

on by the majority as a case exhibiting Oklahoma's long recognized common law riparian right as a private property right, which allowed an action for damages when approximately fourteen acres of plaintiff's land had been washed away by water thrown upon the land as a result of defendant railroad building an embankment which changed the channel and flow of the South Canadian river.

What is seen by these cases is that under the common law of Oklahoma the right we were protecting was the right of a riparian landowner to use the water for various beneficial purposes which he was making of the stream or the right of the riparian owner to have his land or use of that land (e.g. crops) protected from interference by a misuse or excessive use of the water course by another. I do not read them as elevating to the status of vested property right the ability of a riparian to make a use of some unquantified amount of water at some unspecified time in the future, which could never be limited or restricted (or abrogated as wrongly asserted by the majority) by the Legislature and I think the majority is wrong in so concluding. It must next be determined what the legislation did in regard to a riparian owner to see whether the legislation on its face took anything away from them for which compensation must be paid.

The legislation at issue had as its goal the accomplishment of one central purpose. That purpose was to provide a statewide unitary scheme for the acquisition of water rights.[28] The scheme chosen by the legislature was generally along the lines of the prior appropriation system, but it did not simply ignore the fate of those who had been entitled to use water as riparians, as will be shown.

Riparians, as noted previously herein and in the majority opinion, were given a statutory preference to use water from a stream for domestic purposes. These purposes could include general household purposes, for farm and domestic animals up to the normal grazing capacity of the land and for the irrigation of land not exceeding three acres for the watering of gardens, orchards and lawns. It was also provided that water could be stored for such purposes in an amount not to exceed two years supply.[29] A detailed scheme was also contained in the legislation setting forth priorities based on time of initiation of usage.[30] Preexisting beneficial uses, both those of a riparian and appropriator, were subject to protection. The majority admits the legislation so provided. Any water claimant was given a minimum of one year to establish their priority, and such time limit in the discretion of the OWRB could be extended.[31]

An elaborate procedure was set forth mandating that the OWRB conduct surveys, collect data, and gather information to make determinations of all persons using water throughout the State so that such persons could participate in public hearings to determine priorities and rights to the beneficial use of water.[32] Notification of any hearing date by certified or registered mail was required to those persons determined by the OWRB as being users of water.[33] Publication notice in a newspaper of general circulation in each county of the stream system for which rights were to be determined was required for anyone else who might claim the right to use water or might otherwise be interested in the matter.[34]

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27. 168 Okl. 588, 35 P.2d 463 (Okla. 1934).

28. A detailed analysis of the legislative history behind the comprehensive stream water law amendments of 1963 is found in two law review articles. Rarick, Oklahoma Water Law, Stream and Surface in the Pre-1963 Period, 22 Okla. L. Rev. 1 (1969); Rarick, Oklahoma Water Law, Stream and Surface Under the 1963 Amendments, 23 Okla. L. Rev. 19 (1970). These articles show that all water users in the State were represented in the process leading up to passage of the legislation, including riparians and non-riparians alike.

29. 82 O.S. Supp. 1963, § 1-A(a). Domestic use definitions are now found at 82 O.S. 1981, § 105.1(B).

30. 82 O.S. Supp. 1963, § 1-A(b)(1)-(7) and (c). The priorities are now set forth at 82 O.S. Supp. 1988, § 105.2.

31. 1963 Okla. Sess. Laws, Ch. 205, § 4, pg. 269.

32. 82 O.S. Supp. 1963, § 6.

33. Id.

34. Id.

Prior uses, when determined and recognized by the OWRB, were effectively turned into valid appropriations. A right to appeal any decision of the OWRB to a state district court was afforded, with an ultimate appeal to this Court.[35] Any potential water user who sought to initiate a use after passage of the legislation, riparian or not, was required to apply to the OWRB for a permit prior to use.

Certain things are undeniably clear from this legislation. By the amendments the previously existing open-ended and unexercised common law "right" to reasonable future use espoused by the majority concerning riparian water rights was limited to a right of domestic use. Further, all waters entering a definite stream were subject to appropriation, not riparian water uses under the common law doctrine. For riparians then possessing and exercising an existing riparian water right (i.e. the riparian was actually using the water reasonably or beneficially) the amendments provided a mechanism for the recognition, protection and continued validity of such uses and turned those existing uses into valid appropriations. Finally, riparians could gain a right to use water in the future by a grant of an appropriation from the OWRB. All that was actually lost to riparians was the open-ended, unused or unexercised entitlement under the common law factors enunciated by the majority opinion. I differ from the majority because I see no facial constitutional infirmity in these changes accomplished by the 1963 amendments as it does.

The United States Supreme Court has noted on a number of occasions that a state may abandon the common law doctrine of riparian rights in favor of an appropriation system. In the case of United States v. Rio Grande[36] it stated, "As to every stream within its dominion a State may change this common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise." Cases such as Rio Grande point out the plenary authority a state has over the streams and rivers within its borders like those at issue in this case. This Court itself has recognized the plenary power of the State of Oklahoma in a case mistakenly relied on by the majority in support of its just compensation position here. In Oklahoma Water Resources Board v. Central Master Conservancy District[37] we stated, "the state is without authority to transfer one man's property to another, but its power to control unappropriated public waters is plenary. Definite nonnavigable streams are public waters. The state may either reserve to itself or grant to others its right to utilize these streams for beneficial purposes." We also recognized there that a riparian had absolutely no ownership interest in the water forming a definite stream.[38]

In yet another United States Supreme Court case the public right in the waters of a state were deemed paramount over the just compensation arguments of a New Jersey riparian owner who sought to take water from the Passaic River and sell it to New York. The Supreme Court stated:

It appears to us few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. (emphasis added)[39]

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35. 82 O.S. Supp. 1963, § 5.

36. 174 U.S. 690, 702-703 (1899); See also Kansas v. Colorado, 206 U.S. 46, 94, 51 L. Ed. 956, 27 S. Ct. 655 (1907); California v. United States, 438 U.S. 645, 662-663, 57 L. Ed. 2d 1018, 98 S. Ct. 2985 (1977).

37. 464 P.2d 748, 753 (Okla. 1968). We also recognized in Curry v. Hill, 460 P.2d 933 (Okla. 1969) that although a riparian may own the river bed of a generally thought of nonnavigable river which is navigable in fact, his ownership of the river bed grants him no exclusive fishing rights in the river, but the public has a right to use the waterway as a public highway and may fish therein, as long as they do not trespass on the land of the riparian. Id. at 933-934.

38. 464 P.2d at 754, supra note 37.

39. Hudson County Water Co. v. McCarter, 209 U.S. 349, 356, 52 L. Ed. 828, 28 S. Ct. 529 (1908); See also Trelease, Coordination of Riparian and Appropriative Rights to the Use of Water, 33 Texas L. Rev. 24, 66-67 (1954).

With these cases in mind what vested property interest did the 1963 amendments take from riparians? The majority says the ability to demand a reasonable use of the stream in the future (unemoumbered by compliance with our State's water laws) under common law or judicially imposed factors that courts over the years had utilized to decide piecemeal disputes involving riparians or their privies. In essence, the majority indicates it relies on the so-called California Doctrine for its position. It, however, nowhere discusses recent authority from California that sheds serious doubt on its analysis. In the case of In Re Waters of Long Valley Creek Stream System[40] the California Supreme Court was not so generous. There it held that the state, through its water board, may subordinate any future unexercised riparian right below any appropriation awarded prior to user by the riparian when conducting stream wide adjudications because doing so will promote the state's interest in fostering the most reasonable and beneficial uses of scarce water resources.[41] This view was recently reaffirmed in a unanimous decision by the California Supreme Court.[42] In my view our Legislature has accomplished nothing more than that approved by the California Supreme Court via the legislation at issue here and its limitations and modifications in regard to the common law reasonable use doctrine.

The majority also relies on the United States Supreme Court case of United States v. Gerlach Livestock Co.[43] to support its view that the common law reasonable use doctrine is constitutionally protected. Its reliance on this case is misplaced. In the first instance, Gerlach relied on a federal statutory scheme (the Reclamation Act of 1902, 43 U.S.C. § 371 et. seq.) as its basis for holding compensation was required to be paid to riparian landowners which were benefited from the seasonal overflows of the San Joaquin River when the construction of the Friant Dam would cause the loss of this seasonable overflow that the landowners had been utilizing upon their grasslands. Secondly, California had a constitutional provision protecting riparian rights to water and the Supreme Court determined under California law the use of the waters on riparian grassland to enhance its productivity was a private right.[44] Again, the right protected, even in such case, was an existing use of the water in the stream.

In the instant case the majority does not rely for its holding of constitutional infirmity on the loss of any preexisting uses riparians were making of the stream prior to passage of the 1963 amendments. It realizes it cannot do so in this facial attack upon the legislation because the amendments provided a mechanism for protection of these uses. Instead it says riparians have a right to insist that things remain as they were under the common law in regard to future use. Other states have concluded differently.

The South Dakota Supreme Court in the case of Belle Fourche Irrigation District v. Smiley[45] rejected a similar argument to that raised by Appellees here and approved of by the majority. Said case involved a challenge to that state's comprehensive state water law of 1955 by a riparian owner who asserted he had a vested right to use or divert water from the Belle Fourche River for domestic and irrigation purposes by virtue of his ownership of land contiguous to the river. The riparian claimed that this right became an inseparable incident of his land when it was settled, that use did not create it and disuse could not destroy it, and to deny him said right deprived him of property without just compensation.[46] In rejecting the argument the South Dakota Supreme Court effectively determined that the legislature had the authority

40. 599 P.2d 656 (Cali. 1979), supra note 2.

41. Id. at 668-669.

42. In Re Water of Hallett Creek Stream System, 44 Cal. 3d 448, 749 P.2d 324, 336-338, 243 Cal. Rptr. 887 (Cali. 1988), cert. denied 109 S.Ct. 71 (1988).

43. 339 U.S. 725 (1950).

44. Id. at 742-755. It is interesting to note that Justice Douglas, concurring in part and dissenting in part, sought to emphasize that the water rights involved were not protected under U.S. Const. amend. V, but that only the Reclamation Act of 1902 required payment by its terms. Id. at 762.

45. 176 N.W.2d 239 (S.D. 1970) after remand 204 N.W.2d 105 (1973).

46. 204 N.W.2d at 107.

to define a vested right in water as that being utilized for beneficial purposes prior to passage of its state water law and that the Legislature of South Dakota could limit the rights of riparians to domestic use or to those uses granted by appropriation under their statutory scheme.[47]

Another court upholding legislation of a similar nature was the Texas Supreme Court in In Re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin.[48] In pertinent part the legislation at issue in the Texas case provided that water claims would only be recognized to the extent of the maximum actual application of water to beneficial use without waste during any calendar year from 1963 to 1967.[49] The legislation had been passed in 1967 to clear up the confusion and chaotic nature of the water law in Texas, which like Oklahoma had in place a dual system recognizing both the riparian and appropriation doctrines.[50] Even though, as distinguished from the Belle Fourche case, the Texas court acknowledged that riparians who acquired their land before a certain date had a vested right to the use of non-flood waters, the court still upheld the legislation at issue in part because it recognized that what the riparians had was only a right to use what the state owned, i.e. the water.[51] The court determined that such a right, like the appropriator's right, was a right to use the resource beneficially, not to waste it.[52]

The court further relied on Texaco, Inc. v. Short,[53] where the United States Supreme Court upheld the Indiana Dormant Mineral Act which provided that severed mineral interests not used for a period of twenty years automatically lapsed and reverted to the current surface owner, unless certain procedural steps were taken. In said case the Supreme Court stated:

We have concluded that the State may treat a mineral interest that has not been used for twenty years and for which no statement of claim has been filed as abandoned; it follows that, after abandonment, the former owner retains no interest for which he may claim compensation. It is the owner's failure to make any use of the property--and not action of the State--that causes the lapse of the property right; there is no "taking" that requires compensation. The requirement that an owner of a property interest that has not been used for twenty years must come forward and file a current statement of claim is not itself a "taking".[54]

Thus, even if it be assumed the majority is correct that the riparian had a protectible property interest to some unquantified right to make use of the water at some unspecified time in the future, this common law right could be lost or forfeited by nonuse or, at least, limited to domestic use and appropriative uses granted by the OWRB as sought to be accomplished by the legislation under review.[55] To rule otherwise

47. Id. at 107.
48. 642 S.W.2d 438 (Tex. 1982).
49. Id. at 442.
50. A discussion of the history of Texas water law is contained at pp. 439-442 of the Texas Supreme Court opinion.
51. Id. at 444.
52. Id. at 445.
53. 454 U.S. 516 (1982).
54. Id. at 530.
55. Other cases supportive of my position are State v. Knapp, 167 Kan. 546, 207 P.2d 440 (Kan. 1949); In Re Hood River, 114 Ore. 112, 227 P. 1065 (Or. 1924), appeal dismissed 273 U.S. 647 (1926); and In Re Deadman Creek Drainage Basin, 694 P.2d 1071 (Wash. 1985). See also Village of Tequesta v. Jupiter Inlet Corporation, 371 So.2d 663 (Fla. 1979) cert. denied 444 U.S. 965, 62 L. Ed. 2d 377, 100 S. Ct. 453 (1979). In said case the Florida Supreme Court rejected a taking argument in regard to underground water by determining under Florida law that landowners only had a usufructuary interest in such water, rather than any ownership interest. As such the court ruled the interest could not be characterized as private property. It also specifically rejected the argument that a right of user was itself private property requiring condemnation, unless the overlying land had been rendered useless by a diversion of the water by a city government. The court further determined that there was no necessity for its state water act to provide for condemnation of any unexercised common law right to use water. Other cases upholding groundwater legislation are found in Kansas and South Dakota. See Knight v. Grimes, 80 S.D. 517, 127 N.W.2d 708 (S.D. 1964); F. Arthur Stone & Sons v. Gibson, 230 Kan. 224, 630 P.2d 1164 (Kan. 1981). I express no view on how I would treat legislation concerning underground

simply places a common law doctrine as an impenetrable barrier to efficient management of a natural resource never deemed to be owned by private landowners.

The majority further appears to say in part that the legislation on its face is unconstitutional because it did not provide express notice that a riparian would be limited in the future to domestic use and additional future uses only where an appropriation was sought and granted by the OWRB. The position of the majority in such regard is simply untenable under the clear language of the 1963 legislation. First off, Section 1 of the 1963 legislation (60 O.S. Supp. 1963, § 60) and Section 2 (82 O.S. Supp. 1963, § 1-A) unequivocally limited the riparian to domestic use in express terms. Section 60 provided in relevant part as follows:

Water running in a definite stream, formed by nature over or under the surface, may be used by [the riparian] for domestic purposes as defined in [82 O.S. Supp. 1963, § 1-A], as long as it remains there, but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same, as such water then becomes public water and is subject to appropriation for the benefit and welfare of the people of the State . . . . (emphasis added)

Next § 1-A(a) set forth in pertinent part:

Beneficial use shall be the basis, the measure and the limit of the right to the use of water; provided, that domestic use shall not be subject to the provisions of this Title. (emphasis added)

Immediately following § 1-A(a) was subsection 1-A(b) which provided in part as follows:

Priority in time shall give the better right. From and after the effective date of this Act, the following priorities and no others shall exist: . . . . (emphasis added)

Finally, 82 O.S. Supp. 1963, § 21 informed potential future water users that all such persons would have to obtain a permit for an appropriation from the OWRB before using water from a stream. Section 21 provided in pertinent part:

Any person, firm, corporation, State or Federal Governmental Agency or subdivision thereof, intending to acquire the right to the beneficial use of water, shall, before commencing any construction for such purposes, or before taking the same from any constructed works, make an application to the [OWRB] for a permit to appropriate in the form required by the rules and regulations established by the [Board].

It is beyond question these provisions expressly notified riparians future use would be limited to domestic use and any future use beyond this would be limited to those uses for which a permit was sought and granted by the OWRB. The decision of the majority in ruling otherwise simply ignores the express language of the legislation before us.

Any uses then that the majority says must be subject to the common law doctrine of reasonable use (e.g. recreation, fighting grass fires and use to water livestock) and the judicially imposed balancing of factors should have been the subject of an application for an appropriation before the OWRB. If the riparians claiming such use would have filed an application for these uses at any time prior to the City's requested appropriation these uses would presumably have been protected. Further, if some or all of them were uses preexisting passage of the legislation the legislation on its face, as the majority admits, provided a mechanism to validate the uses as appropriations.[56] Thus in my view the language gave express notice

percolating water not forming a definite stream as such is not before us at this time.

56. Appellees do not raise a constitutional lack of notice argument in regard to their ability to validate any preexisting uses and establish

that future use of water would be limited to riparian domestic use and appropriations granted by the OWRB.

The majority further fails in its analysis in the area of just compensation law. It relies on the case of Frost v. Ponca City[57] which ruled although a city may exercise its police power to restrict a landowner's right to capture hydocarbons underlying his property in the interest of health and safety, if a city (or a public entity) itself removes the hydrocarbons and sells them the private landowner must be compensated. The majority fails to see at least two significant distinguishing factors between the situation involved in Frost and that facing us today. One, Frost relied on the fact hydrocarbons, such as oil and gas underlying a landowner's property, were subject to the law of capture, i.e. the landowner had the exclusive right to drill for, produce, or otherwise gain possession of such substances and when reduced to actual possession, the landowner obtained an absolute ownership interest in the substance.[58] After the ownership interest was established the landowner could sell the hydrocarbons. Riparians were never deemed to have such exclusive rights in regard to stream water as shown above and the majority admits this.

Secondly, in Frost the landowners were totally restricted from removing the hydrocarbons themselves or reducing them to actual possession under the law of capture. Here Appellee riparians are not totally restricted from gaining the use of stream water in the future. The only requirement is that they apply for an appropriation permit. Of course they also may use the water for domestic purposes without a permit and the legislation provided an opportunity to protect preexisting uses. No State or public law prohibits their use of stream water, but only inaction on their part. In view of these differences it is inapposite for the majority to rely on Frost.

Instead of placing unwarranted reliance on Frost to strike down the legislation under review I would uphold it by ruling it is akin to zoning regulations which have long been upheld by the courts.

When one properly determines riparians have no property right to insist that the law remain as it was under the common law the attack on the amendments is nothing more then a facial assault that the amendments have an adverse impact on riparian land values and detrimentally effect the ability of riparians to use stream water in connection with their land. I believe such attack is without merit, although it does point out it is use of the water upon the land or, at least, in relation to the land that is the property interest potentially affected. In my view, when the constitutional attack is analyzed in proper perspective the just compensation challenge must fail in regard to any facial attack on the legislation.

The United States Supreme Court has long recognized that land use regulations normally do not effect a taking of property as long as the regulations at issue substantially advance legitimate state interests and do not deny a landowner economically viable use of his land.[59] No one argues here, including the

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priority therefore under the 1963 legislation. There is, thus, no occasion for us to decide any such issue here. It is worth noting, however, that we have not been hesitant to find a lack of notice in a stream system adjudication process under the 1963 legislation when the facts so warranted. Talley v. Carley, 551 P.2d 248 (Okla. 1976) (Priority of riparian appropriators deemed a nullity when OWRB failed to take adequate steps to ascertain the last known address of the involved parties). It is also worth noting, contrary to the view of the majority, that Talley was a specific acknowledgement by this Court that the 1963 water law amendments expressly unitized the water law of this State under the appropriation doctrine and that to protect a future use of water an appropriation would have to be granted by the OWRB.

57. 541 P.2d 1321 (Okla. 1975).

58. Id. at 1323.

59. Agins v. Tiburon, 447 U.S. 255, 260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980). We have recognized the proper test in land use/just compensation situations in the recent case of April v. City of Broken Arrow, 775 P.2d 1347 (Okla. 1989). The United States Supreme Court has upheld land use regulations even in the face of arguments that a drastic diminution in land value has occurred by virtue of the regulations. See e.g. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 131, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1977) and Euclid v. Ambler Realty Co., 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926). In my view, such cases dispose of any argument that mere diminishment in riparian land value by virtue of the limitation of riparian water use to domestic use and uses granted by appropriation permit entitles a riparian to compensation

majority, that the statutory scheme under review does not substantially advance legitimate state interests. The State interests advanced are numerous. Among them are direct promotion of the efficient management of our State's water resources by preventing waste. It provides a semblance of certainty in the area of water rights and distributes this valuable resource which is owned by all the public in response to demonstrated need. Therefore, the only real question in the taking context is whether the legislation has deprived riparians of the economically viable use of their land. I do not think it has nor from my review of the record herein do I read Appellees submissions to assert otherwise.

Nowhere is there evidence in this record that the legislation itself has rendered the use of riparian land economically unviable. Riparians are not estopped from using their land for any purpose or gaining water rights in connection therewith as specified above. The most that could be said from this record is that Appellees argue that if the City is granted the appropriation at issue the entire stream system will be dryed up below the point of diversion on Bryds Mill Spring. Even if such were the case, which it is not,[60] this alone would not render the legislation facially invalid under either the Oklahoma Constitution (as the majority rules) or United States Constitution just compensation clauses. If valid at all such an argument would be an as applied attack which would have to be brought via an inverse condemnation proceeding, rather than from an OWRB administrative order.[61] Such an as applied attack is not before us at this time and we, thus, have no occasion to reach the issue. However, if it was properly before us, in my view, in the normal situation it would not be application of the legislation which could be said to have rendered use of the land economically unviable (if such were adequately proven), but the failure of riparians to gain an appropriation permit under the Act, i.e. the failure of riparians to use the water beneficially or to protect any preexisting uses. In sum, I would hold the legislation on its face did not constitute a taking of private property for which compensation is required just as land use regulation does not constitute a taking of private property when the owner is not denied economically viable use of his land.

Although not discussed in great detail by the majority I am of the further opinion that the majority confuses certain public rights in our streams as being exclusive private property rights of riparians. I come to this conclusion because of the majority's assertion that, if under its common law balancing test protection of wildlife is deemed a reasonable use of the stream and the City or other public entity wants water which will detrimentally affect wildlife, riparians must be compensated for this loss of wildlife.[62]

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for a taking of property.

60. The evidence before the OWRB appeared to show the appropriation at issue would not, as Appellees assert, have the effect of drying up the stream system. In fact, the evidence was that the average annual runoff from rain water for all of the Clear Boggy Basin down to the point where Buck Creek and Clear Boggy Creek intersect was 59,851 acre-feet of water per year. The minimum runoff was calculated to be 23,866 acre-feet of water per year. These figures did not include any flow coming from Bryds Mill Spring and the expert witness for the City was of the opinion the amount of runoff alone would be sufficient to meet all prior existing water rights in the entire watershed, i.e. in the entire upper Clear Boggy System. From my review of the record it is only in extreme drought situations that diversion of the flow from Bryds Mill spring might have the effect of providing less water than needed.

61. Inverse condemnation has been aptly distinguished from a proceeding in eminent domain by the United States Supreme Court in Agins v. Tiburon, supra note 59. There it said:

> Inverse condemnation should be distinguished from eminent domain. Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property.[] Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." (citations omitted) Id., 447 U.S. at 258, f.n. 2.
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> This Court has recognized the potential viability of an inverse condemnation recovery when a landowner's property was flooded by the effect of certain municipal flood plain ordinances and a city's alleged inadequate maintenance of drainage channels. Mattoon v. City of Norman, 617 P.2d 1347 (Okla. 1980). We also recognized in April v. City of Broken Arrow, supra note 59, the distinction between a facial attack on land use regulation in regard to whether a taking of property has occurred and one where particular actions taken under the legislation are applied in such a manner that constitute a taking, even though the legislation is facially constitutional.

62. In footnote 53 of the majority opinion the trial court is directed, in determining whether the riparian owners' use of water is reasonable, to consider that uncaptured wildlife is the property of the State. I, therefore, assume the majority still leaves open the possibility protection of uncaptured wildlife by riparians may, under certain unspecified circumstances, be deemed a reasonable use and if an appropriation will interfere

Wildlife is not the private property of riparians or any other landowner. Oklahoma law specifically indicates that "all wildlife found in this state is the property of the state." 29 O.S. 1981, § 7-204. See also Collopy v. Wildlife Commission, 625 P.2d 994 (Colo. 1981). Thus, I do not believe riparians have any right to demand compensation for loss of wildlife which in no sense is deemed to be their private property. The mistake of the majority does, however, point up an evolving doctrine in the area of the law known as the public trust doctrine which I will briefly discuss.

Generally the public trust doctrine is a recognition that it is all of the people and not a select few, such as riparians or appropriators, that have the paramount interest in public waters like those at issue in this case. The public interests protected are numerous and seemingly expanding.[63] The doctrine has been interpreted to protect navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic and scenic beauty.[64] Obviously, the preservation of such interests require that certain minimum flows be maintained in watercourses so that these public interests are protected. This does not, however, mean that if the minimum flows are not maintained any private property interest of riparians has automatically been taken because, in my view, these interests generally are held by the public at large and not by a few select landowners and it does not necessarily mean riparians have been denied economically viable use of any land.

What the doctrine means, however, at a minimum is that grants of water rights in our streams and rivers, absent express or sufficiently clear legislative intent to the contrary, comes burdened with these public interests. In other words, the public interests are paramount to both riparian and appropriative interests and may be limited by proper legislation aimed at protecting these paramount public interests.

As to the majority's treatment of the other issues involved in this case (consideration of groundwater in the appropriation application process and the recall issue) I concur therein except to the extent the views expressed by the majority on said issues are inconsistent with the views expressed above. Finally, I would remand the matter to the OWRB because from my review of the record the OWRB did not properly consider the needs of downstream domestic users and prior appropriators as it was statutorily required to do.

HARGRAVE, C.J. and REIF, S.J. have joined in the views herein expressed.

HARGRAVE, C.J., dissenting:

I must dissent from the majority opinion. I concur in Justice Lavender's analysis explaining that the 1963 legislative amendments to our state's stream water laws do not constitute a taking without just compensation in violation of Oklahoma constitution, Article 2, § 24. There is no constitutional prohibition of the legislature's power to define or redefine riparian rights. In addition to these objections, the opinion presents additional difficulties. It does not reach far enough to decide the issues presented by the parties. The issues are simply postponed for later resolution under rules here laid out that present a myriad of practical problems themselves.

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with said use compensation must be paid to the riparian even though the wildlife is not the property of the riparian, but is deemed to be public property.

63. Johnson, Water Pollution and the Public Trust Doctrine, 19 Environmental Law 485 (1989).

64. Id.

[Editor's Note: After the Supreme Court of Oklahoma issued its 1990 Franco opinion (the final, second opinion), Defendants filed a motion for rehearing, accompanied by briefs in support of the motion for rehearing. The Supreme Court Order which follows shows that the Supreme Court denied the motion for rehearing of the 1990 Franco opinion twice -- in April and June 1993. Consequently, the 1990 Franco opinion was readopted, reissued, and became the final opinon in this litigation in July 1993 when the Supreme Court issued its mandate of finality.]

FRANCO-AMERICAN CHAROLAISE, LTD., MACK M. BRALEY, and CLAUDIA M. BRALY, THREE B LAND & CATTLE COMPANY, F. E. BATEMAN, CHARLES BATEMAN, W. A. CANNON, GERALD DONSTEWART, HERSHELL CHRONISTER, JESSEE BERRIE, MRS. JOHN PRATER and JACK DUNN, Appellees, v. THE OKLAHOMA WATER RESOURCES BOARD and THE CITY OF ADA, OKLAHOMA, Appellants.

No. 59,310
SUPREME COURT OF OKLAHOMA
1993 Okla. LEXIS 51; 64 O.B.A.J. 1197
April 12, 1993, Decided
April 13, 1993, Filed
June 14, 1993, Rehearing Denied

JUDGES: Hodges, C.J., and Opala, Wilson, Kauger and Watt, JJ., concur in rehearing's denial; Lavender, V.C.J., Hargrave and Summers, JJ., and Reif, S.J., sitting by designation in lieu of Simms, J., who disqualified, dissent from rehearing's denial.

OPINION: ORDER

The court's opinion by Opala, J., promulgated herein on April 24, 1990, together with each separate opinion by individual justices (by Lavender and Hargrave, JJ., and by Reif, S.J.) are hereby readopted and reissued.

Hodges, C.J., and Opala, Wilson, Kauger and Watt, JJ., concur in the opinion by Opala, J.;

Lavender, V.C.J., concurs in part and dissents in part by opinion;

Hargrave, J., dissents by opinion;

Summers, J., concurs in part and dissents in part;

Reif, S.J., sitting by designation in lieu of Simms, J., who disqualified, concurs in part and dissents in part by opinion.

Rehearing is denied.

Hodges, C.J., and Opala, Wilson, Kauger and Watt, JJ., concur in rehearing's denial;

Lavender, V.C.J., Hargrave and Summers, JJ., and Reif, S.J., sitting by designation in lieu of Simms, J., who disqualified, dissent from rehearing's denial.

[Editor's Note: The Oklahoma Legislature immediately responded to the final, second, official Franco opinion by passing the statute which follows. The potential conflict between this 1993 legislative action and the Franco opinion remains unresolved as of the date of preparation of this Report; however, several chapters in this Report discuss the potential conflict and alternative resolutions of the conflict.]

WATERS AND WATER RIGHTS -- STREAM WATER USE -- LEGISLATIVE INTENT

OKLA. SESS. LAWS, 44th Legis., 1st Reg. Sess. (1993)
Chapter 310

AN ACT RELATING TO WATERS AND WATER RIGHTS; STATING PURPOSE OF CERTAIN STATUTES; PROVIDNG FOR CODIFICATION; AND DECLARING AN EMERGENCY.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 105.1A, unless there is created a duplication in numbering, reads as follows:

It is the intent of the Oklahoma Legislature that the purpose of Section 105.1 through Section 105.32 of this title is to provide for stability and certainty in water rights by replacing the incompatible dual systems of riparian and appropriative water rights which governed the use of water from definite streams in Oklahoma prior to June 10, 1963, with an appropriation system of regulation requiring the beneficial use of water and providing that priority in time shall give the better right. These sections are intended to provide that riparian landowners may use water for domestice uses and store water in definite streams and that appropriations shall not interfere with such domestic uses, to recognize through administrative adjudications all uses, riparian and appropriative, existing prior to June 10, 1963, and to extinguish future claims to use water, except for domestic use, based only on ownership of riparian lands.

SECTION 2. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

Approved June 7, 1993.

[Editor's Note: Following the remand of the *Franco* case to the District Court in Coal County, the City of Ada filed a completely new application for a prior appropriation permit from Byrds Mill Spring with the OWRB. The following order indicates how those contesting Ada's application responded to the new application.]

IN THE DISTRICT COURT WITHIN AND FOR COAL COUNTY
STATE OF OKLAHOMA

FRANCO-AMERICAN CHAROLAISE LTD., ET. AL., PLAINTIFFS	)	
VS	)	NO. C-81-23
OKLAHOMA WATER RESOURCES BOARD and CITY OF ADA, OKLA., DEFENDANTS	)	

ORDER GRANTING WRIT OF PROHIBITION

On February 18, 1994, Plaintiff's Application for a Writ of Prohibition came on for hearing. Now, after having fully considered same, the Court makes the following findings and orders:

In 1980 the Defendant City of Ada filed an Application for Stream Water Permit with the Defendant Oklahoma Water Resources Board (OWRB) for diversion of water from Byrds Mill Spring. That permit was subsequently granted in the amount of 5,340 acre-feet of stream water per year. The Plaintiffs, who are riparian owners, appealed to District Court. In 1982, District Judge Lavern Fishel heard evidence and entered a decision modifying OWRB's action in part, reversing it in part and remanding it for further determination. That decision was appealed to the Supreme Court.

On June 9, 1993, after the issuance and recall of two different opinions, the Oklahoma Supreme Court entered its final opinion. In that opinion, the Supreme Court sustained the District Court's decision in part, reversed it in part, and remanded it "for the trial court to determine whether the appellee-riparian owners' claim to the use of the stream flow for the enhancement of the value of the riparian land for recreation, for the preservation of wildlife, for fighting grass fires, and for lowering the body temperature of their cattle on hot summer days is reasonable."

However, on July 15, 1993, Defendant City filed a new Application for Stream Water Permit for diversion of 5,340 acre-feet of stream water per year from Byrd's Mill Creek. OWRB has scheduled that Application for hearing on February 25, 1994. Plaintiffs seek a Writ prohibiting Defendants from further action on the new Application.

Title 82 of the Oklahoma Statutes authorizes and requires the OWRB to provide for the systematic establishment and regulation of water usage in this State. As part of its duties, OWRB is required to accept and review applications for water rights. Once those permits are granted establishing water rights, those rights are vested in the applicant subject to: a) review by the court on appeal; b) review by OWRB every 5 years; or c) loss by nonuse, forfeiture or abandonment as provided by the Act.

In this case, OWRB has already granted Defendant City certain water rights to Byrd Creek in its 1980 permit. The new application involves the very same issues that were presented and ruled on by OWRB in the 1980 Application and appealed to district court and the Supreme Court. The review of the 1980 OWRB decision is now pending in this court. 82 O.S. 1972 Sec. 105.12. The issues involved in that

application are now within this Court's exclusive jurisdiction, not OWRB's, until final disposition of the matter on remand. 75 O.S. Sec. 322; 2 Am. Jur.2d "Administrative Law" Sec. 764. Since OWRB has no jurisdiction to consider the new Application, the Court will not find that the Plaintiffs have waived their right to object by appearing at the administrative hearing.

However, OWRB does have certain duties regarding this case on remand. 75 O.S. Sec. 322 provides that in any proceeding for the review of an agency order, the Supreme Court or the district court may "remand it to the agency for further proceedings" and may also "remand the case to the agency for the taking and consideration of further evidence, if it is deemed essential to a proper disposition of the issue." 2 Am.Jur.2d "Administrative Law" Sec. 766 also states:

> "A remand by the court for further proceedings means simply that the case is returned to the administrative agency in order that it may take further action in accordance with the applicable law. It does not dismiss or terminate the administrative proceedings. The further proceedings are not new proceedings but one stage in a single process. . . . Some statutes provide for a report to the court of the action taken by the agency subsequent to remand."

For these reasons, the Court grants the requested Writ of Prohibition and prohibits the Defendants from further action on the 1993 Application. The Court does, however, remand the present case to Defendant OWRB for the taking of evidence and entering of Findings of Fact and Conclusions of Law on the 1980 Application which are consistent with the Supreme Court's pronouncement in this case. Upon the entering of findings and conclusions, Defendant OWRB shall report same to this Court for further review.

The Clerk is directed to mail a copy of this Order to the parties.
Dated this 23rd day of February, 1994.

Doug Gabbard II
DISTRICT JUDGE

BEFORE THE OKLAHOMA WATER RESOURCES BOARD
STATE OF OKLAHOMA

In re Remand of Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board, from District Court of Coal County, Oklahoma	))))	Case No. C-81-23

HEARING EXAMINER'S
PRE-HEARING CONFERENCE
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND REPORT TO DISTRICT COURT

FINDINGS OF FACT

1. This matter involves the latest state of a legal proceeding which began when the City of Ada ("City") filed an Application No. 80-107 for a stream water use permit with the Oklahoma Water Resources Board ("Board") in 1980. The case has been heard by the board, appealed to the District Court of Coal County, appealed to the Supreme Court of Oklahoma, and remanded back to the District Court for proceedings consistent with the Supreme Court's opinion in the case. The District Court of Coal County, by its Order Granting Writ of Prohibition dated February 23, 1994, remanded the case to the Board

> "for the taking of evidence and entering of Findings of Fact and Conclusions of Law on the 1980 application which are consistent with the Supreme Court's pronouncement in this case. Upon the entering of the findings and conclusions, [the Board] shall report same to this Court for further view."

2. Following an Application for Pre-Hearing Conference filed by the City, a pre-hearing conference was scheduled and held on July 26, 1994 at the Board's office in Oklahoma City, Oklahoma. Jerry Barnett presided as Hearing Examiner on behalf of the Board. Appearing were R. Thomas Lay, Alvin D. Files, and Leslie B. Younger representing the City; George W. Braly representing the protestant landowners (identified below), and John B. Axton, representing Bill and Katherine Brunk.

3. In the fourteen years since the proceeding commenced, there have been a few changes in the parties represented by Mr. Braly. It was confirmed at the pre-hearing conference that Mr. Braly now represents W. H. Braum Family Partnership as the successor in interest to original parties Franco-American Charolaise, Ltd., Mack M. Braly and Claudia M. Braly, and the Three B Land & Cattle Company. Mr. Braly continues to represent original parties F.E. Bateman, Charles Bateman, W.A. Cannon, Gerald Don Stewart, Hershell Chronister, Jesse Berrie, Mrs. John Prater and Jack Dunn. Although Bill and Katherine Brunk were not original parties to the proceeding, there is no objection to their participation and representation by Mr. Axton henceforth.

4. During the course of the pre-hearing conference, several legal issues were raised, including an issue of controlling law, which made further proceedings in a pre-hearing conference or hearing appear to be unnecessary pending a definitive resolution. As stated below, the pre-hearing conference was adjourned following a determination that recently-enacted legislation extinguished the protestants' non-domestic riparian rights.

CONCLUSION OF LAW

1. Mr. Braly reiterated his long-standing objection that not all necessary parties have been properly notified and given an opportunity to be heard. He continues to maintain that all riparian landowners downstream are entitled to be notified by mail, and that if they are not so notified then this proceeding is open to being invalidated upon a future challenge brought by any of these riparians. Mr. Braly's notice objection is overruled and denied for the following reasons:

a. The City complied with the statutory requirement of giving notice by publication in a newspaper of general circulation in the county of the point of diversion plus a newspaper of general circulation in the adjacent downstream county. 82 O.S. § 105.11. The Board construes this statute to be constitutional and therefore sufficient to provide for due process.

b. Despite Mr. Braly's objection, neither the District Court in the initial appeal, nor the Supreme Court on further appeal, held that notice was deficient in this case. The board therefore will not delve further into this issue, and the parties shall remain as they already are shown of record.

2. During this stage of the proceeding, the District Court has retained jurisdiction while referring the matter to the Board for the limited purposes quoted in Finding of Fact No. 1 above. The Board is to take evidence on those issues identified in the Supreme Court's opinion published at 855 P.2d 568 (Okla. 1990), as follows:

a. Whether each of the following uses asserted by the riparian parties is reasonable:

(1) Use of the stream flow for the enhancement of the value of the riparian land for recreation;

(2) Use for the preservation of wildlife;

(3) Use for fighting grass fires; and

(4) Use for lowering the body temperature of the riparians' cattle on hot summer days. 855 P.2d at 577.

The reasonableness of each of these uses is to be determined separately, applying the factors listed below. Additionally, these uses are to be balanced against those of the City. 855 P.2d at 578.

The factors to be applied in making the determinations of reasonableness for each asserted use include

The size of the stream;
Custom;
Climate;
The season of the year;
The size of the diversion;
The place and method of the diversion;
The type of use and its importance to society (beneficial use);
The needs of the other riparians;
The location of the diversion on the stream;
The suitability of the use to the streams; and
The fairness of requiring the use causing the harm to bear the loss. 855 P.2d at 578 and 575, note 60.

b. If any of the uses asserted by the riparians is reasonable, then the right to the flow sufficient to supply such use(s) must be preserved.

c. the Board must determine whether there is surplus water available for appropriation by the City after providing for

(1) all prior appropriations;
(2) all riparian uses perfected under the 1963 statutory amendments;
(3) all riparian domestic uses;
(4) all riparian uses determined to be reasonable according to Conclusion of Law No. 5.a. above.
(5) all anticipated in-basin needs.

All downstream domestic uses below the junction of Buck and Boggy Creeks and above its junction with Muddy Boggy Creek must be considered. 855 P.2d at 578-579.

3. a. However, in 1993 the Oklahoma Legislature enacted a new statute codified at 82 O.S. Supp. 1993, § 105.1A, which states:

"It is the intent of the Oklahoma Legislature that the purpose of Section 105.1 through Section 105.32 of this title is to provide for stability and certainty in water rights by replacing the incompatible dual systems of riparian and appropriative water rights which governed the use of water from definite streams in Oklahoma prior to June 10, 1963, with an appropriation system of regulation requiring the beneficial use of water and providing that priority in time shall give the better right. These sections are intended to provide that riparian landowners may use water for domestic uses and store water in definite streams and that appropriations shall not interfere with such domestic uses, to recognize through administrative adjudications all uses, riparian and appropriate, existing prior to June 10, 1963, and to extinguish future claims to use water, except for domestic use, based only on ownership of riparian lands." (Emphasis added.)

The City argues that because this statute provides for the extinguishment of riparian claims such as those asserted by the protestants in this proceeding, and because it was enacted subsequent to the adoption of the Supreme Court's opinion in this case, the net effect is to make the reasonableness of the riparian claims irrelevant. If this argument is correct, then the Board finds that it would be unnecessary to proceed with a hearing on the reasonableness of the riparian's claims.

b. However, Mr. Braly asserted that the statute is an invalid attempt by the Legislature to abolish constitutional rights and overrule constitutional principles handed down by the judiciary, which is all for naught according to long-standing principles of judicial review going back to the U.S. Supreme Court case of Marbury v. Madison.

c. The Board concludes that as an administrative agency, the Board is bound to hold Section 105.1A to be constitutionally valid. According to the holding of the Supreme Court of Oklahoma in Dow Jones & Co., Inc. v. State ex rel. Oklahoma Tax Commission, 787 P.2d 843 (Okla. 1990),

"[e]very statute is . . . constitutionally valid until a court of competent jurisdiction declares otherwise [citing State ex rel. York v. Turpen, 681 P.2d 763, 767 (Okla. 1984)]." 787 P.2d at 845.

The Court in its Dow Jones opinion also quoted the following from Professor Kenneth Culp Davis' Administration Law Treatise:

> "... We do not commit to administrative agencies the power to determine constitutionality of legislation. Only the courts have authority to take action which runs counter to the expressed will of the legislative body." [Emphasis added in Supreme Court opinion.] 787 P.2d at 845, note 9, quoted Davis, 3 Administrative Law Treatise 74, § 20.04 (1976).

The constitutional validity of Section 105.1A has not been ruled upon by a court of competent jurisdiction. The Board concludes that it has no power or authority to take any action in this proceeding contrary to the will of the Legislature expressed in Section 105.1A, and the Board must hold this Section to be valid and therefore dispositive of the Board's action on the remand from the District Court.

4. Upon announcing a ruling to this effect, the Hearing Examiner adjourned the pre-hearing conference for preparation of a like order and report. After the conclusion of the pre-hearing conference, the Hearing Examiner determine that presentation of this legal issue to the Board would not be necessary and that the matter, together with the instant Findings of Fact and Conclusions of Law, could instead by transmitted directly to the Direct Court for its review.

Dated this 2nd day of August, 1994.

_____

Jerry Barnett
Hearing Examiner
OKLAHOMA WATER RESOURCES BOARD

IN THE DISTRICT COURT WITHIN AND FOR COAL COUNTY
STATE OF OKLAHOMA

FRANCO-AMERICAN CHAROLAISE, LTD, ET. AL., PLAINTIFFS	)	
vs	)	NO. C-81-23
OKLAHOMA WATER RESOURCES BOARD and CITY OF ADA, DEFENDANTS	)	

ORDER RE: HEARING EXAMINERS REPORT

The Court has had under advisement several motions related to the OWRB Hearing Examiner's August 10, 1994, Report. And, having fully considered same, enters the following findings and orders:

By way of history, this case was filed in 1981 to contest a stream water permit issued to Defendant City for diversion of water from Bryds Mill Spring. At trial, Plaintiffs received a favorable verdict and Defendants appealed. After the issuance and withdrawal of two different opinions, the Oklahoma Supreme Court issued its final opinion on June 9, 1993, affirming in part, reversing in part and remanded the case back to the trial court. For purposes of the present motion, the Supreme Court's opinion held that:

1) Oklahoma riparian owners enjoy a vested common law property right in the use of stream water for domestic and other reasonable purposes.

2) 60 O.S. Sec. 60, as amended in 1963, attempted to limit a riparian owner to domestic use, abrogating the common law right to "other reasonable uses", by forcing that owner to seek a permit to use such water through a statutory administrative procedure.

3) That statute was unconstitutional for two reasons: First, it took a vested property right for public purposes without just compensation in violation of Art. 2, Sec. 24 of the Oklahoma Constitution; and Second, it abrogated riparian common law rights by inference, instead of doing so expressly, in violation of Ricks Exploration Co. vs. Okla. Water Resources Board, 695 P.2d 498 (1984).

4) The Supreme Court remanded the case "for the trial court to determine whether the appellee-riparian owners' claim to the use of the stream" for recreation and other uses was reasonable.

On February 24, 1994, this Court issued a Writ of Prohibition prohibiting Defendant OWRB from taking further action on Defendant City's 1993 water permit application, directing OWRB to take evidence and enter findings on the 1980 permit application consistent with the remand order, and then reporting the same to this Court. On August 10, 1994, OWRB's Hearing Examiner reported that a 1993 statute mooted the hearing and that the Board was required to treat this statute as constitutional because of Dow Jones & Co. Inc. v. State ex rel Tax Comm'n, 787 P.2d 843 (Okl. 1990). All parties requested that this Court rule on the new statute's constitutionality and Plaintiff's requested this court recall its remand and hold future evidentiary hearings itself.

The statute in question, 82 O.S. Section 105.1A, provides:

"It is the intent of the Oklahoma Legislature that the purpose of Section 105.1 through Section 105.32 of this title is to provide for stability and certainty in water rights by replacing the incompatible dual

systems of riparian and appropriative water rights which governed the use of water for definite streams in Oklahoma prior to June 10, 1963, with an appropriation system of regulation requiring the beneficial use of water and providing that priority in time shall give the better right. These sections are intended to provide that riparian landowners may use water for domestic uses and store water in definite streams and that appropriations shall not interfere with such domestic uses, to recognize through administrative adjudications all uses, riparian and appropriative, existing prior to June 10, 1963, and to extinguish future claims to use water, except for domestic use, based only on ownership of riparian lands." (Emphasis added)

The new Act became effective on June 7, 1993.

The Court finds that the new statute is either unconstitutional or inapplicable to the 1980 permit determination, depending on the intent of the "future claims" clause. If that clause was intended to extinguish all claims after June 10, 1963, as persuasively argued by Defendants, it suffers from one of the same constitutional infirmities as the 1963 version 60 O.S. Sec. 60: the statute would divest riparian owners of a vested common law property interest, thereby taking private property for public purposes without just compensation as provided by Art. 2, Section 24 of the Oklahoma Constitution. If it is interpreted to apply to "future claims" after its effective date, it is inapplicable to the present case since Plaintiff's assert rights that vested prior thereto.

The Court finds no reason to recall its remand to the Hearing Examiner, nor does it find any statutory, constitutional or other requirement for additional notice to downstream riparian owners prior to conducting the evidentiary hearing. Although the Supreme Court in its opinion noted that "all downstream domestic users...must be considered to determine the water available for appropriation" in conducting that hearing, the Court finds that this was a calculation directive and not a requirement for additional notice of parties.

Based on the foregoing, the Court overrules the Motion to Recall Remand, and orders and directs Defendant OWRB and the Hearing Examiner to expeditiously conduct the evidentiary hearing in accordance with this Court's previous order and the Supreme Court's opinion, or appear and show cause why it should not be cited for contempt of this Court.

The Clerk is directed to mail a copy of this Order to the parties.

Dated this 1st day of June, 1995.

Doug Gabbard II
DISTRICT JUDGE

[Editor's Note: With the Order of June 1, 1995 from the District Court of Coal County, the *Franco* case returned to the Oklahoma Water Resources Board (OWRB). As of September 28, 1995, the OWRB Hearing Officer has conducted two Pre-Hearing Conferences with the *Franco* parties.

As a consequence of these two conferences, the parties are exploring settlement. They are using the Hearing Examiner as a Facilitator-Mediator for the settlement negotiations. The negotiations have focused on stream flows in the relevant stream and creek systems from which the *Franco* litigation arose. The parties are exploring the idea of setting a minimum instream flow that would protect fish and wildlife. They are assuming that the minimum instream flow needed to protect fish and wildlife would concurrently satisfy all other riparian demands for water.

The parties have agreed to meet with expert hydrologists and biologists to discuss the methodologies available to determine the minimum instream flow necessary to protect fish and wildlife. If they can find an acceptable methodology, they have agreed to commission a study or studies to ascertain the exact quantity for the minimum instream flow. The meeting with the experts to discuss methodologies is set for early October 1995.

The parties have tentatively agreed that if they can agree upon the minimum instream flow they will request the Hearing Examiner to make the minimum instream flow a condition of the prior appropriation permit that the City of Ada gained from the OWRB in 1981.

Date of this Editor's Note --September 28, 1995.]

Part Two: The Student Chapters

The Impact of *Franco* upon Water Rights for Agriculture

Julie D. Strong

Table of Contents

I. Introduction

Irrigation has long been a necessary part of agriculture in the arid and semiarid regions of the United States. Farmers have tapped groundwater, streams, and lakes for this precious resource and have built dams in draws and gullies to capture runoff water from rain and snowmelt. Approximately eighty-three percent of the irrigated agricultural land is located in the seventeen western states, including Oklahoma.[1] With abundant rainfall and perennial streams and rivers, those farms east of the ninty-eighth meridian, the line which runs through Oklahoma near Oklahoma City, require irrigation for only five percent of their crop and pasture land, using it largely in times of severe drought.[2] Vastly different hydrologic characteristics in the eastern and western United States spawned very different systems of surface water regulation. In the humid East where water for consumptive uses has been plentiful, the common law riparian system prevails. The West, which requires an orderly system to regulate consumption of scarce water resources for irrigation, animal husbandry, industry, and municipal uses, has developed an appropriation system based not on riparian land ownership, but on earliest beneficial use of stream water.

Lands within Oklahoma reflect the hydrologic characteristics of both the humid East and the semiarid West. Rainfall ranges from a low of fifteen inches per year in the Panhandle to a high of fifty-two inches per year in the southeastern corner of the state.[3] Governing water law in Oklahoma recognized riparian rights as well as appropriative rights from 1907-1963, with the appropriation system replacing the common law riparian system in 1963.[4] However, in 1990, the Oklahoma Supreme Court rejected the primacy of the appropriation system and revived common law riparian rights.[5]

For the Oklahoma farmers irrigating over 650,000 acres of the state's farmland,[6] the relevant question in 1995 is: how can water rights be acquired at a reasonable cost and with a reasonable degree of stability? Whether appropriative or riparian rights will yield the best results for Oklahoma farmers is far from clear. Certainly, the result will vary considerably from the Panhandle to McCurtain County, and between the corporate farm and the family farm and ranch. The following analysis will address some of the issues facing the farm community in the next era of Oklahoma water law. The first section will consider the development of water rights in Oklahoma, outlining the changes in agricultural water rights and offering a description of current rights to water for agriculture. The following section will address the manner in which a riparian state, following *Franco*, might regulate stream and lake water for irrigation and stock raising, focusing on the position of the farmer appropriator in the dual system. Finally, the analysis will examine the capture and use of diffused surface water as an alternative to dependence on the uncertain rights to stream water in a riparian system.

II. The Dual System in Oklahoma

This section will describe the development of the dual system of water rights in Oklahoma beginning with the legislation of Oklahoma Territory and the judicial analysis of riparian and appropriative rights. Further, the reforms encouraged by the Citizens Committee[7] and enacted by the legislature as the 1963

1. SOIL CONSERVATION SERV., BASIC STATISTICS — NATIONAL RESOURCES INVENTORY (NRI) at 1-3, tbl. 3 (1980).
2. *Id.*
3. 2 U.S. GEOLOGICAL SURVEY (USGS), WATER RESOURCES DATA OKLAHOMA 2 (1993) [hereinafter WATER RESOURCES DATA].
4. 60 OKLA. STAT. § 60 (1963); 82 OKLA. STAT. § 1A(a), (b) (1963).
5. Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 855 P.2d 568 (Okla. 1990), *readopted & reissued* 64 OKLA. B.J. 1197 (Okla. 1993).
6. MICHAEL KIZER, 1987 IRRIGATION SURVEY SUMMARY 1 (1987).
7. Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface in the Pre-1963 Period*, 22 OKLA. L. REV. 1, 10 (1969) [hereinafter Rarick, Pre-1963 Water Law]; Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface Under the 1963 Amendments*, 23 OKLA. L. REV. 19 (1970) [hereinafter Rarick, *1963 Amendments*].

amendments[8] will be discussed. The final segment of this section identifies the relative rights of riparians and appropriators in Oklahoma as a result of the *Franco* ruling.[9]

A. Statutory Scheme

The first session of Oklahoma's territorial legislature enacted the basic statutory rights to water recognized in Oklahoma until the amendments of 1963. Borrowed from the laws of Dakota Territory,[10] the statute provided:

> The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream may be used by him so long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same.[11]

Under this territorial statute, the farmer owned water diffused over the surface of land or groundwater absolutely. The water could be captured and used for irrigation or livestock watering without interference from adjoining landowners. The water of a definite stream was not owned by the landowner but could be used as it flowed through the land. Even though the statute appears to adopt a natural flow idea by prohibiting the landowner from preventing the natural flow of the stream, courts in riparian states began applying a reasonable use standard to riparian rights to allow streams to be used more productively.[12] Therefore, it is likely that, when a conflict arose between riparians in Oklahoma Territory, both landowners were required to find some reasonable sharing arrangement to the stream water.

The appropriation system was adopted in Oklahoma Territory in 1897.[13] Prior appropriation was limited to those areas of Oklahoma Territory (western Oklahoma) in which irrigation was required to supplement rainfall for viable agriculture.[14] In these drier areas water was declared to be the property of the public and could be appropriated for irrigation, mining, milling, municipal water, and raising livestock.[15] Water available for appropriation included the "flow or underflow of every running stream or flowing river, and the storm or rain waters of every river or natural stream, canon, ravine, depression or watershed."[16]

Appropriators in Oklahoma Territory acquired appropriative rights based on the earliest beneficial use of water.[17] Oklahoma farmers could acquire appropriative rights to irrigate their farmland by diverting stream water or capturing runoff water flowing through depressions. The appropriation statute protected the earlier users from interference by later appropriators.

The statute also preserved the rights of the riparian landowner by prohibiting diversion of stream water in amounts that would interfere with the riparian's right to use the water for necessary domestic purposes.[18] Additionally, appropriators were prohibited from diverting the ordinary flow of streams to the injury of riparian landowners.[19] It is not clear whether riparians in the semiarid parts of Oklahoma Territory retained reasonable use rights for irrigation, raising livestock, or other uses apart from household needs. Because appropriation was enacted only for the drier regions of western Oklahoma, riparian reasonable use rights may have been limited to those areas of western Oklahoma with more rainfall where

8. 60 OKLA. STAT. § 60 (1963); 82 OKLA. STAT. § 1A(a), (b) (1963).
9. *Franco*, 855 P.2d at 578.
10. TERR. DAK. COMP. LAWS § 2771 (1887).
11. TERR. OKLA. STAT. § 4162 (1890).
12. Joseph W. Dellapenna, *Owning Surface Water in the Eastern United States*, 1 E. MIN. L. INST. 1-1, 1-7 (1981).
13. TERR. OKLA. STAT. ch. 44, art. 1 (1897).
14. TERR. OKLA. STAT. § 3282 (1897).
15. *Id.* § 3285.
16. *Id.* § 3282.
17. *Id.* §§ 3285, 3286.
18. *Id.* § 3291.
19. *Id.* § 3284.

irrigation was not commonly used. If this is the case, riparians in the drier regions would obtain water for domestic uses based on their rights as riparians, but water for irrigation and livestock watering would be acquired by an appropriative right based on priority in time.

Oklahoma water rights were modified in 1905. All rights to the use of water were to be based on beneficial use and priority in time.[20] The statute omitted any reference to the rights of riparian landowners — to preserve the rights of riparians to take domestic water from a fully appropriated stream, or to prohibit injurious diversions without the riparian's consent — as the 1897 version had.[21] Additionally, the 1905 statute, unlike the 1897 laws, made no provision for its application only in the more arid parts of the territory.[22]

The appropriation system created by these 1905 statutes appeared to be the only water rights specifically recognized as water rights on the eve of statehood. However, riparian rights to use stream water continued to be preserved in the real property statutes, in language identical to that adopted in Oklahoma in 1890, as rights appurtenant to land ownership.[23] Changes in 1910 provided that water rights were to be acquired by filing an application with the state engineer.[24] Hydrographic surveys of every watershed or stream system were to be conducted to promote the orderly allocation of the state's water.[25] Under this statutory scheme, appropriative rights could only be acquired by adjudications apportioning stream water among claimants or by permit from the state engineer. The 1910 changes to the appropriation system were an attempt to move Oklahoma from a prior appropriation system based on private diversions to a prior appropriation system based on administrative control.

B. Appropriation Cases

The 1905 appropriation statutes appeared to contemplate only those appropriation rights created by statutes. Early Oklahoma cases, however, recognized a variety of appropriative rights. The Territorial Supreme Court, in *Gates v. Settlers' Milling, Canal, & Reservoir Co.*,[26] decided a conflict between appropriators under "the general law applicable to such cases,"[27] or the common law of appropriation. Where the common law requirements of diversion and application of water to beneficial use were met, the superior appropriative right was based on priority in time.[28] In the 1910 Revised Laws of Oklahoma, the revisor recognized the *Gates* decision in the historical notes to section 3636. The revisor listed the requirements for the common law right (construction of diversion works, actual diversion, application to beneficial use) and called these requirements the "general law, exclusive of statute."[29]

In 1912 the Oklahoma Supreme Court resolved a water rights conflict considering the statutory method of acquiring appropriation rights. In *Gay v. Hicks*,[30] the court ruled that a permit to appropriate may only be obtained after all the procedures of the statute have been completed.[31] According to the court, the statutory requirement of a hydrographic survey was to provide the information necessary for the court to render "a decree which definitely fixes these rights and upon which all parties may act with certainty for the future."[32] A similar conflict arose in 1915, when the court deciding *Owens v. Snider*[33] ruled that

20. 1905 Terr. Okla. Sess. Laws ch. 25, § 1 (1905).
21. TERR. OKLA. STAT. §§ 3284, 3291 (1897).
22. *Id.* § 3282.
23. 2 REV. LAWS OKLA. § 6634 (1910) (identical to TERR. OKLA. STAT. § 4162 (1890)).
24. 1 REV. LAWS OKLA. § 3643 (1910).
25. *Id.* § 3639.
26. 91 P. 856 (Okla. 1907).
27. *Id.* at 856.
28. *Id.* at 858.
29. 1 REV. LAWS OKLA. 941 (1910).
30. 124 P. 1077, 1082 (Okla. 1912).
31. 1909 Comp. Laws Okla. §§ 3915-3982.
32. *Gay*, 124 P. at 1081.
33. 153 P. 833, 836 (Okla. 1915).

the plaintiff's permit, issued by the state engineer before a hydrographic survey or an adjudication of rights, gave the plaintiff no rights as against the defendant appropriator.

The common idea of these cases is that the statutory appropriative right could only be acquired after the completion of a hydrographic survey and a stream adjudication. The extent to which the Supreme Court recognized appropriation under the general law is not entirely clear. The *Gay* court may have contemplated appropriative rights arising outside the statutory framework, in holding that the state engineer could not issue permits that would "impair vested rights" in stream water.[34] The requirement of a hydrographic survey for a stream system, to be followed by an adjudication of rights, implies that numerous parties may have acquired some legal interest in the stream, apart from filing for a permit, through diversion and application to a beneficial use. For example, one of the *Gay* plaintiffs claimed appropriative rights from Texas when his land in Greer County belonged to that state. Furthermore, the *Owens* court noted that apportioning water to various claimants, determining priorities and specific amounts, was to be accomplished by an adjudication involving all parties interested.[35] In neither case was the permit holder afforded rights superior to other users of the stream who had not complied with the statute.

The nature of riparian rights when the early appropriation cases were decided is not clear. Riparian rights were never discussed with respect to appropriative rights.[36] Even with this omission, it is likely that Oklahoma courts contemplated several ways to acquire water rights. The property statutes provided that riparian land owners retained the right to use water flowing in a definite stream through their land.[37] Riparian rights recognized in common law riparian states were limited to reasonable use of water for domestic and other purposes, including irrigation.[38] Additionally, case law recognized appropriators claiming under the "general law,"[39] appropriators claiming under the law of another jurisdiction,[40] and appropriators who initiated claims pursuant to a prior Oklahoma statute.[41] These rights were to be resolved and quantified through the stream adjudication which encompassed "all parties who claim the right to use such waters."[42] It appears that existing riparian uses were to be fixed at a definite quantity with a priority date based on initiation of use, and future riparian rights were to be obtained by filing an application with the state engineer.[43] In this sense the waters of Oklahoma's streams and rivers were public waters to be allocated either by a court or by the state engineer. However, as later cases indicate,[44] the idea of reasonable use riparianism remained a valid basis for water rights claims.

C. *Stream Adjudications*

The framers of the appropriation statutes and the courts interpreting those statutes underestimated the time required to complete surveys and adjudications of all Oklahoma streams. Only four adjudications had been completed by 1962, when a reform of the water code was initiated.[45] The statute in effect at the

34. *Gay*, 124 P. at 1081.

35. *Owens*, 153 P. at 836.

36. *See* WELLS A. HUTCHINS, THE OKLAHOMA LAW OF WATER RIGHTS 17 (1955); Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface in the Pre-1963 Period*, 22 OKLA. L. REV. 1, 44 (1969).

37. 2 REV. LAWS OKLA. § 6634 (1910).

38. *See* Dellapenna, *supra* note 12.

39. *Gates*, 91 P. at 85.

40. *Gay*, 124 P. at 1078.

41. TERR. OKLA. STAT. § 3282 (1897); 1905 Terr. Okla. Sess. Laws ch. 25.

42. 1 REV. LAWS OKLA. § 3634 (1910).

43. *Id.* § 3643.

44. Smith v. Stanolind Oil Co., 172 P.2d 1002 (Okla. 1946); Baker v. Ellls, 292 P.2d 1037 (Okla. 1956).

45. For a full discussion of the reform process, see Rarick, *1963 Amendments*, *supra* note 7. The four stream adjudications were City of Tulsa v. Grand-Hydro, No. 5263 (Dist. Ct. Mayes County, Okla. Feb. 14, 1938) [hereinafter Tulsa-Grand River Decree]; Oklahoma City v. Guymon, No. 99028 (Dist. Ct. Oklahoma County, Okla. Dec. 20, 1939) [hereinafter North Canadian Decree]; City of Durant v. Pexton, No. 1966 : (Dist. Ct. Bryant County, Okla. 1955) [hereinafter Blue River Decree]; Oklahoma City v. State Bd. of Pub. Affairs, No. 10217 (Dist. Ct. Atoka County, Okla. Oct. 28, 1958) [hereinafter North Boggy Creek Decree].

time of the adjudications stated that priority dates were to be determined by either the date of application for a permit or, in cases of claims inititiated before statehood, the date of initiating the claim and putting water to beneficial use.[46] According to Professor Joseph F. Rarick, this change was to recognize all beneficial uses made prior to statehood.[47] Valid beneficial use rights under this provision would encompass the *Gates* appropriations based on the common law of appropriation, uses perfected under the 1897 statute which required only that claims be filed in public records,[48] and those who attempted to follow the 1905 law by filing an application with the state engineer. The adjudications reveal that courts may have applied equitable principles, or common law appropriation, alongside the statutory requirements in determining rights.

Only the Tulsa-Grand River Decree ruled that the permits issued prior to the adjudication did not convey valid appropriative rights.[49] Several cities received senior rights based on beneficial uses before statehood, but their priorities were limited to the amounts beneficially used before statehood.[50] The remaining applicants received vested appropriative rights based on the date of filing an application,[51] in accordance with the 1925 statute.[52]

The other adjudications generally followed the principle of "first in time, first in right." Beneficial uses initiated before statehood were given superior priorities.[53] Those initiating uses after statehood were given priority dates based on the date of application.[54] Both the North Canadian Decree and athe North Boggy Creek Decree, however, recognized appropriative rights initiated after statehood but for which no application had been filed.[55] As noted above, the 1925 amendment limited appropriative rights to those initiated prior to statehood or those based on filing an application.[56] These courts seem to have recognized a common law of appropriation, or, alternatively, used the stream adjudication to transform existing riparian uses into appropriations.

The decrees give no indication whether any of the rights adjudicated actually belonged to riparian landowners. Given the breadth of the stream systems involved, it is reasonable to assume that numerous riparians were not included in the adjudication process. Two of the decrees lists defendants who were served with notice of the adjudication but failed to appear. These parties were judged by default to have priorities lower than any who actually participated in the adjudication.[57] What rights are retained by the landowners who were not notified? In accordance with the due process requirements of notice and the opportunity to be heard, landowners who were not notified of the adjudications and who did not participate are not bound by the decrees.

The potential impact of these unadjudicated rights is incalculable. After *Franco*, riparians asserting rights under the common law could disrupt the rights granted by the decrees to an extent that mass confusion, rather than judicial order, reigns in Oklahoma water law. The cities whose appropriative rights were decided in the adjudications may now be subject to the claims of riparians along all these stream systems. Landowners along the North Canadian, for example, can assert riparian rights for irrigation,

46. 1925 Sess. Laws Okla. ch. 76, § 1, at 125.

47. Rarick, *1963 Amendments*, *supra* note 7, at 38.

48. TERR. OKLA. STAT. § 3287 (1897).

49. Tulsa-Grand River Decree, *supra* note 45, ¶ 13.

50. *Id.* ¶ 13.

51. *Id.* ¶ 18. Although the permits issued to these parties before the adjudication were held invalid, they received priority dates based on the date of filing an application. It so happened that these parties' temporal priority in filing applications coincided with the temporal order in which the parties had initiated beneficial uses. *Id.* ¶¶ 3-7, 12.

52. *See supra* note 46.

53. North Canadian Decree, *supra* note 45, at pt. IV, priorities 1-16; Blue River Decree, *supra* note 4, at pt. IV, priority 1.

54. North Canadian Decree, *supra* note 45, at pt. IV, priorities 17-20; Blue River Decree, *supra* note 45, at pt. IV.

55. North Canadian Decree, *supra* note 45, at pt. IV, priorities 21-66; North Boggy Creek Decree *supra* note 45, at pt. IV, priority 1.

56. 1925 Sess. Laws Okla. ch. 76, § 1.

57. North Canadian Decree, *supra* note 45, at pt. V; Blue River Decree, *supra* note 45, at pt. VI.

domestic uses, raising livestock, or cooling cattle from Texas and Ellis counties in the west to Lake Eufaula in the east. The cities of El Reno and Oklahoma City, who began using North Canadian River water in 1891 and 1892, respectively,[58] may be required to reduce their diversions from that river to provide for the newly initiated uses of riparians. Oklahoma City may also have to reduce diversions from North Boggy Creek, near Atoka. Any of the riparian landowners within the North Boggy Creek watershed, an area covering approximately 231 square miles,[59] could bring suit against the city for release of water that may now be public water to be shared by riparians. If a court grants any of these riparians reasonable use rights to the natural flow, or a minimum flow, the cities and other appropriators will have to look elsewhere for water supplies.

D. Riparian Cases

How might the riparian landowners assert their rights? The rights of the riparian land owner, though not as fully developed by statute, were clearly recognized by Oklahoma courts throughout the state's history. It should be remembered that the cases in which riparian rights were asserted pitted riparians against riparians without need for the court to consider the idea of appropriative rights. Riparian rights in Oklahoma, therefore, developed in a vacuum where the court dealt only with the immediate controversy. Like the appropriation cases discussed earlier, the riparian cases were decided without incorporating the alternative basis for determining rights to water.

Some of the earliest cases purporting to adopt the common law of riparian rights deal with the issue of obstructing a water course to the detriment of neighboring land owners.[60] For example, in *Groves*, the court adopted the common law as opposed to the "civil law" in reference to the law governing the discharge of surface waters.[61] It is in this context that the court stated:

> [W]herever the common law prevails, every proprietor upon water flowing in a definite channel so as to constitute a water course has the right to insist that the water shall continue to run as it has been accustomed, and that no one can change or obstruct its course injuriously to him without being liable for damages.[62]

As a result, the court applied the common law rule to bar modification of a natural water course when the result caused flooding of neighboring land owners. Even though the *Groves* court was not addressing the riparian right to use water, this statement has been viewed by later courts and commentators as the origin of riparian common law in Oklahoma.[63]

Courts have also looked to the statutes as a basis for riparian rights. In *Broady v. Furray*,[64] the court interpreted Title 60, section 60 of the Oklahoma Statutes[65] to grant riparian landowners reciprocal rights to the reasonable use of a stream. The plaintiff contended that if defendant were allowed to remove a natural dam along the North Canadian River, plaintiff's fishing resort would be destroyed. Accordingly, the court viewed the plaintiff's use as reasonable and, balancing the harm to the plaintiff against the benefit to the defendant, enjoined the defendant from removing the dam.[66]

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58. North Canadian Decree, *supra* note 45, at pt. IV, priorities 4, 5.

59. North Boggy Creek Decree, *supra* note 45, at pt. I.

60. Chicago, R.I. & P. Ry. Co. v. Groves, 93 P. 755 (Okla. 1908); Town of Jefferson v. Hicks, 102 P. 79 (1909); Atchison, T. & S.F. Ry. Co. v. Hadley, 35 P.2d 463 (Okla. 1934).

61. *Groves*, 93 P. at 758.

62. *Id.* at 759.

63. *See* Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 855 P.2d 568 (Okla. 1990); Smith v. Stanolind Oil Co., 172 P.2d 1002 (Okla. 1946); Martin v. British American Oil Producing Co., 102 P.2d 124 (Okla. 1940).

64. 21 P.2d 770, 771 (Okla. 1933).

65. 60 OKLA. STAT. § 60 (Supp. 1926) is the identical statute as 1 REV. LAWS OKLA. § 6634, which is identical to TERR. OKLA. STAT. § 4162 (1890). Indeed, title 60, § 60 remained unchanged from 1890 until 1963.

66. *Broady*, 21 P.2d at 772.

Not until a 1946 case from Kingfisher County[67] did the court address the issue of riparian use of water. Plaintiffs sought protection of their use of water for farming and livestock from the defendant, Stanolind Oil Company, which diverted water from Wolf Creek for use in their drilling operations on land not riparian to the stream. Stanolind asserted rights to the reasonable use to riparian water based on a lease with the riparian land owner.

Citing an earlier case,[68] the court recognized Stanolind's right to use the water as deriving from the right of the riparian lessor.[69] In determining whether Stanolind's use was reasonable, the court noted, first, that diversion of water to nonriparian land was not in itself unreasonable, and, further, that "a riparian owner has the right to make any use of water, beneficial to himself, which his situation makes possible, so long as he does not inflict substantial or material injury on those below him who are to be deemed as having corresponding rights."[70] Stanolind was allowed to continue diverting water, but was limited to taking an amount that would not interfere with the plaintiff's needs for domestic uses and livestock. Pursuant to the rule of this case, riparian rights may be transferred to nonriparians, but only to the extent of the riparian's right to a reasonable use. For example, a riparian owning five acres could not lease riparian water to a neighboring landowner who needed the water to irrigate five hundred acres. Riparian rights are based on the amount of riparian land and the use for which the water is needed. However, as will be discussed shortly, the uncertainty of riparian rights makes valuation difficult and may inhibit their transferability.

The plaintiff objected to this division of water rights on the ground that it did not allow for an expansion of the plaintiff's uses. Recognizing the limitations of the action, the court stated that the decree issued was only binding on the parties involved and to the extent that circumstances along Wolf Creek remained unchanged.[71] Under the common law, riparian rights to use water are not fixed, and, in a controversy between riparians, the court makes no "specific apportionment of the waters."[72]

Reasonable use riparian rights were later asserted by both the plaintiff and defendant in *Baker v. Ellis*,[73] a 1956 case from Beckham County. The defendant proposed to dam Fish Creek as it flowed through his land and had consulted with the Soil Conservation Service for assistance. Both the plaintiff and defendant used the creek to water livestock; however, the defendant also used water diverted from the creek for road construction. While the plaintiff conceded no injury had yet occurred, the court found the potential for great harm was certain if the defendant were not enjoined.[74]

In determining whether defendant's use was reasonable, the court considered whether, given the circumstances, the defendant's use would "cause substantial damage or detriment" to the plaintiff.[75] The court explained that "reasonableness is a factual consideration depending on the size and character of the stream, the quantity of water appropriated, the potential danger of a forever loss of the source of supply, and all the circumstances and conditions existing . . . ."[76]

Two factors seem to have tipped the balance in the plaintiff's favor. First, the stream originated on the defendant's land, and the defendant's dam would obstruct therby the fountainhead of the stream. Additionally, the reservoir for the water was located over a geological formation, Blaine Gyp, which would allow most of the water to quickly seep into underground strata, resulting in a "forever loss" of the surface water to an underground basin.[77] In effect, by obstructing the fountainhead and impounding

67. Smith v. Stanolind Oil Co., 172 P.2d 1002 (Okla. 1946).
68. Martin v. British American Oil Producing Co., 102 P.2d 124 (Okla. 1940).
69. *Stanolind*, 172 P.2d at 1005.
70. *Id.* at 1005.
71. *Id.* at 1006.
72. *Id.*
73. 292 P.2d 1037 (Okla. 1956).
74. *Id.* at 1038.
75. Baker v. Ellis, 292 P.2d 1037 (Okla. 1956).
76. *Id.* at 1039; *see also* Broady v. Furray, 21 P.2d 770, 771 (Okla. 1933).
77. *Id.*

in a reservoir prone to rapid seepage, the defendant could remove from the earth a stream which had "run from time immemorial."[78]

Under the reasonable use doctrine, the defendant was not absolutely barred from using the stream. The defendant's uses for livestock and road construction, as well as limited impoundment, were permitted. The defendant was only enjoined from interfering with the plaintiff's reasonable uses.

E. 1963 Amendments

As discussed above, the two systems of water rights developed in Oklahoma as independent bodies of law. In a pure riparian case, the appropriation doctrine was never mentioned. Prior appropriation cases omitted discussion of the riparian doctrine, even when the parties were riparian land owners. In 1963 the state legislature enacted a new water code designed to reconcile the differing judicial and legislative approaches to water rights.[79] This examination of the 1963 changes will briefly outline the legislative alterations and discuss some of the forces involved in making these changes. Information for the latter discussion is gleaned from the thorough explanation of the process by Professor Joseph F. Rarick, a leading participant in the 1963 reforms.[80]

The substance of the legislative reforms originated primarily from the work of the Special Water Code Study Committee (the Citizens Committee) which began meeting in 1962.[81] The Citizens Committee included representatives from governmental, municipal, agricultural, and business sectors,[82] all of whom had a vested interest in the law governing water rights.

The 1963 changes first divided the classes of waters into those owned by the land owner and those available for appropriation. The landowner retains ownership of diffused surface water until it reaches a definite stream, at which time it "becomes public water and is subject to appropriation for the benefit and welfare of the people of the state."[83] The riparian landowner is authorized to use stream water for domestic purposes,[84]2

which are limited to household uses, watering farm and domestic animals, and irrigation of lawns and gardens no larger than a total of three acres.[85] Further, the amendment provided that landowners could store diffused surface water by damming a stream flowing through their land, so long as the they did not reduce the flow of the stream below the level at which it had entered the owner's land.[86]

Appropriative rights were to be acquired only as provided for by statute following the 1963 changes.[87] This restriction was included to avoid any judicial creation of water rights that had no basis in the statute.[88] Seven categories of priorities were established by the amendments.[89]

Riparian landowners were provided with a mechanism to transform their existing riparian uses to an appropriative right. The right could be perfected as an appropriation with a priority date based on the

78. *Id.* at 1037.

79. Rarick, *Pre-1963 Water Law*, *supra* note 7, at 2.

80. *See* Rarick, *1963 Amendments*, *supra* note 7.

81. *Id.* at 20.

82. *Id.* at 19-20.

83. 1963 Sess. Laws Okla. ch. 205, § 1 (codified at 60 OKLA. STAT. § 60 (1991)).

84. *Id.*

85. 1963 Okla. Sess. Laws ch. 205, § 2(a) (codified at 82 OKLA. STAT. § 105.2(A) (1991)).

86. 60 OKLA. STAT. § 60 (1991).

87. 1963 Okla. Sess. Laws ch. 205, § 2(b).

88. Rarick, *1963 Amendments*, *supra* note 7, at 41.

89. The seven categories are as follows: (1) beneficial use before statehood; (2) rights decreed in the stream adjudications; (3) permits issued along the adjudicated streams following the adjudications; (4) priority date based on filing application with Oklahoma Water Resources Board and perfecting the right through the statutory mechanism; (5) federal withdrawals based on the date of issuing notice to the state; (6) beneficial use initiated after statehood but for which no application had been filed (however, this priority could not be superior to others who had filed an application before the effective date of the 1963 amendments); (7) beneficial use of water in Soil Conservation Service sediment pools where land owner granted an easement before the effective date of the 1963 amendments. 1963 Okla. Sess. Laws ch. 205, § 2(b)(1)-(7); 82 OKLA. STAT. § 105.2(B)(1)-(7) (1991).

initiation of use.[90] However, no priority based on this section would be superior to other appropriators who had filed an application for a permit before the 1963 amendments took effect. Therefore, riparians could preserve existing uses, but their claims would be inferior to appropriators who had complied with the statutory scheme before 1963. This was true even if the riparian use had been initiated prior in time.

With respect to the riparian landowner, what rights were affected by the 1963 amendments? The water rights claimed by virtue of owning land along a stream were restricted from reasonable uses to domestic uses. However, the statute provided that the landowner may take water from a stream or "take stream water for domestic use from wells" on the riparian property.[91] At the time of the 1963 amendments, this water, the alluvium, was governed as surface water rather than groundwater;[92] therefore, the alluvium, just like stream water, was available for appropriation after the 1963 changes, although subject to riparian domestic uses. In 1967, in an effort to enhance the rights of land owners, agricultural groups succeeded in having the alluvium water redefined as groundwater subject to the groundwater code.[93]

As noted previously, ownership of diffused surface water remains in the land owner. After 1963, the land owner is also authorized to dam streams for the storage of this water. The purpose of this addition was to ensure the land owner's right to store water in a stream just as water may be stored in other depressions.[94] Thus, while riparian rights were limited to de minimis uses, the land owner enjoyed the practical convenience of using a stream channel to collect and store surface water.

The riparian landowner did have the opportunity to preserve existing uses as appropriations. As appropriations, the beneficial use right was given a priority date in relation to other users along the stream, and a definite quantity. The riparian landowner could initiate a new or expanded use in the same manner as other users, by filing an application with the Water Resources Board to gain a prior appropriation right. Additionally, as an appropriation, the riparian landowner could lose or forfeit the right to use water by nonuse. Therefore, the riparian gained by becoming entitled to a specific quantity of water, but lost the right to enjoin unreasonable uses interfering with common law rights, lost the right to initiate future uses without a permit and, in some cases, could be stuck with rights subordinate to appropriators prior in time.

III. Oklahoma Water Law After Franco-American Charolaise

In 1987, the Supreme Court of Oklahoma addressed the problem of reconciling the riparian and appropriation systems for the first time. This was also the first time the court addressed the 1963 legislative amendments as they relate to the right of the riparian.[95] The following discussion will identify the issues that must be considered by farmers relying on stream or lake water for irrigation and raising livestock. First will be a discussion of the basic rights outlined in the *Franco* decision. The following section will consider the nature of riparian rights as determined by defining the limits of riparian land. The remaining discussion will focus on the conflicting rights of the riparian and the appropriator to both stream and lake water.

A. Franco-American Charolaise, Ltd. v. OWRB

90. 1963 Okla. Sess. Laws ch. 205, § 2(b)(6).

91. 82 OKLA. STAT. § 105.2(A).

92. 82 OKLA. STAT. § 1002 (1961).

93. Rarick, *1963 Amendments, supra* note 7, at 35, 36. Under the groundwater law, only those owning land above a ground water basin may obtain a permit to take water. 82 OKLA. STAT. § 1002 (Supp. 1969).

94. Rarick, *1963 Amendments, supra* note 7, at 30. This addition was part of a compromise with the 1963 changes to allow a land owner some control of water on the riparian land, even while riparian rights were severely limited. *Id.*

95. Talley v. Carley, 551 P.2d 248 (Okla. 1976), dealt with two riparian land owners, but both asserted claims as prior appropriators and had filed applications with the predecessor to the Water Resources Board for permits to apppopriate water. Therefore, this case should not be seen as dealing with riparian rights.

The central ruling of the Oklahoma Supreme Court is that common law riparian rights are vested rights which cannot be restricted by legislation without compensation.[96] Water law in Oklahoma is to be governed by a dual system of water rights, often referred to as the "California Doctrine."[97] The court further held that an appropriative right may be subject not only to loss by nonuse and the superior priority of a senior appropriator, but also to the riparian's common law of reasonable use.[98]

In the court's view, the reconciliation of the riparian and appropriation systems is to be accomplished by considering riparians who seek permits to appropriate water to have voluntarily relinquished their riparian rights under the common law, retaining only the domestic use rights afforded by the statute.[99] The reconciliation of the two doctrines in Oklahoma may also be seen as permitting the appropriator the reasonable use of stream water on nonriparian land, a position similar to the riparian but certainly not equal. In the latter instance, the appropriative right would always be subject to divestment by a riparian asserting a reasonable use.

B. Riparian Land

1. Delimiting Riparian Land

Who may assert riparian rights? How much water may be claimed? Appropriators in Oklahoma's dual system must have some idea of which landowners may challenge the appropriator's consumptive uses and the extent of land for which riparian rights can be claimed. In the riparian system, two basic concepts govern the right to use water. The water use must be reasonable, and the water used must be for the benefit of riparian land. Courts must decide whether the land bears the proper relationship to the water in which rights are claimed. Three theories for defining the extent of riparian land have been used in riparian jurisdictions — the watershed limitation, the source of title theory, and the unity of title theory.

The watershed limitation means that only land within the watershed of the stream may be claimed as riparian. Land owned by the riparian owner lying outside the watershed cannot be considered in determining the amount of water the riparian can reasonably use.[100] The rationale for this limitation is that only the land feeding the watercourse is entitled to benefit from the flowing water.[101] The result of the watershed limitation is that the water diverted by riparians will return to the stream, as irrigation tail waters, for example, for the benefit of downstream riparians who have coequal rights in the waters of the watershed.

Like the watershed limitation, other theories of riparian land are based on the purpose to be served and the position of the riparian within the water rights system. The source of title theory has been adopted in states where riparian rights are restricted. Under this rule land is limited to the smallest tract adjacent to the stream throughout the chain of title.[102] For example, where a landowner along a stream divides the tract and sells the parcel farthest from the stream, this parcel no longer has riparian status. If a later owner buys both parcels, the severed tract does not regain riparian status, even though it is owned by a riparian landowner.

States applying the unity of title rule would consider all land in the previous illustration to be riparian. Unity of title means that all tracts adjacent to the riparian tract and owned by one person are included as riparian land, and, therefore, may be considered in determining riparian rights.[103] The result of the unity of title rule is that one landowner can acquire a riparian tract, buy surrounding nonriparian

96. *Franco*, 855 P.2d at 570.

97. *Id.*

98. *Id.*

99. *Id.* While the court purports to adopt the California Doctrine, California does not hold that riparians relinquish their riparian rights in this manner. WATERS AND WATER RIGHTS § 8.04(b), at 407 (Robert E. Clark ed. 1976) [hereinafter WATER AND WATER RIGHTS]. This relinquishment is attributed to the rule of Oregon and is referred to as the "Oregon Doctrine." *Id.* § 8.04(a), at 405.

100. Stratton v. Mt. Herman Boys School, 103 N.E. 87, 88 (Mass. 1913).

101. Anaheim Union Water Co. v. Fuller, 88 P. 978, 980 (Ca. 1907).

102. Crawford Co. v. Hathaway, 93 N.W. 781, 790-91 (Neb. 1903).

103. Wasserburger v. Coffee, 141 N.W.2d 738, 744 (Neb. 1966).

tracts in a piecemeal fashion, and acquire riparian rights for all parcels. In an exclusively riparian system the unity of title rule may be the most suitable because land ownership is the only means of acquiring water,[104] but where appropriative rights are also recognized, some restrictions on riparian land are in order.[105] Nebraska, a state recognizing both riparian and appropriative rights, restricts riparian land by the source of title rule to further that state's legislative abrogation of the riparian right to initiate future uses of water.[106]

How will Oklahoma define riparian land? The resolution of this issue is the first step in determining the alternatives available to farmers for acquiring water rights. Farmers owning riparian land may reasonably use stream water for irrigation, but their riparian rights will be calculated based on the number of riparian acres. For example, riparian water may be diverted to irrigate nonriparian fields,[107] but the amount of water available depends on the riparian acres, not the size of the nonriparian field where the water will be used. Because riparian water should be used for the benefit of riparian land, a riparian seeking to use water for raising livestock will be limited to the reasonable number of cattle that should be kept on the riparian tract. Where the riparian use is for fighting grass fires, for recreation, or for wildlife, the right to water is based on the amount needed for these uses on the riparian tract, not on all land owned by the riparian.

Oklahoma has no cases that directly face the issue of delimiting riparian lands. Based on past Oklahoma statutes and cases, including *Franco*, relating to water rights, there simply is no way of predicting which of these traditional tests that have delimited riparian lands will become the law in Oklahoma.

2. Severance of Riparian Rights from Riparian Land

Whether riparian rights can be severed from the riparian land is a significant concern for both riparians and appropriators. If riparian rights can be severed and transferred, appropriative rights are even more uncertain because ease of alienation creates more possibility for the initiation of future riparian uses divesting the appropriative right. Some riparian jurisdictions prohibit severance and conveyance of riparian rights when a larger riparian tract is subdivided and some tracts are no longer adjacent to the stream or lake.[108] Because riparian rights depend on the relationship of the land to the water source, they are not alienable, severable, or assignable apart from the land adjacent to the watercourse.[109]

Recent cases from other riparian states grant riparian status to holders of easements, even though the land owned is not riparian.[110] However, these cases involve nonconsumptive uses such as fishing and recreation, rather than the consumptive uses of irrigation or animal husbandry.

In *Smith v. Stanolind*,[111] the Supreme Court of Oklahoma allowed the severance of consumptive riparian rights by lease to nonriparian landowners, but the rights derived from the lease cannot exceed the reasonable use rights of the riparian. Moreover, in *Franco*, the court cited approvingly *Restatement (Second) of Torts*, Section 850 for determining reasonablness of a riparian water use. In light of the *Stanolind* and *Franco* decisions, it seems likely that the Oklahoma Supreme Court would favorably rely upon

104. WATERS AND WATER RIGHTS, *supra* note 99, § 7.02(a)(2), at 223.

105. *Wasserburger*, 141 N.W.2d at 745.

106. *Id.*

107. Smith v. Stanolind, 172 P.2d 1002, 1005 (Okla. 1946).

108. Thompson v. Enz, 154 N.W.2d 473, 481 (Mich. 1967) (littoral tract subdivided for resort property and only tracts bordering on lake retain littoral rights); Harvey Realty Co. v. Borough of Wallingford, 150 A. 60, 63 (Conn. 1930) (developer of lake property prohibited from conveying littoral rights to buyers of nonlittoral tracts).

109. Thompson v. Enz, 154 N.W.2d at 483. Tennessee, a riparian state, limits riparian land to those tracts within the watershed and prohibits severance of riparian rights for use on nonriparian land. JACK D. JONES ET AL., STUDY OF TENNESSEE WATER RESOURCES LAW, LEGAL CONSIDERATIONS FOR EFFECTIVE WATER MANAGEMENT UNDER CONDITIONS OF SHORTAGE 47 (1983). The practical effect of these rules is that water remains within the watershed of origin for the benefit of landowners in the watershed.

110. Stoesser v. Shore Drive Partnership, 494 N.W.2d 204 (Wisc. 1992); Ezikovich v. Linden, 618 A.2d 570, *cert. denied*, 623 A.2d 1023 (Conn. 1993).

111. 172 P.2d 1002, 1004 (Okla. 1946).

Sections 855, 856, and 857 of the *Restatement (Second) of Torts* in any future case raising the issue of alienability of riparian rights in Oklahoma. Sections 855-857 of the *Restatement* make no distinction between riparian and nonriparian uses of water so long as the nonriparian has a grant of a riparian right from a riparian landowner.

If riparian rights are easily alienable in Oklahoma, the prior appropriation system might well wither away because those desiring to use water on nonriparian lands will buy riparian rights, rather than apply to the state for appropriative rights, as the preferred method for obtaining water. Moreover, if riparian rights are easily alienable in Oklahoma, including across watershed boundaries, the delimitation of what lands qualify as riparian lands becomes relatively less important.

3. Relinquishing Riparian Rights

Another issue related to riparian land concerns the relinquishment of riparian rights when the owner applies for appropriative rights. As stated in *Franco*, a riparian who applies for an appropriation in stream water is deemed to have voluntarily given up riparian rights in that stream.[112] The court does not explain how much of the riparian right is forfeited. Does the riparian forfeit rights for all riparian tracts, or only for those lands specified on the permit application? Or is the quantity of riparian water reduced by the amount sought in the application? When a riparian obtains an instream appropriation claiming the right to a certain stream level, this may prevent the riparian from asserting the right to the natural flow or a minimum stream or lake level against other riparians or senior appropriators along the stream.

The *Franco* court indicated that the relinquishment of riparian rights would only apply prospectively to applications for appropriations. It is not clear whether the riparian who perfected appropriative rights after the 1963 amendments must affirmatively forfeit that appropriation to continue riparian rights, or whether the riparian retains both the appropriative right and the riparian right.

Defining the extent of riparian lands might influence whether the riparian chooses to retain or forfeit riparian rights because an appropriative right is not limited to a certain type of land, but only to the lands specified in the permit. If the source of title theory is applied, the riparian will not be allowed to buy contiguous tracts of land and assert the riparian right to initiate future uses of water for that land. Water to irrigate the later-acquired land could possibly be obtained by appropriation. This fact returns us to the rule of relinquishment. By filing an appropriation application to irrigate later-acquired land, is the riparian right to irrigate riparian fields forfeited? Forfeiture would benefit senior appropriators by eliminating the possibility that this particular riparian would initiate future uses of the stream, and thereby divest the appropriative right.

Riparians might also take into account whether riparian rights are easily alienable in deciding to retain or relinquish riparian rights. If riparian rights are easily alienable, riparians would likely be afraid to apply for a prior appropriation after *Franco* because doing so apparently deprives the riparian of the chance to benefit economically by alienating riparian water rights to nonriparians. Moreover, if riparian rights are easily alienable, the simple solution for obtaining water for nonriparian land that a landowner owns is for the landowner to purchase or lease riparian rights for the nonriparian land.

The relinquishment holding of *Franco* seems to carry the implication that the prior appropriation system will wither away in Oklahoma. Riparians would be acting foolishly to apply for prior appropriations because they might lose the right to sell riparian rights to nonriparians and because they would acquire an appropriative right which is always subject to divestment by other riparians, including other riparians alienating riparian water rights.

112. *Franco*, 855 P.2d at 581.

4. Implications for Agriculture of These Riparian Land Issues

Prior appropriation became a part of Oklahoma law in 1897 when the legislature adopted prior appropriation as a statutory method by which farmers could acquired water for irrigation.[113] For years thereafter, the prior appropriation statutes appeared in the Oklahoma statutes under the chapter heading, "Irrigation."[114] Consequently, the Oklahoma agricultural sector has grown accustomed to acquiring and using water in accordance with the prior appropriation system.

As a consequence of *Franco*, the agricultural sector needs to break their habit of thinking of water rights in prior appropriation terms. Farmers and ranchers now must realize that not all of their agricultural lands qualifies as riparian land and that the water used on that land under a prior appropriation is subject to divestment by riparians. Moreover, farmers and ranchers must recognize that how they acquire water for nonriparian lands might have changed from the task of applying for a permit from the Oklahoma Water Resources Board to the task of negotiating with riparian landowners to purchase or lease riparian rights. What farmers and ranchers used to obtain for free from public waters, farmers and ranchers now must likely buy or lease from the private property rights of riparian landowners. Finally, for those farmers and ranchers who have some riparian and some nonriparian land, they must carefully consider the implications of the relinquishment doctrine *Franco* articulates. Farmers and ranchers must now realize that following the old habit of applying for a water rights through the appropriation system comes at the cost of relinquishing riparian rights. After *Franco*, ignorance of Oklahoma water law probably involves substantial unintended consequences for Oklahoma's farmers and ranchers.

C. Competition for Oklahoma's Water After Franco

1. Dividing Stream Water Among Riparians and Prior Appriopriators

Conflict among water users is most likely to occur in the western half of Oklahoma where water is scarce, especially during the summer months. Oklahoma irrigates with 1.6 million acre feet of water, with eighty percent deriving from groundwater sources such as the Ogallala Aquifer and wells drilled into the alluvium and terrace deposits.[115] Of the 659,857 acres of irrigated farmland in Oklahoma, groundwater is used on 538,788 acres, while farmers owning the remaining 115,644 acres depend on surface water from streams and lakes, or diffused surface water.[116] It is clear from these statistics that a significant number of Oklahoma farmers will have to rethink their water usage rights as a result of the revival of riparian rights following *Franco*.

The adjustment to the *Franco* decision will concern a greater number of farmers in western Oklahoma than in eastern Oklahoma. Of primary concern is the fact that, according to the Oklahoma Water Resources Board, by 1980 all stream systems in the western half of Oklahoma were fully appropriated.[117] The result for western Oklahoma farmers is that all those appropriating water from streams are now at risk of divestment by riparians initiating new uses. Figures indicate that 584,657 acres of the reported 659,857 acres of irrigated land are located in the counties located west of Oklahoma City, including Oklahoma County.[118] Western Oklahoma farms use nearly twice the amount of surface water for irrigation that eastern Oklahoma farms use.[119] The number of farms reporting irrigation for 1987 included 3625 western farms compared to only 711 in eastern counties.[120] The paradox of these statistics is that

113. TERR. OKLA. STAT. ch. 44, art. 1 (1897).
114. *E.g.*, 1 REV. LAWS OKLA. ch. 40 (1910) ("Irrigation"); 2 COMP. STAT. OKLA. ch. 53 (Bunn, 1921) ("Irrigation").
115. OKLAHOMA WATER RESOURCES BD., OKLAHOMA WATER ATLAS 67 (1990) [hereinafter WATER ATLAS].
116. KIZER, *supra* note 6, at 1.
117. OKLAHOMA WATER RESOURCES BD., OKLAHOMA COMPREHENSIVE WATER PLAN 10, at fig. 3 (1980) [hereinafter WATER PLAN].
118. KIZER, *supra* note 6, at 2-3. Thus, almost ninety percent of irrigated land lies in arid, western Oklahoma.
119. *Id.* at 10-11.
120. *Id.* at 2-3.

the controversy leading to the revival of riparian rights arose on a stream system in Pontotoc and Coal counties in southeastern Oklahoma where only twenty-two farms reported using irrigation in the 1987 survey.[121] The fact that the riparian uses asserted in *Franco* involved nonconsumptive uses rather than consumptive uses (such as irrigation), coupled with the relatively few farmers irrigating in that area, illustrates the disproportionate impact of a riparian system between western and eastern Oklahoma.

Those allocating Oklahoma water must now consider both appropriators having permits and the reasonable uses of riparians. What are riparian reasonable use rights? A conflict may arise between riparians when a riparian diverts water for irrigation, and too little water is left for irrigation or livestock watering by the downstream riparian. The competitors for water can include any riparians along the stream system. Downstream riparians can challenge the amount of water diverted by an appropriator upstream. Because riparian water rights are outside the prior appropriation system governed by the Oklahoma Water Resources Board, *Franco* creates the conditions for a substantial amount of private litigation between riparians.

In Oklahoma, before and after *Franco*, the riparian land owner had the right to the reasonable use of stream water along with other riparians having "reciprocal rights,"[122] "coequal rights,"[123] or "corresponding rights."[124] Some recognized reasonable riparian uses include watering livestock, domestic or household uses, road construction, commercial fishing, and irrigation.

When the right of the appropriator to a certain quantity of water for irrigation or livestock has previously been established by permit, riparian claims may now partially or completely divest the appropriative right. Therefore, where an appropriator has invested time and money for arable land and irrigation systems, relying on the certainty of the appropriative permit, a riparian can assert a right to use the water for farming or other purposes and the water available for the appropriator's fields and livestock can be reduced by the amount required to meet the riparian's reasonable needs.

2. Private Riparian Right

Simply asserting a riparian right does not mean the riparian will actually receive all the water claimed. The common law riparian right is private and must be asserted pursuant to riparian land ownership.[125] The private nature of the riparian right means that claims asserted against appropriators or other riparians must relate to the landowner's wish to use the stream for irrigation, other farming uses, recreation for the landowner's family or guests, business, or for the protection of aesthetic or environmental values for the benefit of the riparian land, as opposed to the landowner.

The extent to which the public interest can provide additional support for a private riparian claim is not settled in the law.[126] Following *Franco*, Oklahoma courts may be called upon to define the parameters of the private riparian right as it relates to water for wildlife habitat. The *Franco* plaintiffs argued that a reasonable use for the private riparian is the preservation of wildlife. While the Court did not indicate whether this is a reasonable use, reference was made to the Oklahoma statute providing that uncaptured wildlife is the property of the state,[127] and the principle that the reasonableness of any riparian right in wildlife must be considered in light of the common law of private riparian rights.[128]

121. *Id.*

122. Broady v. Furray, 21 P.2d 770, 771 (Okla. 1933).

123. Smith v. Stanolind Oil, 172 P.2d 1002, 1004 (Okla. 1946).

124. *Id.* at 1005.

125. Richard Ausness, *The Public Trust Doctrine And the Protection of Instream Uses*, 1986 UNIV. ILL. L. REV. 407, 418 (1986).

126. *See generally* Peter N. Davis, *The Riparian Right of Streamflow Protection in the Eastern States*, 36 ARK. L. REV. 47, 72 (1982) (noting that riparian water law has not protected private interests in water for natural wildlife habitats); Lynda L. Butler, *Environmental Water Rights: An Evolving Concept of Public Property*, 9 VA. ENVTL. L.J. 323, 328 (1990) (public interest in instream ecological uses protected to the extent of the private riparian right). Applying the Public Trust Doctrine as an alternative to riparian private rights for the protection of instream uses will be discussed in the chapter by Lisa McDonnell.

127. 29 OKLA. STAT. § 7.204 (1991).

128. *Franco*, 855 P.2d at 578 n.53.

In future controversies surrounding the agricultural user and the riparian, the question must be asked, "For what purpose is the riparian claiming water to protect wildlife?" Both the majority and the dissent address the preservation of wildlife, but in different contexts. According to the dissent, protecting wildlife habitat is a public interest which may be pursued by the state under the Public Trust Doctrine, where applicable, but for which the riparian has no compensable private interest.[129] Where the riparian claims a private interest in wildlife, the entitlement is limited to categories which may be characterized as enhancement of the value of riparian land. One Oklahoma court protected a riparian's "pecuniary" interest in preserving an oxbow lake on which the riparian had established a commercial fish hatchery.[130] Other riparian jurisdictions protect the riparian's recreational interest in wildlife, particularly fish,[131] but note that under the reasonable use rule, an irrigator's interference with "occasional recreational fishing" may be negligible and, therefore, not compensable.[132]

3. Other Characteristics of the Riparian Right

Once the private nature of the riparian claim is established, Oklahoma courts must determine the respective rights of riparians and appropriators seeking water for agriculture. Some of the issues involved in the competition for water include natural versus artificial uses, the nature of the farming operation as it relates to the capacity of the stream, and the time the claimant has been using the water.

a) Timing

The basic feature of the appropriative right is priority in time. Riparian rights do not depend on time of use, and, after *Franco*, the appropriator is always at risk that a riparian will start a new use or expand an existing use which will reduce the appropriator's water right. Consider the example of the farmer/appropriator who obtained a permit for irrigation in 1973. For over twenty years, the farmer has depended on the irrigation to raise crops, and has been able to expand production because of the irrigation. In 1995, a riparian downstream sells riparian land to a farmer who begins diverting water for irrigation. In an appropriation system, the farmer who used the water since 1973 has the superior claim over later users. After *Franco*, the later riparian user, because of the vested property right in prospective uses of stream water, has the same, or greater, right to the water as the prior appropriator of over twenty years.[133] The Oklahoma approach holds that the common law riparian right "places no stock in the fact of past use, present use, or even nonuse."[134] This view coincides with the decision of *Tyler v. Wilkinson*,[135] the earliest true riparian case in the United States, which ruled that downstream riparians using an ancient dam had no priority in time and no greater right than the upstream defendant who dammed the stream.[136]

While time of use may be irrelevant to the question of reasonableness, prescriptive title to water usage rights is dependent on the duration of one's use. Securing rights by prescription is one way appropriators in Oklahoma may reduce the uncertainty occasioned by the *Franco* decision. Prescriptive title to use water may be acquired against any riparian to whom the use is adverse, but the prescriptive right is limited to the amount adversely used.[137] The quantity of water held by prescriptive title may not exceed the

129. *Id.* at 595 (Lavender, V.C.J., dissenting).

130. Broady v. Furray, 21 P.2d 770, 772 (Okla. 1933).

131. Nilsson v. Latimer, 664 S.W.2d 447, 450 (Ark. 1984) (protecting recreational fishing but noting that plaintiff suffered, at most, negligible injury); Harris v. Brooks, 283 S.W.2d 129, 132 (Ark. 1955) (protecting recreational and commercial fishing); Taylor v. Tampa Coal Co., 46 So.2d 392, 393 (Fla. 1950) (protecting recreational fishing).

132. *Nilsson*, 664 S.W.2d at 450.

133. *Franco*, 855 P.2d at 577.

134. *Id.* at 577.

135. 24 F. Cas. 472 (R.I. 1827).

136. *Id.* at 478.

137. Dellapenna, *supra* note 12, at 1-18.

amount which could be claimed by the riparian against whom prescription is sought.[138] In other words, an appropriator can claim title by prescription to no more water than the riparian or riparians injured by the use would have been entitled pursuant to the riparian right of reasonable use. Further limitations on prescriptive title include the maxim that prescription in the riparian system does not run upstream[139] and the rule that prescription may only be applied to private riparian rights, not to water held as public property for the benefit of riparian landowners.[140]

In order to prove prescriptive title, an appropriator must demonstrate the "adverse, peaceable, uninterrupted, actual, open, notorious, and exclusive use"[141] of water for the prescriptive period of fifteen years.[142] Where the appropriator's diversion has been permissive, no prescriptive title can arise.[143] Probably the most contentious issue surrounding prescriptive title centers on when the prescriptive period begins to run. Two questions which must be addressed concern the time when the riparian right is interfered with by the adverse use, and when the riparian has notice of this injury.

The prescriptive period begins to run when the riparian landowner can bring a suit for interference with a property right.[144] Whether a court applies the natural flow theory or the reasonable use doctrine determines when the riparian is injured. Under the natural flow theory, the riparian property right extends to the entire streamflow, except for diminution caused by the domestic uses of upstream riparians. Therefore, the cause of action accrues whenever an upstream landowner diverts water for purposes other than domestic uses, regardless of whether the riparian has suffered provable damages.[145]

Alternatively, the reasonable use doctrine may be used to determine the prescriptive period. The riparian has no cause of action until the upstream use unreasonably interferes with the riparian's reasonable use rights. The prescriptive period may begin when the upstream irrigator increases the water diverted, thereby injuring the riparian's commercial fishing business. When the next rain provides sufficient water for both the upper and lower uses, the prescriptive period is interrupted; the irrigator's diversion is no longer adverse to the riparian.[146] Given the inherent difficulty of proving prescriptive title by the reasonable use doctrine, some riparian states and the dual system states apply the natural flow theory to questions of prescription.[147]

Oklahoma courts confronted with the unconstitutionality of the 1963 appropriation amendments may encounter intractable problems when asked to find prescriptive title to riparian rights. Prescriptive title arises only from uses that are adverse or hostile to the riparian landowner.[148] When does the appropriative use become adverse to the riparian right? And when does the riparian have actual or constructive notice of the appropriator's adverse use?[149]

Following the 1963 amendments, riparian landowners had no right to use water for other than the specified domestic uses.[150] Because the prescriptive right can be no greater than the amount to which the riparian is entitled, it can be argued that the appropriator's adverse use is limited to the riparian's domestic needs. While the amendments were in effect between 1963 and 1990, the riparian may have had notice of injury only with respect to domestic uses, the only lawful riparian use for the intervening twenty-seven years. From this perspective, it would make little sense, and would be contrary to law, to

138. Kennebunk, Kennebunkport & Wells Water Dist. v. Maine Turnpike Auth., 84 A.2d 433, 437 (Me. 1951).
139. WATER AND WATER RIGHTS, *supra* note 99, § 7.04(c), at 312.
140. *Id.* at 311.
141. Martin v. Burr, 228 S.W. 543, 544 (Tex. 1921).
142. Curry v. Hill, 460 P.2d 933, 935 (Okla. 1969).
143. *Id.*; Crommelin v. Fain, 403 So.2d 177, 183 (Ala. 1981).
144. WATER AND WATER RIGHTS, *supra* note 99, § 7.04(c), at 307.
145. *Id.* at 306.
146. *Id.* at 307.
147. *Id.* at 308; *id.* § 8.03(b)(5), at 401.
148. City of Moore v. Central Okla. Master Conservancy Dist., 441 P.2d 452, 458 (Okla. 1968).
149. Martin v. Burr, 228 S.W. 543, 546 (Tex. 1921) (notice of injury may be actual or constructive).
150. 82 OKLA. STAT. § 1A(a) (Supp. 1963).

allow an appropriator to assert an adverse use under claim of right against a riparian who had no claim of right according to the statute.

What is the effect of *Franco*'s invalidation of the 1963 amendments? If the amendments have been unconstitutional, and therefore invalid, since 1963, then appropriators may successfully argue that riparians have always had the right of reasonable use, and that the diversion by an upstream appropriator has always been adverse. In this manner prescriptive title to the riparian's reasonable use rights may stand where the riparian has had notice of the appropriator's continued injurious diversion. This result may unfairly and unrealistically charge riparian landowners with the duty to predict the outcome in *Franco*, beginning in 1963. At the same time, because *Franco* validates vested riparian rights, holding riparians responsible for this knowledge may be seen as a refusal to reward property owners who "sleep on their rights."

In addition to determining when the prescriptive period begins, the appropriator must demonstrate that the injurious use has been continuous and uninterrupted for the prescriptive period of fifteen years.[151] Where other parties claiming the right to use water cause an actual physical interruption of the adverse use, however slight, the use may not be seen as continuous.[152] However, it is necessary to distinguish an interruption caused by another user and an interruption caused solely by the party claiming prescriptive title. One Oklahoma case has recognized that continuous use "does not require the use thereof every day for the statutory period but simply the exercise of the right more or less frequently according to the nature of the use."[153] In the context of prescriptive title to irrigation water, continuity of use is not interrupted because the appropriator uses the water only when it is needed.[154] Consequently, the appropriator may acquire prescriptive title by diverting water as needed for the particular crop, or as needed to supplement rainfall during the dry season. However, it should be remembered that prescriptive title will only apply to riparians downstream who, for example, sue to reduce the appropriator's diversion. An appropriator will not be able to use prescriptive rights to force an upstream riparian to release water.

b) Reasonable Use

The primary consideration for riparian rights is a reasonableness standard. A common situation which may arise in Oklahoma is that of an upstream landowner diverting water for use in irrigation. A lower riparian can initiate a consumptive use such as irrigation, stock watering, or even an industrial use. In a riparian system, which use will prevail?

The general rule is that each use is reasonable only to the extent that the diversion does not interfere with the other's reasonable needs.[155] In a riparian system, the stream must provide for the natural needs of the riparian, including drinking water, other household uses, and watering domestic livestock.[156] Oklahoma retained this principle in the appropriation statute of 1963, making appropriations subject to riparian domestic uses.[157] In the previous example, the question of whether each use is reasonable will depend on the nature of the stream, whether the injury or interference is constant or occasional, and whether the uses are a natural use of the property.[158]

The principles discussed above are applicable to conflicts among competing riparian owners, but they will not necessarily apply to a conflict involving a riparian and an appropriator. As a practical matter, a conflict over water will not arise except in times of shortage, when the or stream does not provide sufficient water for both riparian owners and appropriators. When a shortage occurs, *Franco* now requires

151. Lynn v. Rainey, 400 P.2d 805, 813 (Okla. 1965); Hargraves v. Wilson, 382 P.2d 736, 739 (Okla. 1963).

152. *In re* Water Rights in Ahtanum Creek, 245 P. 758, 761 (Wash. 1926).

153. *Hargraves*, 382 P.2d at 739.

154. *Id.* at 740.

155. Smith v. Stanolind, 172 P.2d 1002, 1006 (Okla. 1946).

156. Montelious v. Elsea, 161 N.E.2d 675 (Ohio Ct. Comm. Pleas 1959); Brummond v. Vogel, 168 N.W.2d 24, 27 (Neb. 1969); Kundel Farms v. Vir-Jo Farms, Inc., 467 N.W.2d 291 (Ct. App. Iowa 1991).

157. 60 OKLA. STAT. § 60 (Supp. 1963).

158. Muncie Pulp Co. v. Koontz, 70 N.E. 999, 1001 (Ind. 1904).

Oklahoma appropriators to "release water into the stream sufficient to meet the riparian owner's reasonable use or stop diverting an amount sufficient to supply the riparian owner's reasonable use until there is water sufficient to satisfy both interests."[159] The plain meaning of this language is that reasonable use issues arise only with respect to the riparian use. The appropriator will be asked to stop diverting automatically in times of shortage.

In Oklahoma the reasonableness of a riparian use may be determined considering the factors outlined in the *Restatement (Second) of Torts*.[160] *Franco* suggests consideration of the physical and climatological character of the stream, custom, social value of the use, and the propriety of placing the burden on the user causing the harm.[161] The opinion omitted the *Restatement* factors dealing with accomodation of conflicting uses:

> (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, land, investments and enterprises . . . .[162]

The omission of these factors might have been an oversight, but possibly it was intentional. The *Restatement* factors above discuss the harm caused by the use of water. The philosophy in Oklahoma, in light of the language from the *Franco* court, seems to be that in any time of shortage, it is the appropriator who causes the harm to the "vested rights" of the riparian. Therefore, when sufficient water is not available for both riparian and appropriative needs, practicality is not a consideration in whether the appropriator can adjust the amount of water diverted; the prior appropriator's diversion is simply reduced.

As for which appropriator must stop using water in order that the riparian receives water during a time of shortage, the *Franco* court commented, "Should a riparian owner assert his (or her) vested right to initiate a reasonable use of the stream and should the water in the stream be insufficient to supply that owner's reasonable use, we hold that the appropriator with the last priority must either release water into the stream sufficient to meet the riparian owner's reasonable use or stop diverting an amount sufficient to supply the riparian owner's reasonable use until there is water sufficient to satisfy both interests."[163]

c) Hydrologic Characteristics

The nature of the stream may be a significant factor, especially in the western part of the state where streams are often shallow and flow intermittently. A riparian or appropriator using the water for irrigation will stand on more equal footing in this respect, than an appropriator seeking to divert most of the stream for a commercial livestock operation such as a feedlot. The stream may be unsuited to such a concentrated use, making the feedlot use unreasonable. Another example of a use unsuited to the stream might be a farmer in the Panhandle seeking a diversion to irrigate rice, or other water intensive crop.

Another limitation on reasonable use involves the amount of water which could be lost due to the diversion. Typically, an appropriator or riparian using water for irrigation will dam the stream to store water or divert stream water to an adjacent reservoir. If the underlying geologic formation will not hold water but instead allows water to rapidly escape to lower strata, the diversion might be unreasonable by causing the stream water to be "forever los[t]" to other users.[164] Additionally, where impounded water is lost by high evaporation rates, a challenge of unreasonableness may be asserted.[165] Farmers in western

159. *Franco*, 855 P.2d at 581.
160. *Id.* 575 n.40.
161. *Id.*
162. RESTATEMENT (SECOND) OF TORTS § 850A (1977).
163. *Franco-Amercian Charolaise*, 855 P.2d at 582.
164. Baker v. Ellis, 292 P.2d 1037, 1039 (Okla. 1956).
165. Lawrie v. Silsby, 74 A. 94, 95 (Vt. 1909)

Oklahoma, where evaporation from lakes averages sixty-five inches per year, will be more concerned with loss by evaporation than eastern farmers where evaporation occurs at a rate of forty-eight inches per year, but is counteracted by precipitation rates averaging fifty-six inches annually.[166] It is important to remember that both riparians and appropriators must be concerned with water loss. Where the uses of riparians and appropriators are to be judged by a standard of relative reasonableness, appropriators have standing to challenge loss by upstream riparians diverting water for irrigation or livestock raising, just as the riparian may challenge the appropriator. The appropriation system also recognizes the detriment of water loss by evaporation and rapid seepage by requiring that water appropriated must be beneficially used and waste avoided.

d) Artificial v. Natural Uses

Whether a use is artificial or natural also relates to water rights in a riparian system. Irrigation is viewed as an artificial use, compared to household uses which are described as the "natural wants" of the riparian land owner.[167] A recent Iowa case, *Kundel Farms v. Vir-Jo Farms, Inc.*,[168] exemplifies a conflict between water users that is likely to arise in Oklahoma. In *Kundel Farms*, the riparian upstream dammed the stream to create a wetland for a commercial hunting business. Downstream, a farmer had been using the stream for watering livestock and irrigation, but the water level in the stream was insufficient because of the dam. The court ordered the dam lowered to provide the lower riparian with enough water for farming because both riparians enjoyed equal rights in the stream.[169]

This case has significant implications for Oklahoma farmers, whether claiming water rights as riparians or appropriators. The consumptive uses of water in farming are not necessarily subordinate to commercial or environmental uses that appear to be "natural" uses of stream water. Where the character of the stream has been substantially altered to provide for water-related uses such as hunting and fishing, the irrigator using water to enhance productivity of riparian land has an interest in the stream which may be protected from interference by these other artificial uses. At first glance, a wetland or other water body constructed along a stream may appear to be a natural and superior use, but, according to the Iowa court, creating a wetland where none existed before is an artificial use and subject to the reasonableness standard. As will be discussed, the reasonableness principle may only apply to an artificially created wetland used for fishing or hunting, and may not apply where a downstream riparian asserts the right to the "natural flow" of the stream.

As the previous discussion indicates, the consequence of Oklahoma's recognition of common law riparian rights is the partial or total divestment of the appropriative right when the diversion unreasonably interferes with riparian rights. The term "unreasonable interference" implies that some interference is acceptable. As riparian cases indicate, a diversion cannot be enjoined or reduced absent injury to a riparian downstream.[170] Therefore, when the farmer upstream diverts water for irrigation pursuant to an appropriation permit, the diversion cannot be challenged by a riparian downstream unless the riparian proves unreasonable harm. The harm must be caused by the diversion upstream, and the challenge cannot be based on the fact of a mere reduction in the streamflow or some change in the stream causing no injury.[171]

In light of these general principles, the irrigator should face no reduction in the appropriative right when, for example, the lower riparian cannot prove that a slight reduction in water available to fight grassfires or water livestock actually causes some injury. In most cases a slight reduction will not force riparians to reduce their herds, or create a water shortage preventing riparians from protecting pasture

166. WATER PLAN, *supra* note 117, at 48-49.

167. Lawrie v. Silsby, 74 A. 94, 95 (Vt. 1909).

168. 467 N.W.2d 291 (Ct. App. Iowa 1991).

169. *Id.* at 294.

170. Bollinger v. Henry, 375 S.W.2d 161 (Mo. 1964); Brummond v. Vogel, 168 N.W.2d 24 (Neb. 1969); Borough of Media v. E· gmont Golf Club, Inc., 288 A.2d 803 (Pa. 1972); Ripka v. Wansing, 589 S.W.2d 333 (Mo. Ct. App. 1979).

171. Martin v. British Am. Oil Co., 102 P.2d 124, 126 (Okla. 1940).

land from fires. Additionally, those riparians asserting commercial or recreational claims, such as hunting and fishing, face the obstacle of proving that the reduction of water affects the stream habitat to a degree that wildlife actually dies or fails to reproduce, or that the fish quit biting. These issues of injury and causation will be discussed more fully with respect to the competing rights to lake water.

e) Natural Flow Theory

Riparians asserting recreational rights may limit appropriations under the "natural flow" theory. For example, an appropriator may dam the stream for irrigation, then a riparian downstream initiates a use requiring a minimum streamflow, such as cooling cattle, commercial fishing or hunting, or, simply, preserving the stream habitat for wildlife. What right does the appropriator have to continue using water? While the Oklahoma court in *Franco* expressly rejected the natural flow theory, the court contemplated that some reasonable uses might require a minimum flow, in which case upstream diversions could be enjoined.[172] The irrigator will be required to reduce the amount of water diverted to avoid interfering with the minimum flow required by the riparian. It should be remembered that, as discussed previously, the riparian right is a private right which precludes a claim for preserving the stream habitat for wildlife,[173] unless the claim relates to commercial or recreational activities, or, possibly, the aesthetic value of the riparian land.[174]

Although stream water usage in Oklahoma is divided among the reasonable uses for riparians and appropriators, only the riparian landowner may assert the right to a minimum flow for recreation. The appropriator, whose right to streamwater is based on the appropriation permit, cannot claim the right to a minimum stream flow, but only a reasonable right to water for the beneficial use specified in the permit. Additionally, the riparian's domestic or natural needs must be provided for by the stream, and neither riparian or appropriative reasonable uses may interfere. A question may arise concerning the characterization of "domestic" uses. Although Oklahoma water law before *Franco* recognized that riparian domestic uses are paramount,[175] Oklahoma had never defined domestic uses until the 1963 amendments, where domestic use is defined as:

> [T]he use of water by a natural individual or by a family or household for household purposes, for farm and domestic animals up to the normal grazing capacity of the land, and for irrigation of land not exceeding a total of three (3) acres in area for the growing of gardens, orchards, and lawns . . .[176]

Franco has now rendered the 1963 amendments unconstitutional, reinstating the common law riparian reasonable use doctrine. Does *Franco* also nullify the statutory definition of domestic uses and return to the common law definition? Does it make any difference? The Oklahoma statute comports with the general understanding of the common law in that domestic uses include those needed for the sustenance of the household, such as drinking, bathing, and cooking, as well as watering the family's farm animals and garden.[177] Because of the common law focus on the needs of the household, whether the previously-quoted statutory definition of domestic uses governs in Oklahoma makes little difference. Neither the common law nor the statute would allow a feedlot or a truck farm to claim water under the auspices of

172. *Franco*, 855 P.2d at 568, 579 n.56.

173. *See supra* text accompanying notes 125-32.

174. In the alternative, Oklahoma may affirmatively adopt the Public Trust Doctrine to protect minimum stream or lake levels, as discussed by Justice Lavender. *Franco*, 855 P.2d at 595.

175. 60 OKLA. STAT. § 60 (1981).

176. 82 OKLA. STAT. § 1-A(a) (Supp. 1969).

177. 1 WATER AND WATER RIGHTS, *supra* note 99, § 7.02(b)(1), at 229. Dual system states adopt a similar characterization of domestic uses, although some, like Oklahoma, provide statutory definitions. *Id.* § 8.03(b)(1), at 385; *see also* RESTATEMENT (SECOND) OF TORTS § 850 A cmt. c (1977) (stating that domestic uses provide for household needs, watering livestock raised for consumption by the family or to work the farm, and watering the family garden).

"domestic use." Furthermore, in a conflict between a riparian and an appropriator, it appears that the appropriator must yield to the riparian irrespective of whether the right claimed is for domestic or reasonable riparian uses, or for a right to the natural flow.

f) Riparian Buffer Zones

It is important to note that where riparians successfully assert rights to a minimum streamflow for the purpose of watering livestock or cooling cattle, these vested riparian rights provided for in *Franco* may, in the near future, be removed by federal legislation. Livestock grazing and watering in streams and lakes have been identified as causes of nonpoint source pollution and the degradation of the riparian ecology.[178] As nonpoint source pollution becomes an increasing concern of government and agriculture, changes in federal water pollution legislation might result in the creation of riparian buffer zones.[179] The riparian buffer zones would be designed to protect water quality and riparian vegetation by restricting livestock grazing and watering along streams. Buffer zones would mean that specified areas along the stream would be cordoned off to prevent livestock from entering the stream or grazing too close to the stream.

Arguably, federal legislation to protect water quality may be viewed as a constitutional exercise of federal police power which preempts state law. The practical effect in Oklahoma is that riparian rights to a minimum flow in a stream will be unnecessary because livestock will no longer be able to cross the riparian buffer zone to cool off. Were a riparian to claim that buffer zones amount to a compensable taking of private property rights, the riparian would have to show that the prohibition of grazing or watering near streams and lakes destroys the economic viability of the riparian land. Even if the riparian can demonstrate a taking has occurred, this may still have little effect on the irrigating appropriator. The property right taken in this case must be compensated by the federal government. After this compensation, and because buffer zones may extinguish the riparian's claim to a minimum stream level, the riparian's remaining claim is limited to a right to divert a reasonable amount of water from the stream for watering livestock, which may or may not require the appropriator to maintain a minimum stream level.

g) Littoral Rights

In a riparian system, rights to lake water are shared among adjoining landowners just as riparian rights are shared along streams. Water from lakes, including playa lakes, reservoirs, and farm ponds is a significant source of agricultural water. Because of the increasing uncertainty of appropriation rights in stream water, farmers, especially in western Oklahoma, may increasingly turn to lake and pond water for irrigation. Lake and pond water may also become more important in western Oklahoma given that, as recently as 1980, nearly all stream systems west of Oklahoma City were fully appropriated.[180] Appropriators in western Oklahoma should be aware that these statistics mean that any assertion of riparian rights on these streams might result in some divestment of the appropriative rights.

Lakes and ponds providing water for agriculture cover many thousands of acres of Oklahoma land. Not all lakes, however, provide stable water resources. Natural playa lakes, located mainly in the Panhandle, number nearly 600 and cover approximately 9600 acres.[181] Most playa lakes form during the wet season but have little water during the dry season when farmers need to irrigate.[182] In addition to playas, natural oxbow lakes, located mainly in eastern Oklahoma, cover 2765 acres.[183]

178. Richard H. Braun, *Emerging Limits on Federal Land Management Discretion: Livestock, Riparian Ecosystems, and Clean Water Law*, 17 ENVT'L LAW 45, 68-69 (1986).

179. COMMITTEE ON LONG-RANGE SOIL & WATER CONSERVATION, BD. ON AGRICULTURE, NAT'L RESEARCH COUNCIL, SOIL AND WATER QUALITY: AN AGENDA FOR AGRICULTURE 103-06 (1993).

180. WATER PLAN, *supra* note 117, at 10 fig. 3.

181. WATER ATLAS, *supra* note 115, at 64.

182. *Id.* at 52.

183. *Id.* at 64.

Artificial lakes and ponds are other, more stable, sources of agricultural water. Farmers may appropriate water from the reservoirs of Oklahoma which hold fifteen percent of stored water for irrigation.[184] With the assistance of the Soil Conservation Service, Oklahoma farmers have constructed 220,000 farm ponds storing nearly one million acre feet of water that can be used for irrigation and raising livestock.[185]

It is clear that farmers using lake, reservoir, or pond water must now consider to what extent littoral rights of adjoining landowners attach to the water that has previously been owned by the farmer as an appropriation. The following discussion will address littoral rights issues with which Oklahoma farmers should be concerned and some examples of how courts in riparian jurisdictions have resolved competition for littoral water.

An Oklahoma case, decided in 1980, can be used as an example of the implications of the *Franco* decision with respect to appropriative rights in littoral water. In *Depuy v. Hoeme*,[186] a landowner obtained a permit to appropriate all the water in the playa lake. Relying on the permit to all the water, the landowner installed an irrigation system. After a challenge by the adjoining landowner, the court affirmed the appropriator's right to all the lake water and prevented the adjoining landowner from interfering.

With the revival of riparian rights after *Franco*, the appropriator's exclusive right to lake water no longer exists. By implication, the ruling in *Depuy v. Hoeme* is overruled and the adjoining landowner, who lost in 1980, may now have the right to a reasonable portion of the playa lake. The appropriator who has relied on the water for irrigation since 1980 is now subject to divestment if the adjoining landowner asserts the right to initiate a use for the playa lake.

The *Franco* controversy offers an example of the most common conflict over littoral rights — a riparian landowner asserting the need for a certain water level for recreation and wildlife habitat against an appropriator seeking water for consumptive uses. Oklahoma's riparian system requires the competing users share the available water. However, littoral conflicts may differ from stream water conflicts because stream water is ambient, but lake water remains in place, except for evaporation and use, and is replenished by rainfall. Additionally, conflicts over lake water typically arise between consumptive users, the irrigator, and nonconsumptive users — those who want to use the lake for recreation or wildlife. As will be explained, the riparian system tends to protect the nonconsumptive user from interference by the consumptive user.

Consider the situation of the farmer pumping lake water for irrigation. The irrigation will most likely occur during the dry summer months when landowners adjoining the lake will be using the lake for fishing, boating, and other forms of recreation. Can the recreational users stop the pump? Several cases from riparian states have answered this question in the affirmative. In explaining littoral rights, a Florida court, in *Taylor v. Tampa Coal Co.*,[187] stated that littoral owners choosing to use the lake for recreation enjoyed rights equal to the irrigator and could even restrict the competing use where the diversion altered the natural condition of the lake.[188] The court applied the theory of reasonable use, but found that a natural flow, or no reduction, result was required to protect the recreational users.

The Arkansas Supreme Court arrived at a similar result in *Harris v. Brooks*.[189] Littoral owners and their lessees used the lake for recreation and commercial boating and fishing. The defendant had been using the lake water to irrigate a rice crop for a number of years. Even though the reasonable use theory was applied to the controversy, the irrigator was forbidden to pump water for irrigation if it caused the lake to fall below its normal level. The court recognized that the recreational interests could only be preserved using a minimum lake level, or natural flow, limitation on the rights of the irrigators.[190]

184. *Id.* at 61. Another chapter discusses the effects of *Franco* on riparian and appropriative rights in reservoirs.
185. *Id.* at 64.
186. 611 P.2d 228 (Okla. 1980).
187. 46 So. 2d 392 (Fla. 1950).
188. *Id.* at 394.
189. 283 S.W.2d 129 (Ark. 1955).
190. *Id.* at 132.

Returning to the illustration, the farmer pumping water for irrigation risks being enjoined whether the farmer is a riparian or an appropriator in Oklahoma. As with stream water rights, the appropriator is subject to divestment by littoral landowners, either in whole or in part.[191]

Divestment is not a certainty, however. The littoral owner must prove that the pumping unreasonably interfered with a protected right. When the recreational user cannot prove that pumping for irrigation was the cause of injury, the court will not order the irrigator to divert less water.[192] Where the water level may be caused by drought or high evaporation rates, proving that the pumping of water, rather than natural conditions, caused the injury may be difficult. As a Florida court explained, using water for irrigation did not help to maintain the lake level during a drought, but the irrigator could not be enjoined absent proof that the irrigation itself substantially reduced the lake level.[193]

Michigan has also recognized that both irrigation and recreation are reasonable and legitimate uses of lake water. In *Hoover v. Crane*,[194] a conflict between lakefront property owners and a farmer diverting water to irrigate an orchard, the court applied the reasonable use theory and refused to enjoin the irrigator. The irrigator demonstrated that only one-fourth inch of the lake's level was pumped for irrigation; therefore, the injury, if any, to the property owners was minimal.[195] These cases demonstrate the general riparian principle that only substantial injury caused by a diversion of water will be remedied.[196]

The law concerning littoral rights seems to differentiate between interfering with or impairing one reasonable use and destroying a reasonable use. In the cases of *Taylor* and *Harris*, the irrigator was ordered to stop pumping water to ensure a sufficient lake level for the other littoral owners. This result appears to ignore the needs of the farmer who must have irrigation or the entire crop will be lost. Riparian principles justify the loss to the irrigator because where extensive consumptive uses, like irrigation, threaten the lake and littoral rights of others, the use causing the loss "must yield to the common good."[197] Another statement of the principle is that it is the duty of the riparian or littoral landowner to do nothing to alter the water level to a degree causing substantial harm.[198]

The difference between destroying a use and merely interfering with a use is not readily apparent. Defining these limits must be approached on a case-by-case basis, as with determining whether a use is reasonable or unreasonable. These concepts may be abstractions, but the distinction can have serious consequences for the rights of the irrigator. When a recreational or other littoral use risks being destroyed by a diversion, the diversion must cease completely to preserve a minimum lake level.[199] No balancing of rights occurs where one lawful use destroys another lawful use. However, if the diversion for irrigation merely interferes with or detracts from another lawful use, a court will apply a balancing test to arrive at a reasonable sharing of the water.[200] A sharing arrangement may involve reducing the amount diverted, limiting duration of the diversion, or restricting pumping to certain times of the day.

While sharing may be an alternative in a conflict between littoral owners having coequal rights, the principles outlined previously will not necessarily apply to a conflict involving a littoral owner and an appropriator diverting water for irrigation. Recall the language of the *Franco* court that in the event of a shortage, Oklahoma appropriators are now required to "release water into the stream sufficient to meet the riparian owner's reasonable use or stop diverting an amount sufficient to supply the riparian owner's

191. *See* discussion *supra* III.C.3.b on Reasonable Use.
192. Lake Gibson Land Co. v. Lester, 102 So. 2d 833, 835 (Fla. Dist. Ct. App. 1958).
193. *Id.* at 835.
194. 106 N.W.2d 563 (Mich. 1960).
195. *Id.* at 565.
196. *Id.*
197. *Crane*, 106 N.W.2d at 565.
198. Johnson v. Seifert, 100 N.W.2d 689, 697 (Minn. 1960).
199. Harris v. Brooks, 283 S.W.2d at 134.
200. *Id.*

reasonable use until there is water sufficient to satisfy both interests."[201] Absent the balancing of interests under the reasonable use standard, the appropriator will be asked to stop diverting automatically in times of shortage.[202]

Another significant issue regarding littoral rights is determining the minimum level of water necessary to protect recreational activities, and commercial fishing and boating. The natural flow of a stream or the normal level of a lake may not be required to provide for the rights asserted. In *Harris v. Brooks*[203] the Arkansas court agreed that the plaintiffs proved their interests were injured when the lake fell below its "normal" level. Not all recreational or commercial interests will require the "normal" lake level, and will not suffer from a reduction. Another Arkansas case, *Scott v. Slaughter*,[204] required only that dams be lowered, not completely removed, to provide for the needs of the lower landowner. The parties involved owned land along a bayou and used their property for commercial fishing and hunting businesses. The upper landowner constructed dams interfering with the flow of water to the lower landowner. The "normal" flow of water was not required to preserve the rights of the lower landowner; therefore, the dams could remain in place if they were lowered.

Certainly, to an appropriator accustomed to having full rights to water subject only to a senior appropriator, sharing water will require some adjustment. However, some limitations for interfering with another's use is preferable to a complete loss of water rights. One way an irrigator can limit the harm to other littoral landowners, and possibly avoid a ruling that the irrigation destroyed another lawful use, is to ensure that irrigation tailwaters return to the lake to the maximum extent possible. Although custom and scarce water resources may encourage irrigators to retain irrigation tailwaters to protect their supply, this practice may have the opposite result when a littoral or riparian landowner stops the irrigation at its source.

IV. Use of Diffused Surface Water

Because of the inherent uncertainty of the right to use stream water, it may be necessary to investigate alternative sources of water. Already, most irrigators in the western part of the state rely on groundwater resources.[205] Arguably, most of these irrigators will not feel the impact of the current uncertainty in Oklahoma water rights. The western Oklahoma farmer relying on appropriated stream water, however, will experience the effects of riparian rights each time a riparian right is asserted along the stream because of the fact that all water in the streams west of Oklahoma City is divided among appropriators.[206] Farmers may want to consider other water sources and may find a practical solution in impounding diffused surface water.

Ownership of diffused surface water is vested in the property owner. The statute governing diffused surface water provides:

> The owner of the land owns water standing thereon, or flowing over or under its surface but not forming a definite stream. . . Provided however, that nothing contained herein shall prevent the owner of land from damming up or otherwise using the bed of a stream on his land for the collection or storage of waters in an amount not to exceed that which he owns, by virtue of the

201. *Franco*, 855 P.2d at 581.

202. *See* discussion *supra* III.C.3.b on Reasonable Use.

203. 283 S.W.2d 129 (Ark. 1955).

204. 373 S.W.2d 577 (Ark. 1964).

205. KIZER, *supra* note 6, at 10-11. The survey indicates that groundwater irrigates 538,788 acres while surface water irrigates 115,64 , acres in Oklahoma.

206. WATER PLAN, *supra* note 117, at 10 fig. 3.

> first sentence of this section so long as he provides for the continued natural flow of the stream in an amount equal to that which entered his land.[207]

The farmer wishing to capture diffused surface water must understand which waters are included in the diffused surface water category.

A. Defining Diffused Surface Water

Since before statehood, Oklahoma courts have considered the definition of surface water, primarily with respect to the obstruction or drainage of a water course to the injury of neighboring landowners. In both *Chicago, Rock Island & Pacific Railway Co. v. Groves*[208] and *Town of Jefferson v. Hicks*,[209] the cases turned on whether the water obstructed was diffused surface water, in which case, the common enemy doctrine precluded the plaintiff's claim, or a water course, in which case, the common law of riparianism afforded the plaintiff some remedy for unreasonable obstruction of a water course. The prestatehood case of *Davis v. Fry*[210] considered whether the water drained had lost its character as diffused surface water and had become a definite body of water. In these contexts diffused surface water was initially addressed in comparison with what diffused surface water was not — a definite stream. If the surface water was not a water course or a definite stream, then it must be diffused surface water.

Surface water remains diffused until it becomes part of a water course — when it "reach[es] and become[s] a settled body of water, retained in a natural body or receptacle, forming a lake or pond which is emptied only be evaporation or percolation."[211] A later Oklahoma case involving the obstruction of a water course explained that diffused surface water becomes a water course when "during periodical heavy rains, water is regularly discharged from . . . land and flows through a well defined channel or course. . ."[212] In contrast, the 1966 case of *Nunn v. Osborne*[213] considers that where "a natural drainway a few feet wide and deep has been cut into the land over a period of time by the flow of water following heavy rainfall" and conducts flowing water "only for a period of days following a rainfall," the resulting intermittent flow remains diffused surface water.[214] These definitions may be reconcilable with the idea that identifying diffused surface water is a question of fact related to the characteristics of the surrounding land.[215] Alternatively, the distinction between what is or is not diffused surface water may relate more to the subjective view of the trier of fact. In marginal cases where the evidence does not clearly point to either diffused water or water in a definite stream, the decision of the trier of fact can be upheld if "the determination is well supported by the evidence presented."[216]

B. Capture of Diffused Surface Water

When water is determined to be diffused surface water, what right does the landowner have to capture this water to use for irrigation or other farming needs? The farmer may choose to excavate a pond or construct a dam in a depression to capture runoff water. The common law holds that prior to the time

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207. 60 OKLA. STAT. § 60 (1991).
208. 93 P. 755 (Okla. 1908).
209. 102 P. 79 (Okla. 1909).
210. 78 P. 180 (Okla. 1904).
211. *Id.* at 184.
212. Garrett v. Haworth, 83 P.2d 822 (Okla. 1938).
213. 417 P.2d 571 (Okla. 1966).
214. *Id.* at 574.
215. Okla. Water Resources Bd. v. Central Okla. Master Conservancy Dist., 464 P.2d 748, 753 (Okla. 1968); *Garrett*, 83 P. at 824. Here, again, the hydrological differences between western and eastern Oklahoma may be relevant factors in defining surface water. The increased runoff present in eastern Oklahoma cuts deeper, more regular channels in the surrounding land, making the existence of a well-defined channel more apparent. In contrast, streams in western Oklahoma tend to flow intermittently in poorly-defined channels. WATER RESOURCES DATA, *supra* note 3, at 2. If the trier of fact is not made aware of these differences, the perspective from which the evidence is weighed may prevent an accurate consideration of the surrounding land.
216. *Nunn*, 417 P.2d at 574.

when diffused surface water becomes part of a watercourse, a landowner has an unrestricted right to drain, capture, or modify the flow of the "common enemy," diffused surface water.[217] Two Oklahoma cases, *Oklahoma Water Resources Board v. Central Oklahoma Master Conservancy District*[218] and *Nunn v. Osborne*[219] state that by statute and at common law, the landowner is free to capture diffused surface water as property before it reaches a definite stream.

Some riparian states grant the landowner the absolute right to capture and use diffused surface waters[220], while others employ the civil law rule prohibiting the landowner from changing the flow of surface water to the injury of a neighboring landowner.[221] The reasonable use rule, followed in a third group of riparian states, requires that altering or using diffused surface waters be reasonable with respect to adjoining landowners.[222] It is important to note that in cases where the landowner has been allowed the absolute right to capture and use diffused surface water pursuant to the common enemy doctrine, the courts have focused on the beneficial use of the water and whether the impoundment and use were reasonable.[223] This may indicate that, even where the common enemy doctrine is the rule, reasonableness may be the standard deciding whether capture and use is lawful.

Although *Nunn* was decided before *Franco* revived common law riparianism, the decision seems to adhere to a reasonableness standard like that governing riparian rights. The plaintiff argued the defendant had wrongly impounded the flow of a definite stream which the plaintiff had relied on for domestic uses, watering livestock, and watering trees on the plaintiff's land. Some years before, the defendant had built dams to collect water in dry draws and small gulches for use in irrigation. The project had been undertaken pursuant to a permit given by the Planning and Resources Board, and after consultation with the Soil Conservation Service.

In denying the injunction, the court relied on the statutory provision vesting ownership of diffused surface water in the land owner.[224] Because the water impounded was not part of a definite stream, the lower landowner could not claim riparian rights. Furthermore, under the common enemy doctrine of the common law of diffused surface water, the lower landowner has no right to the continued flow of diffused surface water.[225] Throughout the opinion the court focuses on the landowner's property right to diffused surface water, noting that the landowner's right to diffused surface water is analogous to the title in the land itself.[226]

Despite the repeated declaration of the landowner's property rights, the court also considered the reasonableness of the defendant's activities. The use of the water for irrigation was a reasonable and beneficial use. The defendant consulted with the Soil Conservation Service (SCS), which assists many farmers with similar projects for flood and erosion control, irrigation water, home uses, and recreation. The court noted that SCS projects "are beneficial and should be encouraged where they do not unreasonable interfere with the rights of others."[227] Finally, the location of the dams within the watershed was seen as reasonable because nearly the same amount of watershed lay below the dams as above. Consequently, the plaintiff could still benefit from surface water flowing across the defendant's land and into the draws and gulches that plaintiff claimed were definite streams. According to the court, the

217. Stanley V. Kinyon & Robert C. McClure, *Interferences with Surface Waters*, 24 MINN. L. REV. 891, 898 (1940).

218. 464 P.2d 748, 754 (Okla. 1968).

219. 417 P.2d 571, 574 (Okla. 1966).

220. JACK D. JONES ET AL., STUDY OF TENNESSEE WATER RESOURCES LAW, LEGAL CONSIDERATIONS FOR EFFECTIVE WATER MANAGEMENT UNDER CONDITIONS OF SHORTAGE 48 (1983).

221. Jennifer S. Graham, *The Reasonable Use Rule in Surface Water Law*, 57 MO. L. REV. 223, 224-27, 232-33 (1992).

222. *Id.* at 230-31.

223. Kinyon & McClure, *supra* note 217, at 914; Joseph W. Dellapenna, *The Legal Regulation of Diffused Surface Water*, 2 VILLANOVA ENVTL. L.J. 285, 330 (1991).

224. *Nunn*, 417 P.2d at 574 (citing 60 OKLA. STAT. § 60 (Supp. 1963)).

225. *Id.*

226. *Id.* Nowhere within the *Nunn* opinion did the Supreme Court discuss the fact that the defendant had obtained a prior appropriation permit to the impounded water. The Supreme Court nowhere visualized the issue as the relationship between a senior and a junior appropriator.

227. *Id.* at 575.

defendant was not taking the full amount of surface water to which he was entitled as a landowner capturing diffused surface water.[228]

Why would the court repeatedly address the rights of the plaintiff when the plaintiff, as the lower landowner, had no riparian right to the continued flow of the diffused surface water? Even though the landowner has a property right to diffused surface water, the fact that the court emphasized the reasonableness of the defendant's activities with respect to the plaintiff's rights lends support to the proposition that diffused surface water is governed by reasonableness. What the plaintiff's rights were, if not riparian, is not clear from the opinion. The right may be simply a real property right to be free from the injurious interference of a neighboring landowner.[229] It may also be significant that the case was decided after the 1963 amendments severely limited riparian rights, but before these same amendments were deemed unconstitutional.

After *Franco*, does the right to capture diffused surface water survive? The court in *Franco* gave riparian rights superiority as rights appurtenant to the land and noted that riparians should enjoy the natural rights of land ownership. These principles may be seen as reinforcing landowners' rights to capture and use water diffused over their land, as explained by the court in *Nunn v. Osborne*.[230] Alternatively, the revival of vested riparian rights may signal a limitation on use of diffused water. Because the riparian right to water is based on the "natural advantages conferred on the land by its adjacency to water,"[231] the riparian may have rights in diffused surface water flowing across the lands which feed the stream.[232] Afterall, if landowners are legally entitled to capture all diffused surface water on their land, there will be no water reaching definite streams to satisfy riparian water rights.

If diffused surface water is to be shared with riparians along with stream water, landowners may have to consider the needs of lower riparians and may be prohibited from capturing any surface water if the riparian asserts the need for the natural flow of the stream. Recall that *Nunn* distinguished between the private property rights of the landowner in diffused surface water, and the water of a definite stream.[233] If *Franco* is viewed as granting riparian rights to "the natural benefits of the stream,"[234] as well as to the water flowing across the lands that feed the stream, the riparian may assert rights to the entire watershed. The result is that the entire watershed may become public water to be divided among riparians, landowners, and appropriators under the reasonable use standard. Additionally, riparians could initiate or expand existing uses at anytime, divesting all or a portion of the corresponding rights of other water users.

Riparians would have the right to challenge the capture and use of diffused surface water, along with wasteful uses and pollution of the flowing surface water caused by the use of agricultural chemicals or feedlots. Reasonable sharing of surface water with riparians includes sharing with other farmers, as well as riparians asserting rights for recreation, commercial hunting and fishing, and protection of wildlife habitat. The potential for conflict, especially over farming practices, is enormous when each farming decision may effect riparian rights throughout the watershed.

In the alternative, if landowners capture and use substantial amounts of run-off water, less water will reach streams and lakes, and, therefore, less water will be available to the riparian and the appropriator. Extensive capture of diffused surface water which threatens lakes or streams increases the potential for conflict between appropriators and riparians, and between riparians and nonriparian landowners, demanding some type of sharing arrangement. Appropriators, however, may not have rights as against landowners for diffused surface water, even water stored instream, because, unlike the riparian,

228. *Id.*

229. Chicago, R.I. & P. Ry. Co. v. Groves, 93 P. 755, 759 (Okla. 1908) (referring to the "golden maxim of the common law that one must so use his own property as not to injure the rights of another").

230. *Nunn*, 417 P.2d at 574.

231. Thurston v. City of Portsmouth, 140 S.E.2d 678, 680 (Va. 1965).

232. Anaheim Union Water Co. v. Fuller, 88 P. 978, 980 (Ca. 1907).

233. *Nunn*, 417 P.2d at 574.

234. *Franco*, 855 P.2d at 575.

appropriative claims are not based on any relationship of land to water, but only the appropriation permit created by statute.

Riparian rights to diffused surface water may be limited, and, therefore, those farmers using diffused surface water might not be at great risk from riparian challengers. Recall that *Franco* described riparian rights as merely usufructary and neither absolute nor exclusive.[235] Rights to diffused surface water are property rights analogous to ownership rights in land.[236] If the distinction between these two common law rights remains, landowners will continue to have the right to capture and use diffused surface water, limited only by the requirement in property law to avoid using one's property to cause injury to another. This restriction preserves the property right of the landowner and does not expand the riparian right.

It is also possible that *Franco* is applicable only to conflicts between riparians and appropriators over stream water. Separate systems of water law may govern diffused surface water and water in a definite stream, just as groundwater law is separated from surface water law. Oklahoma has not thus far recognized a riparian right to diffused surface water.[237] However, some courts in western states do allow the appropriator to claim and depend on tributaries which feed the stream.[238]

Even if diffused surface water must be shared among the riparian and the landowner, the riparian is still required to prove that the impoundment of surface water actually caused the riparian unreasonable injury. Where water is shared throughout the watershed, a riparian plaintiff will have a difficult time identifying the specific landowner causing the injury. The practical limitations of time and financial resources may inhibit all but the largest riparian owners from asserting their water rights.

V. Conclusion

The transition from a prior appropriation system back to a riparian system of water law will not be easy for Oklahoma farmers. Nor will it be easy for appropriators who formerly relied on the certainty of a permit to become accustomed to the idea that their appropriative right can be divested at any time to provide for the initiation of a riparian use. The uncertainty of the appropriative right may lead some farmers who are riparian landowners to rely instead on riparian rights. In this event, the riparians will have superior rights to appropriators, but will also be forced to share reasonably with other riparians. Landowners may also rely more heavily on groundwater or the capture of diffused surface water for irrigation and watering livestock. Capturing diffused surface water is not the certain solution it might at first appear to be, especially for farmers in the western part of the state where runoff water is minimal and underground geologic formations lead to rapid seepage.

Only time will reveal how sweeping the changes will be in the wake of *Franco*. Possibly, the changes will not be felt by most of Oklahoma's farmers. As the *Franco* controversy is the first to address the competing interests of riparians and appropriators since before statehood, it may be that Oklahoma water law will not experience the upheaval that the revival of common law riparianism has the potential to bring. On the other hand, even one riparian claim could unsettle a significant portion of the appropriation scheme, especially in western Oklahoma where all streamwater is claimed by appropriation. It is this uncertainty that should have Oklahoma farmers concerned, because, where agriculture is substantially dependent on streamwater supplies, everchanging riparian water rights have the potential to wreak havoc in the farmer's ability to plan for the future.

235. *Id.* at 573.

236. *Nunn*, 417 P.2d at 574; 60 OKLA. STAT. § 60.

237. *Nunn*, 417 P.2d at 574.

238. William F. Dolson, *Diffused Surface Water and Riparian Rights: Legal Doctrines in Conflict*, 1966 WIS. L. REV. 58, 99.

Reservoir Management and Recreation

T. Michael Blake

Table of Contents

I. Introduction

Reservoirs in Oklahoma have a substantial and direct impact on the life of Oklahoma residents. Reservoirs provide waters for irrigation, flood control, municipal use, and myriad other purposes. The numerous man-made lakes which dot the state provide much needed recreational and economic opportunities, making the Oklahoma lake culture a celebrated aspect of life in the Sooner State.

The importance of lakes and reservoirs to Oklahoma is indicated by the competition for the waters they hold. The rights to the use of stored waters are currently uncertain in Oklahoma. Two of the most critical uses of stored waters are physical transfers and in-place recreational uses. In the future, disputes are certain to arise between competing users. The Oklahoma Supreme Court's decision in *Franco American Charolaise, Ltd. v. Oklahoma Water Resources Board* is likely to provide a foundation for the resolution of many of these disputes.[1]

Although *Franco* does not directly involve stored water, it involves water transfers implicitly and recreation explicitly. Therefore, the results in *Franco* could prove in some instances to be analogous to

1. Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 855 P.2d 568 (Okla. 1990), *readopted and reissued,* 64 OKLA. B.J. 1197 (Okla. 1993).

disputes involving stored water. In addition, as an explication of Oklahoma water law the decision provides a framework through which to analyze future disputes which are likely to arise. This chapter attempts to explain the conflicts surrounding the use of stored water, especially as they relate to transfers and recreation, and explain to what extent the decision in *Franco* either enlightens or obfuscates such disputes.

II. The Franco Opinion

The court held in *Franco* that both the riparian rights doctrine and the prior appropriation doctrine coexist under Oklahoma law.[2] The recognition of both of these disparate systems creates an environment fraught with conflict. The prospective water users in a dual system are all trying to procure certain water rights but, depending upon their circumstances, they are forced to play different games in order to gain that certainty. In addition, the playing field is weighted in favor of the riparians.

To understand the relationship among the competing users of water rights, it is conceptually helpful to think of ranking the users in a hierarchy. The users who are higher on the water rights hierarchy trump those users below them on the scale. Although this is a simplification, the practical effect of a user having a higher position on the hierarchy is that in times of shortage the user which is lower on the scale must forego her rights in order to satisfy the superior user. This analogy works extremely well when applied to a prior appropriation system but is complicated by the existence of the concurrent riparian system. The recognition of new riparian uses complicates the system because it allows users not previously considered to place themselves above prior users simply by initiating a reasonable use. Thus, the hierarchy is identifiable at any particular moment, yet is subject to change at any time as the result of a riparian's initiation of a reasonable use. There is also some question as to where federal entities rank in this state-created hierarchy, or even if they do so.

Under *Franco* the doctrine of prior appropriation "does not preempt or abrogate the riparian owner's common-law right."[3] The opinion appears to create a hierarchy in which riparian rights, even the right to prospective use, are superior to all appropriative rights.[4] In fact, the opinion explicitly states that in times of shortage, appropriators will have to forego exercise of their water use rights if a riparian decides to initiate a reasonable use which cannot be satisfied by excess water not already being used by riparians or appropriators.[5]

The uncertainty that results is unsettling, especially to reservoir managers and those who contract with them for supplies of water. Long-term planning, which is one of the premiere benefits provided by reservoirs' ability to store water, becomes impossible if the rights to the waters held in storage are uncertain. *Franco* raises questions as to whether reservoir managers can store water for current or future use. It also raises questions as to who controls the water once it is stored. This uncertainty also implicates the financing system which has arisen to facilitate the public policy goal of capturing as much water as is possible.

III. The Nature of the Storage Right

Once a reservoir is built it is able to provide multiple benefits to water users. One of the greatest of these benefits is the ability to store water for future use. This is especially true in Oklahoma where it is

2. *Id.* at 575-76.
3. *Id.* at 576.
4. *Id.* at 582.
5. *Id.* at 582.

a stated public policy that "[w]ater management in Oklahoma requires the storage of water during periods of surplus supply for use during periods of short supply."[6]

Oklahoma is home to a large number of man-made reservoirs. There are approximately 663,000 acres of major reservoirs, 450,000 acres of farm ponds, and numerous smaller reservoirs owned by the state, municipalities, and other concerns (see Table 1).[7] Storage reservoirs provide storage space for purposes of municipal water supply, flood control, water quality, power generation, recreation, fish and wildlife, irrigation, navigation, and conservation. Reservoirs not only satisfy current needs but also offer certainty to users that necessary supplies will be available in the future. The use of any particular storage space will depend on the identity and needs of the owner, whether it be the federal government, state government, local government, or a private entity.

In order to fully comprehend the conflicts which affect reservoir managers it is necessary to understand that there are two separate and distinct water rights which affect stored water: (1) the water storage right and (2) the water use right. The storage right is the right to divert and collect water so that it may be applied to a designated use.[8] The storage right is not of itself a use of the water, but rather makes the water available for use.[9] Therefore, the mere act of storing water does not give rise to an appropriative right.[10] However, storage coupled with a future use can give rise to an appropriative right.[11] The water use right is the right to make use of the water towards a certain end.

The distinction between the right to store water and the right to use water is recognized by the rules and regulations of the Oklahoma Water Resources Board. Board Rule 785:20-1-9 states:

> USE OF WATER FROM A RESERVOIR: To clarify the distinction between regulation of the use of water in a reservoir and ownership and use of the storage space created by a reservoir, it is recognized:
>
> (1) Water, not previously appropriated or otherwise not subject to previously recognized claims to use, in reservoirs owned by federal, state or local governments or non-governmental entities or persons is public water subject to appropriation as provided herein. The use of storage space created by a reservoir is subject to applicable laws and regulations and is recognized to be property of the owner of such reservoir.[12]

The distinction between use of the water right and ownership of the storage space is also recognized in title 82, Section 105.21 of the Oklahoma Statutes, which requires the owners of storage space to make surplus waters available to the users who are entitled to it.[13] Surplus waters are those waters "in excess

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6. 82 OKLA. STAT. § 1085.31 (1990).

7. OKLAHOMA WATER RESOURCES BD., OKLAHOMA COMPREHENSIVE WATER PLAN 50 (1980) [hereinafter OKLAHOMA COMPREHENSIVE WATER PLAN].

8. John C. Peck, *Legal Aspects of Water Storage in Federal Reservoirs in Kansas*, 32 KAN. L. REV. 785, 787 (1984).

9. FRANK J. TRELEASE, LAW OF WATER RIGHTS AND RESOURCES § 5.09[4], at 5-44.

10. Peck, *supra* note 8, at 787.

11. *Id.*; *see* Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981) (finding that under New Mexico's prior appropriation law, the storage of water where there is no evidence of contracts or negotiations for future use, and storage would result in substantial loss to evaporation, storage is not a beneficial use. For the storage to constitute a beneficial use there must be something more than speculative intent to use the water beneficially in the future).

12. Oklahoma Water Resources Bd., Rules, Oklahoma Administrative Code (OAC) Title 785 (as amended through June 13, 1994) [hereinafter OWRB Rules].

13. 82 OKLA. STAT. § 105.21 (1991). The section states:

> The owner of any works for storage, diversion or carriage of water, which contain water in excess of his needs for irrigation or other beneficial use for which it has been appropriated, shall be required to deliver such surplus, at reasonable rates for storage or carriage, or both, as the case may be, to the parties entitled to the use of the water for the beneficial purposes. In case of the refusal of such owner to deliver any such surplus water at reasonable rates as determined by the Board, he may be compelled to do so by the district court, for the county in which the surplus water is to be used.

Id.

of [the storage owner's] needs for irrigation or other beneficial use for which it has been appropriated."[14] It is apparent that in Oklahoma the storage right to the ownership of storage space and the usufructory right to the use of the waters stored therein are separate and distinct rights.

IV. Federal Reservoirs

A. Overview

Reservoir projects built and operated by either the Army Corps of Engineers or the Bureau of Reclamation occupy an important place in the realm of Oklahoma water law. Thirty-two of the largest reservoirs in the state are multi-purpose federal reservoirs. The Corps of Engineers is usually responsible for the construction of the dam if the primary function of the reservoir is flood control.[15] The Bureau of Reclamation is usually responsible for the project if the primary purpose is irrigation.[16]

The federal government owns large volumes of storage space. Nonetheless, the federal government has historically deferred to state water laws regarding the use of the water.[17] Federal law governs the building and operation of federal projects, but the regulation of water use rights is generally left to the states.[18]

However, where the two sets of laws result in conflict as to who has authority to regulate water use, the federal law predominates in most situations as the result of either the Commerce Clause,[19] or the Supremacy Clause[20] and the Property Clause.[21] The Supreme Court has recognized that the United States has the power to protect the navigability of a river from state action under the Commerce Clause.[22] The Supreme Court has also recognized the federal government's right to use water for primary purposes on reserved lands under the property and supremacy clauses.[23] To determine whether federal law preempts state law the specific project legislation must be examined to determine whether the presumed deference to state law is overcome by a sufficient federal interest.[24]

Each federal reservoir that is built is governed by authorizing statutes which state the operating criteria for the reservoir. These statutory criteria define the purposes of the reservoir and the existing water use rights that must be protected. The reservoir must be managed in a manner which is consistent with these criteria. Because there are multiple objectives of each of these reservoirs, it is the duty of the reservoir manager to balance conflicts between the competing objectives.[25]

Oklahoma has provided in its statutes the manner by which the United States is able to appropriate water within the state.[26] The statute provides for a hearing process to determine whether the withdrawals of the United States are in the best interest of the state. Upon a finding by the OWRB that the withdrawal

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14. *Id.*

15. Peck, *supra* note 8, at 794.

16. *Id.*

17. J.W. Looney, *An Update on Arkansas Water Law: Is the Riparian Rights Doctrine Dead?*, 43 ARK. L. REV. 573, 620 (1990). *See generally* California v. United States, 438 U.S. 645, 653-70 (1978) (upholding the principle that Congress generally defers to state law in determining right to waters on federal lands); United States v. New Mexico, 438 U.S. 696, 701-02 (1978).

18. TRELEASE, *supra* note 9, at 9, 56.

19. U.S. CONST. art. I, § 8, cl. 3.

20. U.S. CONST. art. VI, cl. 2.

21. U.S. CONST. art. IV, § 3, cl. 2; *see* Utah v. Marsh, 740 F.2d 799 (10th Cir. 1984) (holding that Congress has the power under the Commerce Clause to regulate a storage reservoir located entirely within the state and not connected with any interstate navigation because the lake has an effect on interstate commerce through irrigation of crops which are sold interstate, support of a fishery which raises fish for sale interstate, providing recreation to interstate travelers, and existing in the flyway of migratory waterfowl protected under international treaties).

22. United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 703 (1899).

23. United States v. New Mexico, 438 U.S. 696, 716 (1978).

24. TRELEASE, *supra* note 9, § 5.09[4], at 5-44.

25. *Id.* § 5.09[4], at 5-48.

26. 82 OKLA. STAT. § 105.29 (1991).

is not in the best interests of the state, the Board has three options. The Board can reduce the amount of the appropriation, it can place conditions on the appropriation, or it can reject the request. The statute also limits water appropriated by the United States prior to 1967 to the waters "necessary for the plans filed for the project's economic justification and water supply."[27]

Federal water supply projects allocate their supplies by contract.[28] A federal agency may contract with any nonfederal agency for storage of the water.[29] These nonfederal agencies are necessarily appropriators because the federal government owns the storage facility. In order to build the facility the federal entity must have assurances from nonfederal entities that they will pay the costs of constructing and maintaining the requisite storage space.[30] The federal entity then constructs the reservoir using federal funds. The non-federal appropriative users may then make use of the stored waters, while repaying the costs of construction, operation, and maintenance over a specified period of time.

In order to make use of the water in a federal impoundment, the user must obtain a permit from the OWRB. The OWRB permit recognizes an appropriative right to use the water. Under Oklahoma law, users are only allowed to contract with the federal government for the water in the conservation storage pool. Board Rule 785:20-1-9 states:

> (2) For reservoirs constructed by agencies of the federal government, such as the U.S. Army Corps of Engineers, Department of Interior Bureau of Reclamation, and U.S. Department of Agriculture Soil Conservation Service, the Board will consider applications for regular permits to appropriate water only within quantities which represent the dependable yield of water from conservation storage space in such reservoirs, as calculated by such agencies, provided that for upstream flood control impoundments constructed under sponsorship of Soil and Water Conservation District, the amount of water in the sediment pool will be available to landowners or their predecessors who granted easements without compensation for such impoundments and who obtain water rights for the beneficial use of such water, and provided further that 785:20-11-1 shall be applicable where multiple landowners granted such easements.

The OWRB requires the user to negotiate and sign a storage repayment contract within two years of the date of issuance of the permit or the date of impoundment.[31] The OWRB has the responsibility of determining the priority of rights among those who contract for the water in federal storage facilities.[32] The federal government still has an element of control, however, because the water use contracts impose conditions which must be met before state law rights may be exercised.[33]

B. Department of Interior Bureau of Reclamation Projects

The Reclamation Act of 1902 authorizes the Secretary of the Interior, acting through the Bureau of Reclamation, to construct, operate, and maintain water storage and distribution facilities in the seventeen Western states.[34] The Bureau acquires rights to store the water either through filing an application for

27. *Id.* § 105.29(B).

28. Zach Willey & Tom Graff, *Federal Water Policy in the United States—An Agenda for Economic and Environmental Reform*, 13 COLUM J. ENVTL. L. 325, 332 (1988).

29. The Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, § 10, 75 Stat. 204, 210 (codified at 43 U.S.C. § 390b (1970)) (amending Water Supply Act of 1958).

30. The Water Supply Act of 1958, as amended, 43 U.S.C. 390b (Supp. V 1987). *See generally* Save Our Invaluable Land (SOIL), Inc. v. Needham, 542 F.2d 539, 543-44 (10th Cir. 1976) (affirming decision that there was sufficient evidence of demand for future use of the water to be stored in the proposed reservoir to satisfy the requirements of the Water Supply Act of 1958 that there be contracts evidencing present demands for the water as well as reasonable assurances and evidence that there will be future demand).

31. OWRB Rules, *supra* note 12, Rule 785:20-7-5.

32. *Id.* at Rule 785:20-11-7.

33. J. W. Looney, *An Update on Arkansas Water Law: Is the Riparian Rights Doctrine Dead?* 43 ARK. L. REV. 573, 621 (1990)

34. Reclamation Act of June 17, 1902, 43 U.S.C. § § 371-600e (1988 & Supp. III 1991). The seventeen reclamation states are Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah,

the appropriation of previously unappropriated water, or through purchase or condemnation of vested water rights.[35] By acquiring these rights the Bureau enables itself to make the water available on a contract basis to appropriative users who subsequently acquire appropriative rights to the stored water. Following construction of the storage reservoir, the Bureau enters into water rights contracts under the terms of the Reclamation Project Act of 1939.[36]

The contracting party is then able to use the stored water in return for agreeing to repay a part of the construction, operation, and maintenance costs over a period of time. The Bureau makes water from the reservoirs available to users primarily for irrigation purposes but may make water available for other purposes as well.[37] For example, municipalities are authorized to enter into contracts with the United States government for municipal water supply under title 11, section 37-122 of the Oklahoma Statutes.

When the Bureau enters into a water delivery contract with a party, two different property rights come into play. First, the Bureau has a property right in the ownership of the storage facility and any attendant irrigation works.[38] This property right derives from ownership of the actual real estate and works which comprise the storage facility. Second, the water user holds a property right in the right to make use of the water. The property right which the Bureau holds in the facility is completely distinct from the property right which the water user holds to the use of the water. In *Ickes v. Fox*[39] the U.S. Supreme Court addressed the ownership of waters contained in a Bureau of Reclamation project. The Court stated:

> Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works. Compare *Murphy v. Kerr*, 296 Fed 536, 544, 545. The government was and remained simply a carrier and distributor of the water (ibid.), with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. As security therefore, it was provided that the government should have a lien upon the lands and the water rights appurtenant thereto—a provision which in itself imports that the water-rights belong to another than the lienor, that is to say, to the landowner.[40]

The second property right, the ownership of the water right, arises when the water user puts the water to beneficial use in accordance with state law.[41] The ownership right does not arise from the water-delivery contract with the Bureau. The origin of the tenet that the water right arises from putting the water to beneficial use derives from section 8 of the Reclamation Act of 1902[42]. Thus, the water right is gained by satisfying state appropriation law pursuant to federal law. The status of the state water right is uncertain, however, when one considers the possibility that Oklahoma does not follow a strict prior appropriation doctrine. Because the waters stored in a Bureau reservoir are waters appropriated under

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Washington, and Wyoming. *See* 43 U.S.C § 391 (1988).

35. Carl Boronkay & Jerome Muys, *Federal Contractual Water Rights*, *in* WATER RIGHTS OF THE FIFTY STATES AND TERRITORIES 84, 85 (Kenneth R. Wright ed., 1990).

36. *Id.*

37. Reclamation Act of June 17, 1902, 43 U.S.C. § 372-383 (1988 & Supp. III 1991).

38. Boronkay & Muys, *supra* note 35, at 85.

39. 300 U.S. 82 (1937).

40. *Id.* at 94-95.

41. Boronkay & Muys, *supra* note 35, at 86,

42. 43 U.S.C. § 383 (1988).

state law, the water rights, even though contracted for, may be subject to depletion to satisfy reasonable riparian uses under *Franco*.

Beneficial use is a concept which belongs to the doctrine of prior appropriation. Therefore, if after *Franco* the doctrine of prior appropriation is inapplicable in Oklahoma, there is some question as to the certainty of water rights held on the basis of use of waters gained through contract with the Bureau. If both beneficial use and satisfaction of state water laws are prerequisites of gaining a water use right, then the result is unclear when the two conditions are incompatible.

If the riparian system alone governs in Oklahoma, a court could find that the federal statutory requirements control and hold that the appropriative rights vested in spite of state law. On the other hand, if a dual system of water rights is recognized, and the federal statutes are not controlling, the appropriative rights could be recognized as vested, yet junior in priority to any riparian rights. Another possible scenario is that such use could be recognized as permissive use of unappropriated waters subject to divestment at any time by riparian uses. These uncertainties affect not only existing reservoirs and their attendant water delivery contracts, but also proposed projects such as the Mountain Park Project.[43]
Section 8 of the Reclamation Act sets forth the relationship between the reclamation program and state water law.[44] In *California v. United States*[45] the Supreme Court of the United States held that Section 8 authorizes state regulation of federal water uses. The Court stated: "The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law."[46]

In *California v. United States* the state sought to impose conditions on the state's permit authorizing construction of the New Melones Project on the Stanislaus River. The most important condition provided that the Bureau could not store water behind the newly constructed dam until the Bureau was able to show firm commitments, or a specific plan for the use of the impounded water. The Court found that section 8 requires the Bureau to comply with state water laws when they are not inconsistent with congressional directives.[47]

The results in Oklahoma will likely turn on the level of deference afforded state law by the Bureau. Under the most recent amendments to the Reclamation Act of 1902 it is recognized "that the federal government has recognized and continues to recognize the primary jurisdiction of the several states over the allocation, priority, and use of water resources of the states, except to the extent such jurisdiction has been preempted in whole or in part by the federal government."[48] If state law does control, then under *Franco* the certainty of the contractual water rights with the Bureau will depend on judicial interpretations of the relative reasonableness of riparian uses and storage rights. If in the future riparian uses of waters act to deny contractors for Bureau water their expectations, the utility of water supply projects built by the Bureau could be adversely affected. In addition, contracting parties who are unable to appropriate the entire amount of contract water are unlikely to fully satisfy the payment requirements of their contracts, thereby leaving the Bureau to bear a greater portion of the costs of constructing, operating, and maintaining the reservoir.

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43. Brenda W. Jahns, *Reforming Western Water Rights: Contemporary Vision or Stubborn Revisionism?*, 39 ROCKY MOUNTAIN MINERAL L. INST. 21-1, 21-18 (1993).

44. 43 U.S.C. § 383 (1988). The section states:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws . . . .

Id.

45. 438 U.S. 645, 676 (1978).

46. *Id.* at 676.

47. *Id.* at 672; *see also* Roderick E. Walston, *State Regulation of Federally-Licensed Hydropower Projects: The Conflict Between California and First Iowa*, 43 OKLA. L. REV. 87, 94 (1990).

48. Jahns, *supra* note 43, at 21-19 to 21-20; *see also* The Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, 106 Stat. 4600.

C. United States Army Corps of Engineers Projects

The U.S. Army Corps of Engineers (the Corps) is authorized to construct dams to promote navigability and control floods through the regulation of streamflows.[49] The Secretary of the Army has exclusive authority to make surplus waters from these reservoirs available to water users if such uses do not "adversely affect then existing lawful uses of such water."[50] Section 6 of the Flood Control Act of 1944 provides that the Secretary of the Army may "make contracts with states, municipalities, private concerns or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir."[51]

The Secretary of the Army's authority to enter into water-delivery contracts extends only to "surplus water." However, there is no settled means of determining the availability of surplus water. In ETSI Pipeline Project v. Missouri[52] the U.S. Supreme Court stated:

> [The Corps] current position is that § 6 of the Act gives the Army Secretary the same authority over "water he determines is not needed to fulfill a project purpose in Army reservoirs" that the Interior Department possesses over water contained in its own reservoir projects, namely, the authority to withdraw water for industrial use if to do so would not impair the efficiency of the project for its other stated purposes.[53]

Thus, any waters available in a storage reservoir which are not currently being used by the Corps are surplus waters and subject to the authority of the Corps. This policy is in direct conflict with the Oklahoma statute defining surplus water.[54] The Oklahoma statute provides that stored water not used for irrigation or a beneficial appropriative use is surplus water which must be delivered to those persons who are entitled to put the water to beneficial use.[55]

Thus, under *Franco*, an argument could be made that the Corps is required to "deliver" water to downstream riparians by releasing stored water from the reservoirs. If water rights recognized under state law are "existing lawful uses," then the managers of Corps reservoirs could be required to release waters to satisfy riparian demands. Whether the Corps is required to do so will depend on a determination of precisely which waters are affected by the *Franco* holding, as well as a determination of whether the state or the federal government has jurisdiction over waters stored in federal reservoirs.

In *ETSI Pipeline Project v. Missouri* the Court did not address the question of whether state water rights are "existing lawful uses" which may not be adversely affected by the project under section 6 the Flood Control Act of 1944.[56] Future disputes over the control of waters stored in Corps reservoirs could turn on the definition of "existing lawful uses." If state water rights are "existing lawful uses," then riparians may be entitled to diminish appropriative rights held in stored water by initiating reasonable uses.

The Court noted in *ETSI Pipeline Project* that the Corps could logically make the claim that all waters in its reservoirs are unappropriated flood waters.[57] Such waters would not be affected by any "existing lawful uses." Therefore, the Corps would not be subject to any constraints as to how it disposed of these

49. Boronkay & Muys, *supra* note 35, at 87.

50. Boronkay & Muys, *supra* note 35, at 87; *see also* ETSI Pipeline Project v. Missouri, 484 U.S. 495, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988) (holding that the Secretary of the Army's authority over Corps reservoirs is exclusive, and that the Secretary of the Interior could not contract for the withdrawal of water for industrial use from a Corps reservoir without the approval of the Secretary of the Army).

51. Boronkay & Muys, *supra* note 35, at 87.

52. 484 U.S. 495 (1988).

53. *Id.* at 506 n.3.

54. 82 OKLA. STAT. § 105.21 (1991).

55. *Id.*

56. Boronkay & Muys, *supra* note 35, at 88.

57. ETSI Pipeline Project v. Missouri, 484 U.S. 495, 506 n.3 (1988).

waters through water-delivery contracts. As a result the water user's right would derive from the federal contract and be controlled by its provisions, without reference to state water laws.

The Corps has chosen to take a different approach. It avoids the problem of defining surplus water by contracting for water storage under the Water Supply Act of 1958.[58] The Corps requires that the water user either have an existing water right under state law or exempt the United States from any liability which might arise from subsequent claims for prior water rights.[59] Contracting in this manner places the Secretary of the Army in a position similar to that of the Secretary of the Interior relative to the water users.[60]

The declaration of policy section of the Flood Control Act states that "it is hereby declared the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control."[61] However, this is not an explicit requirement that the Secretary of the Army conform to state law, such as was found in the Reclamation Act of 1902.[62] Therefore, the Corps have an argument that they have not waived their right to preempt state law with respect to waters stored in reservoirs constructed by the Corps.

The Flood Control Act does protect both present and future beneficial consumptive use in states lying wholly or partly west of the ninety-eighth meridian.[63] Oklahoma is one of these states. The Flood Control Act provides that water use "for navigation" may not conflict with present or future beneficial consumptive use in these states.[64] The extent of the protection given to the states by this subsection is unclear, however, because there is uncertainty as to whether the terms of the subsection apply only to navigation or also to the use of water for industrial or domestic contracts.[65]

V. Federal Government Rights to Waters Stored in Federal Reservoirs

A. Overview

Managers of federal reservoirs are faced with conflicting concerns. They need the flexibility to regulate reservoir levels in order to meet the multiple objectives served by their reservoirs. The *Franco* decision threatens to restrict the management flexibility of federal reservoir managers by making them subservient to holders of riparian rights. One argument available to the federal government agencies in response to *Franco* is that the federal government itself has rights to the use of waters stored in federal reservoirs. There are two theories which the federal government could assert towards this end: (1) the federal reserved rights doctrine and (2) the federal riparian rights doctrine.

B. Federal Reserved Rights

The federal government may claim an interest in the use of the water stored in federal reservoirs under the doctrine of federal reserved rights.[66] John C. Peck has posited that

> [a]rguably, the acquiring of land for a Corps of Engineers reservoir, the construction of a dam, and the impounding of water for water quality purposes fits the situation involving reserved

58. Boronkay & Muys, *supra* note 35, at 88.
59. *Id.*
60. *Id.*
61. *Id.* at 87.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 87-88.
66. Peck, *supra* note 8, at 832.

> rights. If it does, the right would date from the date of the reservation, and the quantity would likely be at least that amount represented by the storage volume for that purpose.[67]

The same argument should apply to Bureau reservoirs as well. If federal control over water stored in federal reservoirs is threatened by the joint impact of state water laws, and the *Franco* decision, then it is possible that the federal agencies will argue that they have reserved rights in those reservoirs.

Federal reserved rights give the government the right to use those waters stored in a federal water storage project for the primary purposes of the reservation. The right arises when the federal government reserves public land for specific purposes. The right to the use of water for the benefit of this land is seen as attendant to the right to the land.[68] This right is in addition to any rights the federal government may hold in Oklahoma under the Commerce Clause to either an appurtenant right, or a right in gross to the navigable waters of the state.[69]

The federal reserved rights doctrine first appeared in *Winters v. United States*[70], but was regarded as being a doctrine exclusive to Indian law. In the "Peltom Dam" case, *Federal Power Commission v. Oregon*[71], the Supreme Court intimated that the doctrine espoused in *Winters* might apply outside the context of Indian reservations. In *Peltom Dam*, the Court upheld the Federal Power Commission's (FPC) grant of a license to construct a dam over the objection of Oregon's Fish and Game Commission. The Court held that the property clause of the Constitution gave the FPC the right to issue the license without the approval of the state. The license did not grant water use rights, but it has been assumed that the power company operating the facility is exercising the reserved rights of the United States.[72]

The United States Supreme Court held in *Arizona v. California*[73] that the withdrawal of land for public use may result in the acquisition of a federal right to use water on the reserved land. To determine whether the water right exists, it is necessary to determine the intent of the federal government at the time the land was withdrawn. Generally, the intent is based on implication because withdrawal orders rarely discuss water rights.

The nature of the federal reserved water right is unusual because it is not based on the same conditions as rights held by other users. The National Water Commission has stated:

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67. *Id.*

68. *See* TRELEASE, *supra* note 9, at 109. Trelease offers the following definition:

> If the United States, by treaty, act of Congress or executive order reserves a portion of the public domain for a federal purpose which will ultimately require water, and if at the same time the government intends to reserve unappropriated water for that purpose, then sufficient water to fulfill that purpose is reserved from appropriation by private users. The effect of the doctrine is twofold: (1) when the water is eventually put to use the right of the United States will be superior to private rights in the source of water acquired after the date of the reservation, hence such private rights may be impaired or destroyed without compensation by the exercise of the reserved right, and (2) the federal use is not subject to state laws regulating the appropriation and use of water.

Id.

69. United States v. Grand River Dam Authority, 363 U.S. 229 (1960); *see* TRELEASE, *supra* note 9, at 115. Trelease adds the following discussion of the relation of the reserved rights doctrine in Oklahoma:

> It has been argued that the reservation doctrine must logically be limited to those western states in which the Desert Land Act is applicable. That act declared the "surplus waters" on the public lands, but not on reserved lands, to be "free from appropriation" under state law, thus "severing" it from the land. A post-1877 reservation of land and water took the reserved water out of the jurisdiction of the state, undid the severance and apparently made the water again appurtenant to the reserved land. These events did not and could not take place in Oklahoma where the act does not apply. Yet non-Indian water users in Oklahoma are very much aware of the potential of reserved rights for the Indian reservations in that state, and take little comfort from this argument. To them it is an unnecessary circuity, and the theory of the reservation doctrine can be stated more simply: the United States was the owner of the land and water, and although it permitted [by the Act of 1866?] the appropriation of the water, it reserved the unappropriated water when it reserved the land. No exception from a severance or reattachment by a reservation need be postulated.

Id.

70. 207 U.S. 564 (1908).

71. 349 U.S. 435 (1955).

72. TRELEASE, *supra* note 9, at 106.

73. 373 U.S. 546 (1963).

> If a reserved Federal water right is determined to have been created, it has characteristics which are quite incompatible with State appropriation water law: (1) it may be created without diversion or beneficial use, (2) it is not lost by nonuse, (3) its priority dates from the time of the land withdrawal, and (4) the measure of the right is the amount of water reasonably necessary to satisfy the purposes for which the land has been withdrawn.[74]

The right is neither strictly an appropriative nor a riparian right, and therefore fits uneasily into the Oklahoma system.

Nevertheless, a reserved right in stored waters is likely to be superior to any rights in stored waters which are subject to appropriation. If the status of waters in federal reservoirs becomes uncertain as a result of *Franco*, federal agencies may be able to protect their interests in the stored waters by claiming at least a portion of the water under the federal reserved rights doctrine. A similar justification exists with respect to the discussion of federal riparian rights which follows.

C. Federal Riparian Rights

The federal government also has riparian rights in those states which recognize the riparian doctrine under state law. Federal riparian rights supplement any federal reserved rights. In *In re Water of Hallett Creek Stream System*,[75] the Supreme Court of California held that under California water law the United States holds riparian rights on federal reserved lands. These rights are subject to governance by the state water board and must be evaluated and approved by that board before they may be exercised.[76]

In re Hallett Creek involved the United States' claim of an unexercised riparian right in a national forest. The Forest Service claimed a reserved right to water in the forest for the purposes of firefighting and roadwatering. However, the Forest Service also desired a right to use water for future wildlife enhancement. Wildlife was not a primary purpose of the reservation and therefore did not qualify for a reserved right. Thus, the Forest Service sought to obtain the water right by claiming riparian status. The court agreed with the Forest Service and held that the United States held an unexercised right under California law which would have to be approved by the State Water Resources Control Board before being utilized.[77]

There has not been a decision in Oklahoma recognizing a riparian right in the federal government. This is an important question, however, if reasonableness of use is to be based on projections of possible future uses. Whether the OWRB considers possible future initiation of federal riparian rights could substantially affect the determination as to the reasonableness of current uses. In addition, federal reservoir managers may turn to the federal riparian rights doctrine as a recourse to protect their control over water stored in federal reservoirs.

VII. Bond Financing of Water Reservoirs

A. Overview of Financing Mechanisms Available to Non-federal Entities

Nonfederal water projects are usually financed through the vehicle of long-term bond indebtedness.[78] The long useful life of projects, coupled with the high costs of construction, indicate long-term bonds as the ideal financing mechanism for reservoirs. Generally, limited obligation revenue bonds are used.[79] Limited obligation revenue bonds are secured by the revenues to be produced by the project, or, in some

74. NATIONAL WATER COMM'N, WATER POLICES FOR THE FUTURE 464.

75. 749 P.2d 324, 334 (Cal. 1988).

76. *Id.* at 337, 338.

77. *Id.* at 338.

78. William D. Kiser, *Financing Water Projects in the 90's*, at 1, *in* CLE INTERNATIONAL: OKLAHOMA WATER LAW (Oklahoma Cit_, Okla. Oct. 6-7, 1994).

79. *Id.* at 1; 82 OKLA. STAT. § 1085.33 (1991) (governing bonds issued under the Water Resources Fund).

instances, by other revenue sources. By using limited obligation revenue bonds the public entity is able to limit the amount of public funds and assets which are pledged to the payment of indebtedness and preserve the tax base for the financing of non-revenue producing facilities.[80]

Most of the bonds issued for water projects are qualified for federal tax exemption because they are issued by public entities and are used for a governmental purpose. Government purpose bonds are entitled to exclusion from gross income for federal taxation purposes under section 103 of the Internal Revenue Code.[81] Some bonds issued for water projects are also exempt from state income taxes. The OWRB, Grand River Dam Authority (GRDA), rural water and sewer districts, regional water districts, and master conservancy districts have specific state tax exemptions by statutory authority.[82] However, the majority of issuers of bonds for water projects in Oklahoma do not qualify for exemption from state taxes.[83] Cities, towns, and public trusts issuing bonds on behalf of such political subdivisions do not qualify for any state tax exemptions. The tax exempt status of those bonds which are exempt allows the bonds to be offered at an interest rate which is lower than the rates attached to similarly situated bonds which are not tax exempt. This allows the public entity to save money by paying lower interest costs over the life of the bond than a corporate entity would pay.

Most water projects in Oklahoma are financed through the OWRB financing project. The OWRB financing project for water storage and control facilities is outlined in title 82, sections 1085.31 through 1085.39 of the Oklahoma Statutes. The statutes provide for the creation of the Water Resources Fund to provide necessary funds to entities engaging in projects authorized under the Act. The Board is authorized to issue bonds to provide the necessary cash for the fund. Such bonds are special obligation revenue bonds which are exempt from state taxes.[84] Security for these bonds is provided by the Statewide Water Development Revolving Fund.[85]

Under this program the OWRB has authority to issue debt to finance the construction, extension or improvement of reservoirs.[86] Since its inception in 1979 the program has issued over $240 million principal amount of bonds, with participation from entities in seventy-five of the seventy-seven Oklahoma counties.[87]

The OWRB also has a mechanism by which it can provide loans to municipalities or public trusts when they want to acquire, construct, or refinance a project.[88] This loan program allows municipal entities which contract for water in federal water supply projects to borrow the amounts necessary to satisfy the contract with the federal entity. This loan program is separate and distinct from the Water Resources Fund.

Cities and towns in Oklahoma who wish to build water storage facilities often utilize the mechanism of a public trust. The Oklahoma legislature authorized the use of public trusts for two reasons: (1) Oklahoma law does not allow cities and towns to issue bonds payable solely from revenue arising from a municipally-owned facility, and (2) the trusts allow public projects to be financed on a self-liquidating basis.[89] The public trust is the preferred means of cities utilizing the Water Resources Fund. Use of the public trust allows the city or town to incur debt upon a two-thirds vote of the governing body of the beneficiary.[90] A city or town which issues bonds directly, without using the mechanism of the public trust, must undergo an election and pledge the taxing power of the municipality to secure payment of the

80. Kiser, *supra* note 78, at 1.
81. 26 U.S.C. § 103 (1988).
82. 82 OKLA. STAT. § 1085.33 (1991) (providing the exemption for the OWRB); *id.* § 876 (providing the exemption for the GRDA).
83. Kiser, *supra* note 78, at 1.
84. 82 OKLA. STAT. § 1085.33 (1991).
85. *Id.* § 1085.44.
86. *Id.* § 1085.33.
87. Kiser, *supra* note 78, at 10.
88. 82 OKLA. STAT. § 1085.36 (1991).
89. Kiser, *supra* note 78, at 3; *see* Application of the City Council of the City of Talequah, 285 P.2d 418 (1955).
90. 60 OKLA. STAT. § 176(a)(3) (1991).

debt.[91] Use of the public trust thereby allows a city or town greater flexibility and control with regard to water project financing issues.

B. Franco's Effect on Municipal Storage Reservoir Financing

Municipalities are faced with the problem of providing an adequate supply of water to meet the demands of their citizens. Municipalities seek a supply which is quantifiable and definite over an extensive period of time. In addition, the source of supply should allow for increased usage over time in the event of rising demand as a result of growth.

However, the municipality faces many problems while attempting to accomplish this task. Obtaining a municipal water supply requires both long-term planning and tremendous capital investment. A source of supply must be identified. A right to the water must be gained. Facilities for the utilization of the water must be constructed. Finally, all of this must be financed.

Municipalities in Oklahoma act as appropriators because they do not qualify as riparians, in the strict sense of the word, and because the riparian right to water is not assured at a given quantity over a given period of time. The riparian right is a claim to a relative amount of water. As appropriators, municipalities are theoretically able to gain a right to a specified amount of water which they can rely on for a period of time into the future.

The *Franco* decision has undoubtedly appeared like a specter before a host of horrified municipal attorneys. The possibility that *Franco* may be interpreted as giving future assertions of riparian rights priority over appropriations leaves the municipalities without a reliable source of water supply. In addition, it threatens their ability to pay for the storage and conveyance facilities which have been financed through the vehicle of long-term bonds. These potentialities threaten the economic heart of those municipalities which are unable to supply their needs through groundwater sources or contract with federal storage facilities. The problem is exacerbated by the reality that the period of time in which municipalities face their greatest need is the same period of time that riparians are most likely to initiate new uses. This crucial period of time exists when there is a scarcity of water supply from drought-like conditions.

After *Franco* there exists the possibility, however unwelcome, that either an upstream or a downstream riparian or a combination of multiple parties could initiate riparian uses which would effectively deny the municipality its expected water supply. An upstream riparian could make use of the water to the extent allowed by the riparian right, such that insufficient amounts of water would reach the municipality's storage facility. Similarly, a downstream riparian could claim that because of the municipality's storage of the stream water, insufficient quantities are reaching the riparian, effectively denying the riparian right to initiate a reasonable use. As a result the municipality would be faced with three options: (1) purchase the riparian water rights or purchase the riparian's agreement not to assert the rights, (2) condemn the riparian lands, or (3) utilize other sources of water.

The first option, of purchasing the rights or agreements not to assert the rights, might be appealing if there were only a small number of identifiable riparians who could be paid an economically efficient amount. However, on most stream systems there are numerous riparians and, as the stream adjudications show, identifying them is an arduous task. In reality this option is both financially prohibitive and nearly impossible as a practical matter. One option would be to pay riparians as they identified themselves as interfering users. However, this would allow riparians to choose at what times and at what quantities they initiated their use. This would be economically unfavorable to the municipality and would make long-term planning impossible.

The second option, of condemnation, is an available means of securing a water supply, but it is not as appealing as simply applying for unappropriated waters. Municipalities, and possibly, public trusts, have the power of eminent domain.[92] The amount of riparian land which would have to be condemned

91. Kiser, *supra* note 78, at 3.

92. *See* Kennebunk, Kennebunkport & Wells Water Dist. v. Maine Turnpike Auth., 71 A.2d 520 (Me. 1950) (holding that riparian rights

is uncertain. This will depend on future determinations of exactly what types and amounts of riparian use are reasonable. Regardless, the costs of condemning an area large enough to guarantee an adequate supply in the future may be prohibitive.

The third option, utilizing other sources of water, is also unworkable. It fails to take into account existing indebtedness, the repayment of which is contingent on revenues produced from already existing facilities. Outstanding bonds would be in default because there would be insufficient revenues accruing to the cities to make the payments to the bondholders. In the event of default both bond issuers and bond holders would be harmed. As a result of the default, the bond market would require the bond issuer to pay higher rates to finance future projects. Higher rates on bond issues translate into higher taxes for residents. In addition, because the benefit of double tax exemption only accrues to those persons who have to pay Oklahoma state taxes, bondholders of municipal bonds issued in Oklahoma are generally Oklahoma residents. Thus, Oklahoma residents would bear the greater part of any burden resulting from a default on uninsured bonds.

Additionally, municipalities would likely be unable to issue new bonds on a limited obligation basis. In the interest of security, bond purchasers would require future bonds to be issued on a general obligation basis. Thus, the general taxing power of the municipality would have to be pledged to satisfy bonds which are used solely for water supply projects. This would limit the ability of the municipality to secure obligations to finance non-revenue producing facilities which the municipality must provide its citizens, such as streets, parks, and playgrounds.

The result of such uncertainty in the municipal water bond market will be devastating to municipalities who must rely on storage reservoirs for their water supply. Credit enhancement vehicles such as letters of credit and municipal bond insurance could allow bonds to be issued in the face of such uncertainties. However, the costs of these techniques are prohibitive, especially for smaller projects. Additionally, such credit enhancement may not be available if the uncertainties are too great.

The City of Oklahoma City, in its brief amicus curiae, argued that the recognition of riparian rights would seriously undermine its water rights appropriations. The City stated that it had relied upon its appropriative rights when issuing indebtedness to fund a water procurement, storage, treatment, and delivery system. Similar uncertainties about the inability to satisfy current indebtedness and the inability to undertake new indebtedness will face many of Oklahoma's municipalities if the extent of the riparian right under Oklahoma law is not clearly defined.

In addition to the financial tremors felt by the municipalities as a result of *Franco*, the State of Oklahoma faces great financial exposure as a result of the Water Resources Fund and the OWRB loan program. The Water Resources Fund is secured solely by the revenues of the projects; the loan program is secured by mortgages on the projects and pledges of revenues. Were the necessary water to become unavailable then the revenues would not materialize and the state might have no choice but to allow the bonds to go into default.

VIII. Transfers

A. Intrastate Transfers

Generally, intrastate transfers are divided into two categories: (1) intrabasin transfers, and (2) interbasin transfers. It is difficult to precisely define what areas are within and what areas are outside a particular basin. The problem of defining what exactly constitutes a stream system, a basin, appears in *Franco*. The court found that eighty percent of the City of Ada is located in the South Canadian Stream Basin and twenty percent is located in the Clear Boggy Stream Basin.[93] Because in-basin use is preferred

are limited, and that public entities may condemn water rights in Maine).

93. *Franco*, 855 P.2d at 571.

in Oklahoma, the definition of particular basins may be important to the resolutions of disputes among water users.

In *Franco*, the court held that Ada, an out-of-basin appropriator, could be granted an appropriation which was not subject to recall by in-basin users.[94] The court noted Oklahoma's statutory preference for in-basin use, but found that the Oklahoma legislature intended for out-of-basin appropriations to be subjugated to in-basin appropriations only when conflicting appropriations were before the OWRB, or when the last five-year review revealed future in-basin needs.[95] Thus, out-of-basin water transfers which do not implicate either of these two concerns should have the same certainty as in-basin uses.

In order for water to be transferable, the rights to use the water must be severable. Oklahoma statutes dictate that water rights are severable.[96] Water used for irrigation purposes is appurtenant to the land.[97] However, if the water cannot beneficially or economically be put to practicable use, or if the water is not used for irrigation purposes, then it is severable.[98] Generally, rights to water gained through the appropriation system are also transferable.[99] The exception that must be noted is the GRDA. The GRDA's authorizing statutes only provide for use, distribution, and sale within the district.[100]

The riparian system acts as a built-in protection of the area of origin against out-of-basin transfers.[101] By requiring that the water be used on riparian land, the doctrine precludes out-of-basin use. However, in many instances this doctrine has been relaxed to allow riparians to use waters on nonriparian lands. In *Smith v. Stanolind Oil & Gas Co.*,[102] the Oklahoma Supreme Court held that the defendant, who gained rights to the use of the water through contract, could use that water on nonriparian land. Thus, riparian water rights may be severed so that the water may be used on nonriparian land.[103] The severed right is subject to the same restrictions as the original right, but no more nor less.

In *Franco* the court refers to *Stanolind* for the proposition that it has applied the reasonable use theory to conflicts between riparian users in the past.[104] The court then quotes from *Lawrie v. Silsby*, which was followed in *Stanolind*.[105] *Lawrie* stands for the proposition that using riparian waters on nonriparian lands is not per se unreasonable.[106] Thus, although it is unclear after *Franco* whether riparian waters can be transferred out-of-basin, they may at least be transferred to nonriparian lands.

The prior appropriation system does not inherently provide any protection to the area of origin. The appropriation doctrine is based on the time of the initiation of use rather than on geographical proximity. The *Franco* opinion implicitly recognizes that water may be put to beneficial use by out-of-basin appropriators under the prior appropriation doctrine.[107] The opinion also recognizes that Oklahoma has a statutory preference for in-basin use.[108] Title 82 , section 1086.1 of the Oklahoma Statutes provides that:

> Only excess and surplus water should be utilized outside of the areas of origin and citizens within the areas of origin have a prior right to water originating therein to the extent that it may be required for beneficial use therein.

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94. *Id.* at 581-82.
95. *Id.* at 581.
96. 82 OKLA. STAT. §§ 105.22, 105.24 (1991).
97. *Id.* § 105.22.
98. *Id.* §§ 105.22, 105.23.
99. *Id.* § 105.24.
100. *Id.* § 862.
101. *See* J.W. Looney, *An Update on Arkansas Water Law: Is the Riparian Rights Doctrine Dead?* 43 ARK. L. REV. 573, 588 (1990).
102. Smith v. Stanolind Oil & Gas Co., 172 P.2d 1002 (Okla. 1946).
103. *Franco*, 855 P.2d at 575.
104. *Id.* at 575.
105. *Id.* at 575.
106. Lawrie v. Silsby, 74 A. 94, 96 (Vt. 1909).
107. *Franco*, 855 P.2d at 580-81.
108. *Id.* at 581.

In the withdrawn *Franco* opinion,[109] Justice Kauger held that the use of water by out-of-basin users was encouraged by the state, but only to the extent that such use did not interfere with the use in the basin.[110] Under Kauger's paradigm, the out-of-basin uses could be recalled if in-basin needs were discovered during a five-year review.[111]

The *Franco* court relied upon legislative clarification of title 82, section 105.12 to determine that the statutory preference only exists when applications of both out-of-basin and in-basin appropriators are before the OWRB, or when the most recent five-year review revealed future in-basin needs.[112] Otherwise, out-of-basin appropriators acquire a vested right through their continued beneficial use and stand on equal footing with in-basin appropriators.[113]

Combining the prior discussions of severability under Oklahoma's riparian doctrine and out-of-basin vested rights acquisition under Oklahoma's appropriation system, it might appear that out-of-basin transfers are unproblematic under Oklahoma law. Unfortunately, this is not the case. Transfers are based upon economic valuations which reveal that water is more highly valued in the location to which it is going than it was in its original location. The impetus behind a transfer is one location projecting that, according to its anticipated future needs, the importation of water is more economically feasible than local alternatives, assuming they exist. The importing entity intends to satisfy its expected future need by contracting for a fixed and predictable amount of water.

Under the doctrine of relative reasonableness articulated in *Franco*, it is unlikely that either riparian or appropriated water can be satisfactorily guaranteed in the future. Although this does not preclude transfer of rights, it does impede their use. Rights which are uncertain are difficult to value and consequently difficult to market, and difficult to guarantee. Therefore, the Franco opinion recognizes the legal validity of out-of-basin intrastate transfers, yet may in fact curtail such transfers because of the uncertainty created by the opinion.

B. Interstate Transfers

The prior appropriation doctrine allows a vested water right to operate similarly to an interest in real property in regard to interstate transfers of water.[114] Although an appropriative right is usufructory, representing only a right to use the water and not ownership, the acquired right is exclusive and may be sold or conveyed.[115] However, there are many prohibitions to the interstate transfer of Oklahoma water.[116]

Title 82, section 1085.2(1) of the Oklahoma Statutes provides that the OWRB may not contract conveying the title or use of any waters of the state to any person, firm, corporation, or other state, for sale or use in any other state, unless it is specifically authorized by the Oklahoma legislature.[117] Section 1085.22 provides that the Commission shall not permit the sale or resale of any water for use outside the State of Oklahoma.[118] Section 105.12(A)(4) creates a priority for intrabasin existing or proposed beneficial

109. 58 OKLA. B.J. 1406 (Okla. May 19, 1987), *withdrawn and superseded on reh'g*, 855 P.2d 568 (Okla. 1990).

110. *Id.* at 1409.

111. *Id.* at 1410-11.

112. *Franco*, 855 P.2d at 581-82 (interpreting 1988 Okla. Sess. Laws § 3, at 203; OWRB Rules, *supra* note 12, Rule 785:20-5-6 (Approval of Application for Out-of-Stream System Use); *see also* 82 OKLA. STAT. § 105.12(A)(4), (B), (C) (1991).

113. *Franco*, 855 P.2d at 581-82.

114. Charles L. Neff, *Interstate Transfers of Water: South Dakota's Decision to Market Water for Coal Slurry Operations*, 18 TULSA L.J. 515, 518 (1983).

115. *Id.*

116. Many western states have enacted water embargo statutes which prohibit the diversion of water for use in other states. *See* ARIZ. REV. STAT. ANN. § 45-153B (1956); COLO. REV. STAT. § 37-81-101 (Supp. 1982); IDAHO CODE § 42-408 (1977); KAN. STAT. ANN. § 82a-726 (1977); MONT. CODE ANN. § 81-1-121 (1982); NEB. REV. STAT. § 46-233.01 (1978); NEV. REV. STAT. § 533.520 (1979); N.M. STAT. ANN. § 72-12-19 (1978); OR. REV. STAT. § 537.810 (1981); S.D. COMP. LAWS ANN. § 46-1-13 (Supp. 1982); UTAH CODE ANN. § 73-2-8 (1980); WASH. REV. CODE ANN. §§ 90.16.110, 90.16.120 (1962); WYO. STAT. § 41-3-105 (1977).

117. 82 OKLA. STAT. § 1085.2(2) (1991 & Supp. 1993).

118. 82 OKLA. STAT. § 1085.22 (1991).

uses.[119] Section 105.22 states that all water used in this state for irrigation purposes shall remain appurtenant to the land upon which it is used if it is not impracticable to beneficially or economically use the water on that land.[120] These statutes reflect the legislative intent to keep water in the state to satisfy the needs of Oklahoma users.

There are some constitutional limits on prohibitions of exports of natural resources. In *Sporhase v. Nebraska ex rel Douglas*,[121] the United State Supreme Court held that water was an article of commerce that is subject to congressional regulation under the Commerce Clause. In *City of Altus v. Carr*,[122] the court noted that when a natural resource belongs to an owner of the land, it is individual property and may be subject to interstate commerce. The court then held that a state law which "prevents, obstructs or burdens" the transmission of a natural resource is a regulation of interstate commerce, which is a prohibited interference.[123] As a result of the holding of *City of Altus v. Carr*, the state statutes preferring in-state use may be unconstitutional to the extent that they interfere with interstate commerce, notwithstanding the intent of the Oklahoma legislature.

However, in *Reeves Inc. v. Stake*,[124] the court made a distinction between a state as a market participant and a market regulator. The court stated that "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace . . . . There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."[125]

Oklahoma draws its authority to regulate interstate transfers of water from *Reeves*. Because Oklahoma follows the doctrine of prior appropriation, it is understood that all unappropriated waters are waters of the state, and therefore are owned by the state. In *Oklahoma Water Resources Board v. Central Master Conservancy District*[126] the court stated:

> [T]he state is without authority to transfer one man's property to another, but its power to control unappropriated public waters is plenary. Definite nonnavigable streams are public waters. The state may either reserve to itself or grant to others its right to utilize these streams for beneficial purposes.[127]

Just as in *Reeves*, Oklahoma works as a market participant and can choose to allow or disallow the sale of its unappropriated water outside the state as it wishes.

Problems arise, however, if it is determined that Oklahoma has been transformed from a prior appropriation state to a dual system or regulated riparian system. The *Franco* court classified a riparian interest as one in real property but not absolute or exclusive.[128] It is usufructory in character and subject to the rights of other riparian owners.[129] The court further explained that a common law riparian right to use stream water, as long as the use is reasonable, is a private property interest.[130] Once created, it becomes absolute and is protected from legislative invasion.[131] Because of the resurrection of the full riparian right, the state may not have the power to prohibit the interstate transfer of water because such prohibition would violate the Commerce Clause. Therefore, the legislative intent to keep water within this

119. *Id.* § 105.12(A)(4), (B); *see also* OKLA. ADMIN. CODE § 785:20-5-6 (1994).
120. 82 OKLA. STAT. § 1085.22 (Supp. 1972).
121. 458 U.S. 941, 954 (1982).
122. 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd per curiam*, 385 U.S. 35 (1966).
123. *Id.* at 838-39.
124. 447 U.S. 429, 436 (1980).
125. *Id.* at 437.
126. Oklahoma Water Resources Bd. v. Central Master Conservancy Dist., 464 P.2d 748 (Okla. 1968).
127. *Id.* at 753.
128. *Franco*, 855 P.2d at 568 n.20.
129. *Id.*
130. *Id.* at 568 n.24.
131. *Id.*

state would be undermined; riparians may sell their water outside the state, as long as such sale is onsidered a reasonable use.[132]

An example of the state's ability to regulate transfers of surplus waters which belong to the state can be seen in the controversy over the sale of surplus waters in Lake Sardis to the North Texas Municipal Water District. Because Lake Sardis had a surplus of water over projected needs, to the extent of at least 130 million gallons per day, the OWRB sought authorization to sell the surplus water to Texas. The OWRB intended to use the proceeds of the sale to pay amounts due to the federal government under water storage contracts. Excess funds were to go into the Statewide Water Development Revolving Fund.

Pursuant to title 82, section 1085.2(1) of the Oklahoma Statutes, the OWRB sought and gained legislative approval in 1991 to sell surplus water from Lake Sardis to Texas.[133] Additional approval was gained through an Oklahoma senate joint resolution.[134] In the 1993 legislative session, the agreement to sell the surplus water later came under attack on the basis that the OWRB had not allowed for sufficient citizen participation.[135] The state senate then withdrew its 1992 joint resolution that had supported the sale of surplus Sardis water to Texas.[136] Finally, the attorney general opined that Senate Joint Resolution 31 supporting the sale of Sardis water, did not qualify as a valid authorization of the contract.[137] Therefore, the OWRB cannot contract for the sale of Sardis water to Texas unless further affirmative legislative approval occurs.

This inability to contract raises a serious problem for the OWRB as to how to generate sufficient revenues to meet its contractual obligations to the federal government. The OWRB faces the perplexing situation of being unable to generate sufficient revenues to repay the federal government from the sale of water within the local Sardis region. At the same time, the OWRB lacks legislative authorization to generate sufficient revenues through sale of the surplus water in Sardis to Texas municipalities. As a result, if the OWRB is unable to meet its obligations under the contract for storage space with the federal government, the federal government potentially could exercise its power upon default to foreclose on the surplus water.

Under prior appropriation, the state of Oklahoma has plenary control over surplus (unappropriated) waters. These waters are property of the state. Thus, the OWRB had the power to pledge the surplus Sardis waters to secure the obligation to the federal government. If this is true, then the legislature's failure to sell the water to Texas could result in the federal government foreclosing on the water, and selling it to Texas for its own benefit. Oklahoma would lose both revenue and regulatory control as a result.

The *Franco* decision creates uncertainty about this relationship between the OWRB and the United States Army Corps of Engineers concerning Sardis Lake because *Franco* calls into question whether the state has property claims to surplus waters. *Franco* raises the possibility that riparians, not the state, have the property rights to the surplus waters of Lake Sardis.

VIII. Recreation

Oklahoma's lakes and reservoirs provide much needed recreational opportunities which both satisfy the demands of the state's residents and attract tourist dollars to the state. The many lakes and reservoirs in the state provide opportunities for fishing, boating, canoeing, hunting, hiking, camping, picnicking, sightseeing, bird-watching, and other wildlife-related activities. These recreational opportunities are important to both satisfy resident demand and bolster the state economy by attracting tourism.

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132. *See* Smith v. Stanolind Oil & Gas Co., 172 P.2d 1002 (Okla. 1946).
133. Okla. H.B. 1743 (1991).
134. Okla. S.J.R. 31 (1992).
135. Okla. H.R. 1007 (1993).
136. Okla. S.R. 18 (1993).
137. Okla. Att'y Gen. Op. No. 93-20 (Aug. 13, 1993).

In *Franco* the court remanded the issue of whether recreational use of a stream by riparians is reasonable under the relative reasonable use theory.[138] In a footnote the court stated:

> Reasonableness is a question of fact to be determined by the court on a case-to-case basis, factors courts consider in determining reasonableness include the size of the stream, custom, climate, season of the year, size of the diversion, place and method of diversion, type of use and its importance to society (beneficial use), needs of other riparians, location of the diversion on the stream, the suitability of the use to the stream, and the fairness of requiring the user causing the harm to bear the loss. See Restatement (Second) Torts § 850A [1979].[139]

In addition to determining the reasonableness of recreational use in light of these factors, the trial court is charged on remand with determining the relative reasonableness of recreational use against the competing uses of the appropriator.[140]

The court announced in *Franco* that it was adopting the approach taken by the Supreme Court of Nebraska in *Wasserburger v. Coffee*.[141] In *Wasserburger* the Supreme Court of Nebraska resolved a conflict between riparians and prior appropriators along a stream by comparing the reasonableness of each party's uses.[142] The appropriator's upstream use of the water for irrigation purposes depleted the stream to the extent that it flowed only intermittently through the lands of the downstream riparians. The riparians used the water for stock watering. The court noted that the common law test of reasonableness under the riparian doctrine was incompatible with the prior appropriation test based upon priority of use.[143] For this reason the court disclaimed a synthesis of the two doctrines and proceeded to compare the relative reasonableness of each use.[144] The court noted that other water sources were unavailable to the riparians, and that the construction of storage facilities was impractical. The appropriator's use allowed them to irrigate crops, as well as to increase the grazing capacity of their land. The court held, "On the facts of this case the riparian right is superior. Plaintiff's need for livestock water is greater than defendants' need for irrigation, and the difference is not neutralized by time priorities.[145]

The court's holding is limited to the facts of the case.[146] However, the court does offer some guidance as to general principles.[147] An appropriator who intentionally causes harm to a riparian is liable in damages if the appropriation is unreasonable with respect to the riparian. The test of reasonableness in this circumstance weighs the utility against the gravity of the harm. The court listed the following factors to consider in determining the utility of the appropriation: "(1) The social value which the law attaches to the use for which the appropriation is made; (2) the priority date of the appropriation; and (3)

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138. *Franco*, 855 P.2d at 577 ("This case must be remanded for the trial court's determination of the issue whether the appellee-riparian owners' claim to the use of the stream flow for the enhancement of the value of the riparian land, for recreation, for the preservation of wildlife, for fighting grass fires, and for lowering the body temperature of their cattle on hot summer days is reasonable.").

139. *Franco*, 855 P.2d at 575 n.40; *cf.* State v. Apfelbacher, 167 N.W. 244 (Wis. 1918) (applying the reasonable use doctrine to a dispute between a downstream riparian mill operator suing an upstream mill operator and the state who had contracted to take water from the reservoir formed behind the upstream mill operator's dam and mill). To determine reasonableness the court considered "the extent and capacity of the stream, the uses to which it is and has been put, and the rights that other riparian owners on the same stream also have." *Id.* The court held that the upstream mill owner's use coupled with the water contracted to the state constituted an unreasonable use under the circumstances. *Id.*

140. *Franco*, 855 P.2d at 578 ("To assure that the state's resources are put to the most reasonable and beneficial use, we adopt the approach of the supreme Court of Nebraska in Wasserburger v. Coffee. *Wasserburger* holds that the rights of the riparian owner and the appropriator are to be determined by relative reasonableness. On remand, the trial court shall balance the riparian owners' uses against those of the City, with due consideration to be given all the factors listed earlier in this opinion.").

141. *Id.* at 578.

142. Wasserburger v. Coffee, 141 N.W.2d 738 (Neb. 1966).

143. *Id.* at 745.

144. *Id.* at 745.

145. *Id.* at 747.

146. *Id.* at 745. The court stated: "We limit our broad outline of a system to the specific facts before us." *Id.*

147. *Id.* at 745, 746.

the impracticability of preventing or avoiding the harm."[148] The court also listed factors to consider in determining the gravity of the harm: "(1) The extent of harm involved; (2) the social value which the law attaches to the riparian use; (3) the time of initiation of the riparian use; (4) the suitability of the riparian use to the watercourse; and (5) the burden on the riparian proprietor of avoiding the harm."[149]

Although *Wasserburger* did not address the reasonableness of recreational use, the *Franco* court noted five cases which have found that recreational use of streamwater is a reasonable use.[150] These cases exhibit some common themes. Each of these cases is the result of conflict between competing riparians. Three of the cases deal with disputes over use from a common non-navigable natural lake, while the other two are claims by downstream riparians that the upstream riparian's dam(s) interfere with their water rights.

This set of cases is informative for its import with respect to the relative importance of recreational use under a reasonableness doctrine. In addition, the *Franco* court's choice of cases which involve lakes implies that recreation may be valued the same or similarly on both streams and reservoirs in Oklahoma. Thus, if minimum stream levels are recognized as necessary to riparian recreational use, minimum reservoir levels could analogously be recognized as necessary. A crucial interpretational problem could develop for Oklahoma reservoir managers if, on remand, recreational use is found to be a reasonable riparian use of the stream water. Because *Franco* does not involve water stored in a reservoir, it is unclear whether recreation will be treated the same in both situations. The inference may be drawn that, by citing to cases involving lakes, the *Franco* court intends for recreation to be treated the same under both circumstances. Of course, there is also the possibility that the court did not fully consider this problem.

One argument for the proposition that recreation on streams and reservoirs should be treated similarly is that the right given to the recreational user in each situation is very similar. If there is a right to recreational use, what is protected is not a right to consume the water, as in irrigation, but rather a right to have a certain amount of water available for use.

As a result of this method of use, recreational use places riparians in a different relationship with competing upstream and downstream users. Recreational users, because their use is nonconsumptive, will not generally have a substantial effect on downstream users. The scenario where downstream users would be negatively affected by a riparian's recreational use occurs when a recreational user, riparian to a reservoir, maintains a reservoir level for recreational purposes which results in reduced flows to downstream users. Such a situation could occur during a period of drought, or following increased consumptive use by upstream users, or after periods of increased usage of stored waters for other consumptive purposes. This situation presents a problem for reservoir managers as to whether some minimum lake level must be maintained or whether water must be released, to the detriment of reservoir users, to satisfy downstream demands.

The recreational user's relationship to upstream users also presents a possible dilemma for reservoir managers. Much of the stored water in reservoirs, as previously discussed, is claimed under the prior

148. *Id.* at 746.

149. *Id.*

150. *Franco*, 855 P.2d at 578 n.53. In addition to the five cases the Oklahoma Supreme Court cites in note 53, see also Collens v. New Canaan Water Co., 234 A.2d 825 (Conn. 1967) (finding that an injunction sought by both upstream and downstream riparians against a riparian public utility was proper, and finding that the public utility's pumping of subsurface stream water deprived the riparians of their use of the river for recreational activities such as swimming, boating and fishing); Rice v. Naimish, 155 N.W.2d 370 (Mich. Ct. App. Div. 2 1967) ("Among the rights of a littoral owner is the right to use his upland property to gain access to the lake waters; the right to put out in a boat or on foot from his upland property where it touches the lake waters; the right, after so embarking, to go boating, swimming, water skiing, fishing, ice skating or sledding or to engage in other aquatic sports, in or upon the lake waters; and the right to use the entire surface and sub-surface lake waters for such purposes."); State v. Great Falls Mfg. Co., 83 A. 126 (N.H. 1912) (holding that the dam operator's use of the pond water to create power for its manufacturing business was unreasonable and should be enjoined because of its tendency to interfere with the right of the public to use the pond for bathing, boating and fishing); Snively v. Jaber, 296 P.2d 1015 (Wash. 1956) (en banc) (holding that "with respect to the boating swimming, fishing, and other similar rights of riparian proprietors upon a nonnavigable lake, these rights or privileges are owned in cc.nmon, and that any proprietor or his licensee may use the entire surface of a lake so long as he does not unreasonably interfere with the exercise of similar rights by the other owners").

appropriation doctrine in Oklahoma by nonriparians — often municipalities. If a downstream recreational user asserts a right to either a minimum stream level or a minimum reservoir level for recreational use, is the reservoir manager allowed to release stored waters held for benefit of prior appropriators? If the result of *Franco* is that all reasonable riparian uses are superior to appropriative rights, then the problematic result could be that an appropriator, such as a municipality, could be denied necessary water so that riparian recreational uses are satisfied.

It should be noted that reservoir managers will not generally be concerned with the recreational users of their own facilities. Most recreational users of reservoirs are permissive users who have neither riparian or appropriative rights. Although most large reservoirs in Oklahoma have recreation as an authorized purpose (see Table 1), the recreational use is considered to be incidental to the storage of water supply.[151] As a result, reservoir managers and recreational users generally do not have a contractual relationship.[152]

The five cases cited by the *Franco* court do not grant maintenance of minimum reservoir levels to the recreational users. They do intimate that other users could be liable for unreasonable interference with recreational uses. Awards of injunction or damages appear to be possible alternative results of such unreasonable interference. The injunction remedy will likely be the greatest concern of reservoir managers. Damages will often be difficult or impossible to determine with the likely result of small or nominal awards. Injunction could result in the inability to fulfill contractual obligations to prior appropriators with resulting deleterious effects on bonds or hydropower operations.

In the first case, *Taylor v. Tampa Coal Co.*,[153] the Supreme Court of Florida examined the competing uses of riparians located around a natural non-navigable lake. Tampa Coal, who utilized the lake for the recreational purposes of boating, fishing and swimming, sought an injunction against Taylor. Taylor was using the waters of the lake to irrigate his citrus groves. The court found that the recreational use was entitled to the same protections as the agricultural use.[154] The court stated the rule relating to a non-navigable lake under the riparian system:

> Except as to the supplying of natural wants, including the use of water for domestic purposes of home or farm, such as drinking, washing, cooking, or for stock of the proprietor, each riparian owner has the right to use the water in the lake for all lawful purposes, so long as his use of the water is not detrimental to the rights of other riparian owners.[155]

The effect of the injunction which was issued in this case was to provide protection of the natural lake level for recreational purposes.[156]

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151. OKLAHOMA COMPREHENSIVE WATER PLAN, *supra* note 7, at 61.

152. *Id.*

153. 46 So. 2d 392 (Fla. 1950).

154. *Id.* at 393; *see* Harris v. Brooks, 283 S.W.2d 129 (Ark. 1955). The *Harris* court adopted the reasonable use theory in Arkansas. The dispute at issue arose between an operator of a commercial boating and fishing enterprise and an irrigator on a privately owned non-navigable lake. The court determined that it was unreasonable to irrigate when the water level of the lake reached the normal lake level. The court explained that the riparian recreational user was not entitled to the natural normal level, but that under the facts presented this happened to be the level at which the irrigator's use became unreasonable. The analysis by the court is enlightening about the reasonable use doctrine and follows the decision in *Taylor v. Tampa Coal Co.* In reaching its decision the court outlined four general principles of the reasonable use doctrine: (1) domestic use is superior to other uses; (2) other lawful uses are of equal status; (3) a lawful use may not destroy another lawful use; (4) when one lawful use interferes with another it must be determined according to all the facts and circumstances whether the use should be enjoined or an equitable apportionment should be made. *See* Lake Gibson Land Co. v. Lester, 102 So. 2d 833 (Fla. Dist. Ct. App. 1958) (citing, under similar to both *Taylor* and *Harris*, and determining that the irrigators' lowering of the lake level by 22/32 of an inch over a period of several months during a drought was not unreasonable).

155. *Taylor*, 46 So. 2d at 394.

156. *See* Peter N. Davis, *The Riparian Right of Streamflow Protection in the Eastern States*, 36 ARK. L. REV. 47, 52 (1982); *see also* Brown v. Ellingson, 224 So. 2d 391 (Fla. Dist. Ct. App. 1969) (remanding a case factually similar to Taylor v. Tampa Coal Co. to de ise an apportionment based on the doctrine that recreational and agricultural uses are equal); *cf.* Lake Gibson Land Co v. Lester, 102 So. 2d 833 (Fla. Dist. Ct. App. 1958) (denying injunctive relief where the defendant's irrigation of his citrus grove lowered the lake level by 22/32 of an inch).

In the second case, *Hoover v. Crane*,[157] the Supreme Court of Michigan affirmed the denial of an injunction against an irrigator riparian to a natural lake. The action for the injunction was brought by a resort which used the lake for recreational purposes. The court found that both the recreational use and the agricultural use were legitimate purposes.[158] The court applied the reasonable use rule and determined that the irrigator's use was reasonable under the circumstances.[159]

In the third case, *Bach v. Sarich*,[160] the Supreme Court of Washington held that a riparian owner did not have the right to build an apartment building which extended into a natural lake and interfered with the recreational use of the lake by other riparian owners. The lake was a non-navigable natural lake which had been used for recreational purposes for many years by the riparian owners along the lake shore. The court recognized swimming, fishing, boating, and bathing as riparian rights on non-navigable lakes.[161]

The fourth case, *Scott v. Slaughter*,[162] presented a conflict between upstream and downstream riparian users on a bayou. The upstream riparian had constructed three dams to impound water for use in a commercial hunting and fishing enterprise. The downstream riparian claimed that these impoundments unreasonably interfered with his right to use the bayou for commercial hunting and fishing purposes. The court required the upstream riparian to lower two dams.[163] In making this determination the court stated certain general rules and principles as applying in Arkansas; including the statement that fishing, swimming, recreation and irrigation are lawful uses of water of equal status under Arkansas law.[164]

The remedy in this case has dire implications for some reservoir managers. The possibility that a court or the OWRB could order a state or local reservoir manager to lower the level of a dam to satisfy a downstream riparian recreational use is haunting. This would cause great cost to the dam owner. This result is also directly opposed to the stated water policy of the State of Oklahoma, which is to maximize the amount of storage at each facility.[165]

This type of remedy is unlikely in the case of a federal reservoir storage facility. The remedy in *Scott* was an equitable remedy where, presumably, the costs and implications of the remedy were taken into account. In addition, the upstream riparian was also a recreational user. Surely the slight curtailment of recreational use would receive less weight in the balancing process of apportionment than functions such as the ability to control floods and provide a municipal water supply. In addition, federal reservoir managers might avoid such drastic remedies through arguments that federal law preempts state law, or possibly that the federal entity, and not the state, own the water.[166]

The fifth case noted by the *Franco* court is *Sturtevant v. Ford*.[167] The case arose from a conflict between an upstream riparian, who constructed a dam along a brook, and a downstream riparian, who claimed the dam interfered with the natural flow of the brook to which he was entitled. The case does not explicitly mention recreation, but it appears that the downstream riparian purchased the property containing the brook for the purpose of enjoying the aesthetic qualities of the brook, including viewing the waterfowl which it attracted. As described by the court:

> The plaintiff [the downstream riparian], after a long search for a very special kind of property susceptible of adaptation as an unusual country place to his peculiar uses and sensibilities and possessing features attractive to birds and waterfowl, bought, beginning in 1922, four parcels of

157. 106 N.W.2d 563 (Mich. 1960).
158. *Id.* at 566.
159. *Id.* at 565, 566.
160. 445 P.2d 648, 654 (Wash. 1968).
161. *Id.* at 651.
162. 373 S.W.2d 577 (Ark. 1964).
163. *Id.* at 579, 580.
164. *Id.* at 579.
165. 82 OKLA. STAT. § 1085.31 (1991).
166. *See* discussion *supra* part IV with regard to pre-emption and/or possible federal ownership of stored water in federal reservoirs.
167. 182 N.E. 560 (Mass. 1932).

> wild land aggregating about six acres in area, and spent several years in developing the tract for his particular purpose at a total cost of about $40,000. The brook was the central feature of his plan and the use made by him of it, intended to gratify his own taste, was legal and reasonable.[168]

The court found that the parties held equal riparian rights and that the upstream riparian would be required to release water from the dam in an amount which the court found sufficient to satisfy the needs of the downstream riparian.[169]

This case has important implications for reservoir managers. The injunction, issued because the upstream pond was being operated in an unreasonable manner, stated:

> The findings respecting that pond show that water has been kept for storage and not used in any way, that the operation of the mechanisms at the dam for releasing water has been such as to hold it back and prevent its flow into the brook, and that the seepage into the neighboring watershed has been excessive.[170]

Two other ponds—one operating a grist mill and the other providing storage for domestic purposes, sanitation, and fire protection—were found to be reasonable uses of the water and thus not subject to the injunction. However, once the determination of unreasonableness is made, the remedy is of great concern. The specification in the injunction of a constant definite flow being provided to the downstream riparian gave him a greater right than he held previously. Prior to the injunction the downstream riparian user was subject to the natural inconstancies of the flow. The results of the injunction are certainly more advantageous to the downstream recreational user than the natural status quo. Consequently, the harm to the upstream reservoir owner is greater than would be mere correction of the wrong. During periods of the least natural flow the reservoir owner will be required to release the same amounts of water which are released during periods of the greatest natural flow.

The reasonable use theory, as applied to lakes, has resulted in two basic tenets. First, the reservoir manager is not required to maintain natural lake levels to support recreational uses. Second, a diverter of lake waters may not lower the lake level such that the recreational uses of the other riparians are unreasonably interfered with.[171] It is generally stated in the cases that the recreational right is equal to other uses in times of shortage; however, the recreational right is in fact superior.[172] In fact, the courts appear to have created a natural minimum flow water level which is available to the recreational use riparians.[173]

The creation of a minimum lake level which accommodates recreational use is sensible from the perspective of the recreational riparian user under an economic analysis because this is what is of value to recreational users.[174] Adequate lake levels are essential to most recreational uses.[175] Incremental flows above this adequate level are of little value to the recreational user but are likely to be of much greater relative value to other types of users. A rise in the lake level of one inch above the adequate level is likely

168. *Id.* at 562.

169. *Id.* at 564, 565.

170. *Id.* at 565.

171. Davis, *supra* note 156, at 54.

172. Davis, *supra* note 156, at 62.

173. Davis, *supra* note 156, at 54. *See generally* Okla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 681 F. Supp. 1470, 1484-85 (N.D. Okl. 1988) (finding that a withdrawal of water for transfer purposes from large reservoir does not require an environmental impact statement to determine the effects on recreation industry because the withdrawal will not affect lake levels due to the fact that the withdrawal is not a new diversion, but is a reallocation from hydropower to municipal water supply).

174. Bonnie G. Colby, *The Economic Value of Instream Flows — Can Instream Values Compete in the Market for Water Rights?*, *in* INSTREAM FLOW PROTECTION IN THE WEST 87, 88 (Lawrence J. MacDonnell et al. eds., 1989).

175. *Id.* at 87-88.

to provide little extra benefit to boaters, fishers, swimmers, etc., but this may provide great benefits to consumptive users.

From the perspective of the reservoir manager, who has to satisfy nonrecreational users, the maintenance of minimum reservoir levels is an unwelcome imposition. The reservoir manager needs flexibility to meet the multiple purposes of most reservoirs. The release of flows from reservoirs must be managed in such a way that their purposes can be fulfilled; otherwise, the usefulness of reservoirs which have become vitally important to the well-being of the State of Oklahoma is jeopardized.

Under current law it appears that managers of federal reservoirs are immune from many of the concerns which *Franco* raises. Federal preemption of state laws likely gives managers of federal impoundments authority to exercise discretion over the release of stored waters. Federal reservoirs have multiple purposes, and as a result recreational use will at times suffer as a result of trying to meet the demands of these multiple purposes.

In *Spillway Marina, Inc. v. United States*[176] the Tenth Circuit held that a drawdown of the reservoir waters was within the discretionary function exclusion of the Federal Tort Claims Act.[177] A marina owner suffered damages when the Corps. of Engineers drastically lowered the water level of a lake. The primary purpose of the reservoir was flood control. The other purposes included quality control, navigation, fish and wildlife, and recreation. The drawdown occurred during a period of drought. The released water was used to aid navigation and also to allow work on boat ramps in the lake. The court found that, considering the multiple objectives of the reservoir, the drastic drawdown was within the discretion of the reservoir manager and, therefore, summary judgment in favor of the Corps of Engineers was appropriate.[178]

Managers of hydroelectric facilities may not be as fortunate. Conflicts may occur between recreational users and hydroelectric dam owners who operate the dams to meet their power-generating needs. To meet the demands for electricity, the dam operator must conduct operations which often result in frequently changing reservoir levels. The results of cases which have arisen between recreational users and hydropower concerns suggest that substantial variance in lake levels resulting from hydropower use is unreasonable as against recreational use.[179] For example, in *State v. Great Falls Mfg. Co.*,[180] the Supreme Court of New Hampshire held that the dam operator's use of a pond's water to create power for its manufacturing business was unreasonable and should be enjoined because it interfered with the right of the public, which owned the land on which the pond was situated, to use the pond for swimming, boating, and fishing. However, such results have not been reached on a consistent basis, and none of the cases have applied the theory of relative reasonableness. This is likely a result of the early dates of the cases. The lack of recent case law in the area is attributable to the fact that most hydropower facility operators purchase the land on which the reservoir exists, making recreational users of the reservoirs licensees or lessees rather than riparians.[181]

However, after *Franco*, hydropower reservoir managers face potential conflicts with both upstream and downstream riparian recreational users. The generation of hydroelectric power requires large volumes of water to flow through the generating turbines in order to produce electricity. Generally the energy is produced on an as-needed basis, causing large fluctuations in the amounts of water flowing out of the reservoir. At many facilities the operations occur on twenty-four hour cycles — releases occurr in the morning and waters are held back to accumulate storage during the rest of the day and night.

Under *Franco*, the possibility exists that an upstream riparian recreational user could assert rights to a minimum stream or lake level such that the flow of water into the downstream hydroelectric facility

176. 445 F.2d 876, 878 (10th Cir. 1971).

177. Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2680(a) (1976).

178. Spillway Marina, Inc. v. United States, 445 F.2d 876, 878 (10th Cir. 1971).

179. Davis, *supra* note 156, at 56, 57 (analyzing the cases of Hammond v. Antwerp Light & Power Co., 230 N.Y.S. 621 (N.Y. Sup. Ct. 1928); Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co., 48 N.W. 371 (Wis. 1891); State v. Great Falls Mfg. Co., 83 A. 126 (N.H. 912)).

180. 83 A. 126 (N.H. 1912).

181. Davis, *supra* note 156, at 57-58.

would be impeded, especially during times of shortage. Such an occurrence could result in insufficient storage over the recharge period to produce energy as needed. The result of extended recharge periods would be the hydropower facility's inability to supply its customers with the necessary electricity. This would negatively affect any outstanding indebtedness held by the hydroelectric entity.

The other threat to hydropower storage reservoirs is a claim of recreational use by a downstream riparian. Were a hydropower reservoir's activities found to be unreasonable with respect to such a downstream use, the possibility exists that an injunction could issue requiring either a constant or a minimum rate of flow. A substantial constant rate of flow could undermine a hydroelectric project's ability to operate. A lesser minimum flow requirement could seriously curtail hydroelectric operations, leading to higher costs and reduced output.

The response of hydropower reservoir managers to these concerns is that their use of the waters is eminently reasonable. This viewpoint is supported by *Dunlap v. Carolina Power & Light Co.*.[182] In *Dunlap*, the Supreme Court of North Carolina held that a downstream riparian did not offer sufficient evidence of unreasonable use to properly state a case.[183] The downstream riparian claimed that the hydropower operator's practice of holding back the flow of the water at night and then releasing it in the morning interfered with his ability to exercise his riparian rights. One of the uses claimed by the riparian was fishing for pleasure. Applying the reasonable use theory, the court found the use by the hydropower operator was reasonable compared to similar uses by other hydropower operators.[184] The court did not compare the relative reasonableness of the competing users, but rather the hydropower project's reasonableness as against other hydropower projects. The court found that the downstream riparian had offered no evidence tending to show unreasonable use, even though he had shown that the dam operator was holding back the water and then releasing it in unnaturally large quantities.[185]

The weakness of *Dunlap* within the Oklahoma framework is that the reasonableness of the hydropower operator's method of use was compared to similar uses by other hydropower operators. Under *Franco*, the hydropower operator's use should be compared to the competing use, the downstream recreational use. Thus, although logic dictates that a hydropower project's operations would be considered reasonable in contrast to any recreational use, the possibility of recreational use interfering with hydropower operations does exist.

IX. Conclusion

Obviously, a myriad of questions are raised by the *Franco* opinion. Reservoir managers are faced with the daunting task of determining to whom their duties lie in this uncertain atmosphere. Managers of federal reservoirs must ascertain the nature of their rights to waters stored in their reservoirs. In addition, they must demarcate the boundaries between federal and state law. Managers of smaller state reservoirs are also faced with the task of determining the extent of their control over stored waters.

Managers of Oklahoma reservoirs are justified in their concerns about the uncertainty following *Franco's* resurrection of the riparian system because they need identifiable and certain supplies of water. Certainty is required in order to plan for future needs, in order to satisfy bond indebtedness, and in order to effectuate transfers both intrastate and interstate. In addition, the managers need to know the status of recreational use as compared to other competing uses for the state's water.

Franco raises more questions than it answers. The only consolation which can be found is that these are ultimately important questions because their resolution affects all residents of the State of Oklahoma. The issues facing reservoir managers are not solely about technicalities, such as the flow rates which must be released from the dam, but rather are broad questions about who has the right to the water. Even

182. 195 S.E. 43, 48 (N.C. 1938).
183. *Id.* at 48.
184. *Id.* at 45.
185. *Id.* at 48.

though many of these questions will ultimately have to be decided by the legislature and the courts, it is the reservoir managers who have to make the initial attempt at divining the impact of *Franco* on Oklahoma water law and the Oklahoma waters in their reservoirs.

Table 1

Selected Oklahoma Reservoirs and Their Purposes

Reservoirs Grouped by Construction Agency	Purposes/Authorization							
A. U.S. ARMY CORPS OF ENGINEERS	WS	FC	W Q	PG	R	FW	I	N
1. Arcadia Lake	X	X			X			
1. Birch Lake	X	X	X		X	X		
1. Broken Bow Lake	X	X	X	X	X	X		
1. Canton Lake	X	X					X	
1. Copan Lake	X	X	X		X	X		
1. Eufala Lake	X	X		X				X
1. Fort Gibson Lake		X		X				
1. Fort Supply Lake	X	X			X			
1. Great Salt Plains Lake		X			X			
1. Heyburn Lake*	X	X						
1. Hugo Lake	X	X	X		X	X		
1. Hulah Lake*	X	X						
1. Kaw Lake	X	X	X		X	X		
1. Keystone Lake	X	X		X		X		
1. Oologah Lake	X	X						X
1. Optima Lake	X	X			X	X		
1. Pine Creek Lake	X	X	X			X		
1. Robert S. Kerr Lake				X	X			X
1. Sardis Lake	X	X			X	X		
1. Skiatook Lake	X	X	X		X	X		
1. Tenkiller Ferry Lake	X	X		X	X			
1. Lake Texoma	X	X		X				
1. Waurika Lake	X	X	X		X	X	X	
1. Webbers Falls Reservoir				X	X	X		X
1. Wister Lake	X	X			X	X		
B. BUREAU OF RECLAMATION	WS	FC	W Q	PG	R	FW	I	N
1. Altus Lake	X	X					X	
1. Arbuckle Lake	X	X			X	X		
1. Fort Cobb Lake	X	X			X	X	X	
1. Foss Lake	X	X			X		X	
1. McGee Creek Lake	X	X			X			
1. Lake Thunderbird	X	X			X			
1. Tom Steed Reservoir	X	X			X			
C. GRAND RIVER DAM AUTHORITY	WS	FC	W Q	PG	R	FW	I	N
1. Grand Lake O' the Cherokees		X		X				
1. Markham Ferry Reservoir (Hudson Lake)		X		X				
1. Holway Reservoir	X			X	X			

D. U.S. DEPARTMENT OF AGRICULTURE	WS	FC	W Q	PG	R	FW	I	N
1. Lake Carl Blackwell	X				X			
1. Cedar Lake					X			
E. STATE OF OKLAHOMA	WS	FC	W Q	PG	R	FW	I	N
1. American Horse Lake					X			
1. Lake Burtschi					X			
1. Lake Carlton					X			
1. Lake Chambers					X			
1. Clayton Lake					X			
1. Crowder Lake		X			X			
1. Lake Dahlgren					X			
1. Lake Elmer					X			
1. Lake Etling					X			
1. Greenleaf Lake					X			
1. Lake Hall					X			
1. Lake Jap Beaver					X			
1. Lake Murray					X			
1. Lake Nanih Waiya					X			
1. Lake Ozzie Cobb					X			
1. Lake Raymond Gary					X			
1. Lake Schooler					X			
1. Lake Schultz					X			
1. Lake Vanderwork					X			
1. Lake Vincent					X			
1. Lake Watonga					X			
1. Lake Wayne Wallace		X			X			
F. CITIES	WS	FC	W Q	PG	R	FW	I	N
1. Altus City Reservoir (City of Altus)	X				X			
1. Ardmore City Lake (City of Ardmore)					X			
1. Atoka Lake (City of Oklahoma City)	X				X			
1. Lake Bixhoma (City of Bixby)	X				X			
1. Bluestem Lake (City of Pawhuska)	X				X			
1. Boomer Lake (City of Stillwater)				X	X			
1. Carl Albert Lake (City of Talihina)	X	X			X			
1. Carter Lake (City of Madill)	X				X			
1. Chandler Lake (City of Chandler)	X				X			
1. Claremore Lake (City of Claremore)	X				X			
1. Lake Chickasha (City of Chickasha)	X				X			
1. Clear Creek Lake (City of Duncan)	X				X			
1. Cleveland City Lake (City of Cleveland)	X				X			
1. Clinton Lake (City of Clinton)	X				X			

1.	Coalgate City Lake (City of Coalgate)	X	X			X			
1.	Comanche Lake (City of Comanche)	X				X			
1.	Cushing Municipal Lake (City of Cushing)	X				X			
1.	Dave Boyer Lake (City of Walters)	X				X			
1.	Dead Indian Lake (City of Cheyenne)		X			X			
1.	Draper Lake (City of Oklahoma City)	X				X			
1.	Dripping Springs Lake (City of Okmulgee)	X	X			X			
1.	Duncan Lake (City of Duncan)	X				X			
1.	Lake El Reno (City of El Reno)		X			X			
1.	Lake Elk City (City of Elk City)		X			X			
1.	Lake Ellsworth (City of Lawton)	X				X			
1.	Eucha Lake (City of Tulsa)	X				X			
1.	Fairfax City Lake (City of Fairfax)	X				X			
1.	Lake Frances (City of Siloam Springs)	X				X			
1.	Lake Frederick (City of Frederick)	X	X			X			
1.	Fuqua Lake (City of Duncan)	X	X			X			
1.	Guthrie Lake (City of Guthrie)	X				X			
1.	Lake Hefner (City of Oklahoma City)	X				X			
1.	Healdton City Lake (City of Healdton)	X	X			X			
1.	Lake Henryetta (City of Henryetta)	X				X			
1.	Holdenville Lake (City of Holdenville)	X				X			
1.	Hominy Municiipal Lake (City of Hominy)	X				X			
1.	Hudson Lake (City of Bartlesville)	X				X			
1.	Humphreys Lake (City of Duncan)	X	X			X			
1.	Lake Jean Neustadt (City of Ardmore)					X			
1.	John Wells Lake (City of Stigler)	X				X			
1.	Langston Lake (City of Langston)	X	X			X			
1.	Lake Lawtonka (City of Lawton)	X				X			
1.	Liberty Lake (City of Guthrie)	X				X			
1.	Lloyd Church Lake (City of Wilburton)	X	X			X			
1.	McAlester Lakes (City of McAlester)	X	X			X			
1.	Lake McMurtry (City of Stillwater)	X	X			X			
1.	Meeker Lake (City of Meeker)	X	X			X			
1.	Mountain Lake (City of Ardmore)					X			
1.	New Spiro Lake (City of Spiro)	X				X			
1.	Okemah Lake (City of Okemah)	X				X			
1.	Okmulgee Lake (City of Okmulgee)	X				X			
1.	Lake Overholser (City of Oklahoma City)	X				X			
1.	Pauls Valley City Lake (City of Pauls Valley)	X				X			
1.	Lake Pawhuska (City of Pawhuska)	X				X			
1.	Pawnee Lake (City of Pawnee)	X				X			
1.	Perry Lake (City of Perry)	X	X			X			
1.	Lake Ponca (City of Ponca City)	X				X			
1.	Prague City Lake (City of Prague)	X	X			X			
1.	Purcell Lake (City of Purcell)	X				X			
1.	Rock Creek Reservoir (City of Ardmore)					X			

1. Rocky Lake (City of Hobart)	X				X			
1. Lake Sahoma (City of Sapulpa)	X				X			
1. Shawnee Lakes (City of Shawnee)	X				X			
1. Shell Lake (City of Sand Springs)	X				X			
1. Spavinaw Lake (City of Tulsa)	X				X			
1. Sportsman Lake (City of Seminole)		X			X			
1. Lake Stanley Draper (City of Oklahoma City)	X				X			
1. Stilwell City Lake (City of Stilwell)	X	X			X			
1. Stroud Lake (City of Stroud)	X	X			X			
1. Talawanda Lakes (City of McAlester)	X				X			
1. Taylor Lake (City of Marlow)	X	X			X			
1. Tecumseh Lake (City of Tecumseh)	X				X			
1. Veterans Lake (City of Sulphur)					X			
1. Lake Waxhoma (City of Barnsdall)	X				X			
1. Weleetka Lake (City of Weleetka)	X				X			
1. Wetumka Lake (City of Wetumka)	X				X			
1. Wewoka Lake (City of Wewoka)	X				X			
1. Wiley Post Memorial Lake (City of Maysville)	X	X			X			
1. Lake Yahola (City of Tulsa)	X				X			
G. OTHER ENTITIES	WS	FC	W Q	PG	R	FW	I	N
1. Elmer Thomas Lake (U.S. Dept. of the Interior)					X			
1. Lake Carl Blackwell (Oklahoma State University)	X				X			
1. Lone Chimney Lake (Tri-County Development Authority)	X	X			X			
1. Konawa Reservoir (Oklahoma Gas & Electric)				X	X			
1. Quanah Parker Lake (U.S. Dept. of the Interior)					X			
1. Sooner Reservoir (Oklahoma Gas & Electric)		X		X	X			

KEY:
WS = Municipal Water Supply
FC = Flood Control
WQ = Water Quality
PG = Power Generation
R = Recreation
FW = Fish and Wildlife
I = Irrigation
N = Navigation

* = Water Conservation is an additional purpose for two U.S. Army Corps of Engineers structures -- Heyburn Lake and Hulah Lake.

Municipalities & Rural Water Districts

Koni Johnson

Table of Contents

With oil comes wealth, but with water comes life.[1]

I. Introduction

A city's most vital function is to supply its citizens with their basic necessities. Water is one of life's most primary needs and has been referred to as the "key to prosperity"[2]. Without this essential element, human life could not be sustained. Not only do individuals need water for immediate drinking, bathing,

1. Kevin Smith, *Texas Municipalities' Thirst For Water: Acquisition Methods For Water Planning*, 45 BAYLOR L. REV. 685 (1993).
2. Mark W. Tader, Note, *Reallocating Western Water: Beneficial Use, Property, and Politics*, 1986 U. ILL. L. REV. 277, 290.

industrial uses, and agricultural needs, but also a city needs the stability of a future water supply in order to effectuate long-term planning. A municipality needs a secure water supply to plan for a growing community and to meet the economic investment obligations necessary to maintain a municipal water supply.[3]

The economic existence of a city's future depends upon its ability to secure water for its citizens.[4] Citizens depend upon the municipality to provide them with an abundance of safe, reliable water for consumptive needs. The city's planners depend upon the water supply for industrial and economic purposes. New business will not invest in a locality which cannot provide dependable and reliable natural resources. In order to sustain its economic existence, a city must have secure water resources.

The Oklahoma Supreme Court has left cities and towns in a tenuous position. By resurrecting the common law doctrine of riparian rights,[5] the Court has possibly left municipalities' existing water rights subject to diversion by riparians and might have placed a city's ability to plan future water needs in jeopardy.[6] If unused riparian rights are given priority over a city's prior appropriation status, a riparian could take advantage of this insecure position of a municipality-appropriator by procuring large payments for continued access to the municipal water supply's source based upon bad-faith claims.[7] This chapter will attempt to reconcile the Court's decision with the realities of how municipalities function and the needs of a urban world.

II. A Brief History of Oklahoma's Mixed System of Water Rights

Historically, Oklahoma adopted the commonly law doctrine of riparianism in 1890.[8] This system worked well in the eastern portion of the United States, were there was an abundance of available water. However the arid west followed the appropriation system, by which water was allocated on a permit system. The appropriation system guarantees the earliest appropriator the right to a fixed quantity of water, limited only by forfeiture or abandonment for nonuse. Thus, arid cities were given a guaranteed, predictable quantity of water with which to supply their inhabitants' needs and to plan effectively for the future.

As Oklahoma is a mix of arid and water-rich territory, riparianism did not work well. The Oklahoma territorial legislature attempted to reconcile this problem in 1897 by adopting a prior appropriation system to operate simultaneously with the riparian system.[9] Nevertheless, this attempt at reconciliation did not promote stability due to the two systems basic theoretical differences.[10] When applying both systems to the same stream, riparian land owners would come into conflict with prior appropriators' use and desire

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3. Todd S. Hageman, Note, *Water Law: Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board: The Oklahoma Supreme Court's Resurrection of Riparian Rights Leaves Municipal Water Supplies High and Dry*, 47 OKLA. L. REV. 183, 194 (1994).

4. *Id.*

5. The riparian doctrine of water law gives the landowner a right, free from unreasonable interference, to a reasonable use of the quantity or quality of water flowing though his land for benifit to his riparian land. *See* Jaqualin Friend, *Nephi City v. Hansen: The Utah Supreme Court Sidesteps Public Trust Principles in Allowing Forfeiture of Municipal Water Rights*, 11 J. ENERGY, NAT. RES. & ENVTL. L. 369 (1991); Lynda L. Butler, *Allocating Consumptive Water Rights in a Riparian Jurisdiction: Defining the Relationship Between Public and Private Interests*, 47 U. PITT. L. REV. 95, 105 (1985).

6. Eastern states such as Virginia have experienced difficulties in adequately supplying water to meet the growing urban needs. The common-law system does not promote commercial, industrial, and municipal development. Butler, *supra* note 5, at 99.

7. *Id.*

8. TERR. OKLA. STAT. § 4162 (1890). The section stated:

> The owner of land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature over or under the surface may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same.

Id.

9. Sess. Laws of Terr. Okla. ch. 19, art 1, at 187-95 (1897).

10. Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface in the Pre-1963 Period*, 22 OKLA. L. REV. 1, 21 (1969).

of water. Both would claim priority use based either on their allocated permit quantities or property right status.

When the Oklahoma legislature attempted to restructure the state's water law in 1963,[11] it attempted to reconcile the conflicting needs of urban growth and an individual's property interests.[12] The new system was meant to be prospective prior appropriation,[13] while protecting pre-existing water rights, including riparian rights.[14] While prospective non-domestic riparian rights were not protected, a riparian

11. The 1963 amended water property statute is found in 60 OKLA. STAT. § 60 (1981). The section reads:

> The owner of the land owns water standing thereon, or flowing over or under its surface but not forming a definite stream. The use of groundwater shall be governed by the Oklahoma Ground Water Law. Water running in a definite stream, formed by nature over or under the surface, may be used by him for domestic purposes as defined in Section 2(a) of this Act, as long as it remains there, but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same, as such water then becomes public water and is subject to appropriation for the benefit and welfare of the people of the state, as provided by law; Provided however, that nothing contained herein shall prevent the owner of land from damming up or otherwise using the bed of a stream on his land for the collection or storage of waters in an amount not to exceed that which he owns, by virtue of the first sentence of this section so long as he provides for the continued natural flow of the stream in an amount equal to that which entered his land less the uses allowed in this Act; provided further, that nothing contained herein shall be construed to limit the powers of the Oklahoma Water Resources Board to grant permission to build or alter structures on a stream pursuant to Title 82 to provide for the storage of additional water the use of which the land owner has or acquires by virtue of this act.

Id. Oklahoma's stream water appropriation statute, 82 OKLA. STAT., § 105.2(A) (1981), reads:

> Beneficial use shall be the basis, the measure and the limit of the right to the use of water; provided, that water taken for domestic use shall not be subject to the provisions of this act, except as provided in Section 5. Any person has the right to take water for domestic use from a stream to which he is a riparian or to take stream water for domestic use from wells on his premises. Water for domestic use may be stored in an amount not to exceed two (2) years' supply. The provisions of this act shall not apply to farm ponds or gully plugs which are not located on definite streams and which have been constructed under the supervision and specifications of the Soil and Water Conservation Districts.

Id.

12. Other jurisdictions have upheld similar legislation as constitutional. *See* California v. United States (*In re* Waters of Hallett Creek Stream System), 749 P.2d 324 (Cal.) (holding restriction of riparian right to be constitutional), *cert. denied*, 488 U.S. 824 (1988).

13. Prior appropriation doctrine is a system by which water rights are distributed upon application and issuance of a permit if unappropriated water is available. Available water and beneficial use are the criteria upon which permits are granted. Many have argued that water rights under the prior appropriation doctrine are better defined and protected than property interests under the riparian doctrine. *See* Jaqualin Friend, *Nephi City v. Hansen: The Utah Supreme Court Sidesteps Public Trust Principles in Allowing Forfeiture of Municipal Water Rights*, 11 J. ENERGY, NAT. RES. & ENVTL. L. 369, 372 (1991).

14. Title 82 set out the priorities to be applied when appropriating the states waters while protecting certain prior riparian rights. Section 105.2(B) states:

> B. Priority in time shall give the better right. From and after the date of June 10, 1963, the following priorities for the use of water and no other shall exist:
>
> 1. Prestatehood uses. Priorities to the quantity of water put to beneficial use prior to November 15, 1907, to the extent to which the priority has not been lost in whole or in part pursuant to Section 16 when the same shall have been perfected as provided by this act and rules and regulations adopted by the Board. Such said priorities shall date from the initiation of the beneficial use.
>
> 2. Spavinaw, Grand, North Canadian, Blue and North Boggy adjudications. Priorities decreed to exist in adjudications brought in pursuance of this act where such adjudications have been initiated prior to the date of June 10, 1963, to the extent to which these priorities have not been lost in whole or in part pursuant to Section 16. Such said priorities shall be dated as of the date assigned to them in the respective adjudication decrees.
>
> 3. Spavinaw, Grand, North Canadian, Blue and North Boggy Rivers - Applications prior to June 10, 1963. Priorities based upon applications for appropriations where the same shall have been perfected heretofore under the law heretofore applicable to the extent to which the priority has not been lost in whole or in part pursuant to Section 16. Such said priorities shall be dated as of the date of the applications therefore.
>
> 4. All other applications. Priorities based upon applications for appropriations to the extent the priority has not been lost in whole or in part pursuant to Section 16 where the same shall be perfected after June 10, 1963, as provided by this act and rules and regulations adopted by the Board pursuant thereto. Such said priorities shall date from the date of applications for the priority.
>
> 5. Federal Withdrawals. Priorities based on the withdrawal of water by the United States pursuant to Section 29 to the extent to which the priority has not been lost in whole or in part through nonutilization as provided by the said section or pursuant to Section 16. Such said priorities shall vest in the users of said water as of the date of notification given pursuant to Section 29.
>
> 6. Poststatehood-Nonapplicant uses. Priorities based upon present beneficial use prior to June 10, 1963, and initiated on or subsequent to November 15, 1907, to the extent to which the priority has not been lost in whole or in part pursuant to Section 16

landowner retained the right to continue existing riparian uses and to provide for domestic needs at any time in the future.

However, the new 1963 statutes[15] acknowledged that for effective urban growth and practical planning, prior appropriation would be needed to meet the needs of a complex, modern urban community. Other jurisdictions have attempted to balance property rights with growing urbanization through similar approaches.[16]

Other mixed-systems states in the West[17] have enacted legislation to balance the competing interests — between a municipality's responsibility to its citizens and private property rights in water arising from riparian land ownership — by moving to a prior appropriation system. They have recognized the predictability and stability that prior appropriation systems afford metropolitan areas.

California was the first state to adopt a mixed system of both riparianism and prior-appropriation. Thus, states that have retained the mixed system are referred to as "California Doctrine" states.[18] However, despite the *Franco* Court's majority's insistence that they are following the "California Doctrine" of water rights,[19] the majority did not acknowledge the fact that California does not recognize prospective, unused riparian rights as vested property rights.[20] The California Supreme Court held unused future riparian rights impede urban planning and the promotion of reasonable and beneficial water uses.[21] Therefore, if the "California Doctrine" is to be followed, a municipal water supply would not be in jeopardy to a riparian asserting an unused future need absent a proper appropriation permit.[22]

Nebraska also claims to follow a mixed system of riparianism and prior appropriation[23]. However, upon closer inspection, riparianism is severely restricted, with prior appropriation being the predominate system of allocating the scarce resource of water throughout the state. Nebraska recognized the validity of unused riparian rights, but only for land patented into private ownership before the statutory cutoff date of 1895.[24] The *Franco* Court professes to adopt the Nebraska approach in order to put the state's

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where the same has been perfected as provided by this act and rules and regulations adopted by the Board pursuant thereto. Such said priorities as to each quantity of water shall date from the initiation of the beneficial use of that quantity of water. Provided, however, that no priority based solely upon this paragraph 6 shall take priority over priority which bear a priority date earlier than the effective date of June 10, 1963, and which arise by virtue of compliance with the provisions of the first five paragraphs of this subsection.

7. Soil Conservation Service sediment pools. Priorities based upon beneficial use of that portion of the water designated by the Soil Conservation Service engineers as necessary for the sediment pool where landowners have granted easements without compensation for upstream flood control impoundments under the sponsorship of Soil and Water Conservation Districts prior to June 10, 1963, to the extent to which the priority has not been lost in whole or in part pursuant to Section 16 when the same shall have been perfected as provided by this act and rules and regulations adopted by the Board. Such said priorities shall date from the date of the grant of the easement. Subsequent to June 10, 1963, those landowners who shall grant easements for such upstream flood control impoundments may acquire a priority for beneficial use of that water designated as the sediment pool by complying with subsection B, 4 of this section.

82 OKLA. STAT. § 105.2(B) (1981)

15. 60 OKLA. STAT. § 60 (1981); 82 OKLA. STAT. § 105.2 (1981).

16. Those states which recognize both riparian and prior appropriation rights have attempted to balance the two competing systems by various methods. *See generally* Joseph Dellapenna, *Riparian Rights in the West*, 43 OKLA. L. REV. 51 (1990); Robert H. Abrams, *Replacing Riparianism in the Twenty-First Century*, 36 WAYNE L. REV. 93 (1989); Robert H. Abrams, *Interbasin Transfer in a Riparian Jurisdiction*, 24 WM. & MARY L. REV. 591 (1988).

17. Mixed-systems refers to the recognition of riparian and prior-appropriation rights within one body of water law. California, Nebraska, and Oklahoma are the only three states currently recognizing mixed water law rights. Kansas, North Dakota, Oregon, South Dakota, Texas, and Washington have had mixed systems in the past. These six states, however, have so severely limited riparian rights that in all essence prior appropriation is the water law system for these states today. Hageman, *supra* note 3, at 186; JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 9-10 (1991).

18. Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 855 P.2d 568, 572 & n.15 (Okla. 1990).

19. *Id.* at 571.

20. Hageman, *supra* note 3, at 192.

21. *In re* Waters of Long Valley Creek Stream System, 599 P.2d 656, 661 & n.3 (Cal. 1979).

22. However, a riparian has the right to assert domestic riparian rights now and in the future. 60 OKLA. STAT. § 60 (1981).

23. Wasserburger v. Coffee, 141 N.W.2d 738, 744 (Neb. 1966).

24. *Id.* at 745.

resources to the "most reasonable and beneficial use.[25] Accordingly, the *Franco* Court misapplied Nebraska law by resurrecting unused riparian rights which Nebraska law does not recognize.[26] Oklahoma has reasserted riparianism as the predominate water law by granting riparians the right to initiate future uses.[27]

III. Should Municipal Water Supplies Be Subordinate to Riparian Claims?

One policy argument behind subordinating municipalities' water rights to riparian landowners could be the recognition that small users are less able to afford expensive litigation expenses to challenge the city's claim and/or to bring a damage suit against the city within the riparian sytem.[28] Small users are less able to organize collectively for litigation, and if water is taken by a larger, more affluent entity, the riparian reasonable use theory may favor the large, municipal user over the smaller riparian landowner if a court is looking to economic, as opposed to noneconomic, values.[29] Thus, since the economic value of water to a large user will outweigh the economic loss of an individual small user, the larger riparian would generally win. The need to adequately protect the individual farmer and small businessman is addressed in the riparian doctrine.

The policy behind holding municipalities subject to riparian landowners could be viewed as inferring that public systems are better able to bear the expense of compensating displaced users than most private riparians.[30] This is also a reinforcement of the policy to protect the small entrepreneur from the large "institutional" organization, such as a municipality.[31]

However, Oklahoma's water-rights property statute[32] gives riparians property rights in surface water[33] and the right to use surface water for domestic purposes.[34] The statute also gives the riparian the right and opportunity to apply for a valid appropriation permit for beneficial use of the stream water. What a riparian no longer has, according to the statutes[35], is the right to establish future, undetermined nondomestic stream water use based solely based upon riparian status. This prohibition is what *Franco* has deemed unconstitutional.[36]

Cities and the individual riparian were put on equal footing for future use by the 1963 statutes — each had to obtain an appropriation permit and put the water to beneficial use. This system attempts to efficiently manage one of the state's most valuable limited resources. A city has the obligation to supply it's citizens with an abundance of quality water. If riparian's may now assert future non-domestic need,[37] to the detriment of municipalities, a city's ability to effectively plan for the future and establish public water systems is severely impaired.[38]

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25. *Franco*, 855 P.2d at 578.
26. Hageman, *supra* note 3, at 192.
27. *Franco*, 855 P.2d at 582.
28. 1 ROBERT E. BECK, WATER AND WATER RIGHTS § 7.05(c) (1991).
29. *Id.* However, small users could bring a class action suit against a municipality.
30. *Id.*
31. *Id.*
32. 60 OKLA. STAT. § 60 (Supp. 1992).
33. Surface water is water standing on or flowing over or under the surface but not forming a definite stream.
34. Domestic purposes is defined in title 82, § 105.1. This section states:

> B. In this act, unless the context clearly indicates otherwise, "domestic use" means the use of water by a natural individual or by a family or household for household purposes, for farm and domestic animals up to the normal grazing capacity of the land and for the irrigation of land not exceeding a total of three (3) acres in area for the growing of gardens, orchards and lawns.

82 OKLA. STAT. § 105.1 (1981).

35. 60 OKLA. STAT. § 60 (Supp. 1992); 82 OKLA. STAT. § 105 (1981).
36. 855 P.2d 568, 571 (Okla. 1990).
37. The *Franco-American* decision appears to place municipal appropriators at the mercy of riparians. A riparian's property right t / assert future uses appears to be given priority over an appropriator's permit allocation. *Id.*
38. Brief of Amicus Curiae, Oklahoma Municipal League in Support of Petition for Rehearing (June 1990).

However, municipalities and rural water districts are protecting many small users' water rights. Municipalities and rural water districts hold, in trust, the rights and responsibilities owed to their inhabitants. The fiduciary duty mandates that a city be afforded predictable water rights in order to offer secure vital necessities to its citizens. Thus, the justification of promoting riparianism over appropriation, because small users need more protection from the larger organizational appropriator, does not prove true. Many small users, city inhabitants and rural dwellers, would be left with unsecured water rights.

IV. Has There Been a Taking

The *Franco* court opined that the 1963 Oklahoma statutes[39] did not provide a reasonable time for riparian's to exercise previously unused riparian rights.[40] Only pre-existing riparian rights, properly validated, and future domestic uses were protected in the priority structure of Oklahoma's water law.[41] "Domestic uses" is defined as household uses and the irrigation of up to three acres and limited watering of livestock.[42]

If *Franco*[43] stands for the proposition that the 1963 statutes did constitute an unconstitutional taking, the Oklahoma Supreme Court has two options. The first is to require cities to compensate affected riparians for the unconstitutional taking of property. The other option is to issue an injunction against the trespassing municipal appropriator.

A. Compensation

Assuming the Oklahoma Supreme Court will not take away existing municipal water supplies due to their life-sustaining necessity, compensation should be the remedy afforded injured riparians. The law of inverse condemnation requires just compensation be given to affected riparians for property illegally taken.[44]

Fair compensation and compliance with statutory procedures is necessary for the taking of private property for public use.[45] However, attempting to quantify the amount of compensation due for past takings may be difficult to determine. Furthermore, attempting to quantify unexercised future riparian

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39. 60 OKLA. STAT. § 60 (1981); 82 OKLA. STAT. § 105.2 (1981).

40. *Franco*, 855 P.2d at 577. *See generally* Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface Under the 1963 Amendments*, 23 OKLA. L. REV. 19 (1970); Gary D. Allison, *Franco-American Charolaise: The Never Ending Story*, 30 TULSA L.J. 1, 17-24 (1994).

41. 60 OKLA. STAT. § 60 (Supp. 1992); 82 OKLA. STAT. § 105.2(B)(6) (1991).

42. 82 OKLA. STAT. ANN. § 105.1(B) (1991).

43. 855 P.2d 568 (Okla. 1990).

44. A municipality may acquire land and water rights either by purchase or condemnation proceedings. The power and authority of municipalities and rural water districts may exercise the law of eminent domain as to rivers, streams, surface waters or percolating water. 11 OKLA. STAT. §§ 291-293, 305, 563, 670 (1951); 27 OKLA. STAT. § 5 (1951); 82 OKLA. STAT. §§ 1001-1019 (1951); *see also* OKLA. CONST. art. 2 § 24 (providing for taking private property for public use).

45. OKLA. CONST. art. 2, § 24. Section 24 provides:

> ;bPrivate Property shall not be taken or damaged for public use without just compensation. Such compensation, irrespective of any benefit from any improvements proposed, shall be ascertained by a board of commissioners of not less than three freeholders, in such manner as may be prescribed by law. The commissioners shall not be appointed by any judge or court without reasonable notice having been served upon all parties in interest. The commissioners shall be selected from the regular jury list of names prepared and made as the Legislature shall provide. Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into the court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of such compensation. The fee of land taken by common carriers for right of way, without the consent of the owner, shall remain in such owner subject only to the use for which it is taken. In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question.

Id.; *see also* Kennebunk, Kennebunkport & Wells Water Dist. v. Maine Turnpike Authority, 71 A.2d 520, 528 (Me. 1950); Dimmock v. City of New London, 245 A.2d 569 (Conn. 1968).

rights would also be very difficult.[46] Since the riparian has asserted no quantifiable use, no economic benefit or value has been set.

Various other individualized factors pertaining to riparian land would also need to be taken into account in order to value just compensation, such as regional differences, economic values of particular streams, and the characteristics of each parcel of riparian land. This piece-meal approach to valuation of previous takings would overwhelm the courts, due to its complexity, and would result in expensive litigation and appeals, as well as being economically inefficient and impractical.[47]

In times of emergency, such as drought, a municipality may be able to take water from other appropriators and riparians without compensating for such.[48] However, the Nebraska Supreme Court, in *Wasserburger v. Coffee*,[49] has embraced a "relative reasonableness" standard to balance conflicting rights between a riparian and a prior appropriator in such times and for the determination of when compensation is due. The Nebraska Court held that when an appropriator intentionally causes substantial harm to a riparian proprietor, they are liable for damages only if the harmful appropriation is "unreasonable". Unreasonableness was further defined as whether the appropriation's benefits outweigh the gravity of the harm to the riparian.[50]

Factors considered in evaluating the utility of the appropriation use include: "(1) The social value which the law attaches to the use for which the appropriation is made; (2) the priority date of the appropriation; and (3) the impracticability of preventing or avoiding the harm."[51]

Factors considered in weighing the gravity of the appropriators intentional harm to the riparian include: "(1) The extent of harm involved; (2) the social value which the law attaches to the riparian use; (3) the time of initiation of the riparian use; (4) the suitability of the riparian use to the watercourse; and (5) the burden on the riparian proprietor of avoiding the harm."[52]

Therefore, a municipality's need to obtain secure water rights for its citizens would probably weigh as not unreasonable. A city must secure efficient utilization of water in order to supply this vital natural resource to a multitude of urban dwellers and a rural water district must supply comparable supply to many rural individuals and companies. When a municipal corporation is diverting water from outside its limits into the city for the use of the citizens, this diversion should be held reasonable. When the diversion causes little, if any, actual injury to other users, courts will most likely allow such a diversion.[53] However, the *Franco* decision may imply that the Oklahoma Supreme Court will order that just compensation be given injured riparians. The question will be if and when an affected riparian is injured.

However, another question which will need to be addressed is whether compensation should be a one-time lump sum or continuing damages. If the city were to deem the taking as complete, one-time compensation could be viewed as condemnation compensation and the city would own these riparian water rights. However, if the riparian still owns these property rights, the city may owe damages each time it diverts water and thus injures the property owner. This theory is unrealistic economically. Thus, the city's eminent domain power would give the city the power to condemn the property and pay one-time damages.

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46. Hageman, *supra* note 3, at 197.

47. *Id.*

48. Smith, *supra* note 1, at 689; TEX. WATER CODE ANN. § 11.028 (Vernon 1988).

49. 141 N.W.2d 738, 743 (Neb. 1966).

50. *Id.*

51. *Id.* at 746.

52. *Id.*

53. Wilbert L. Ziegler, *Acquisition and Protection of Water Supplies by Municipalities*, 57 MICH. L. REV. 349, 358 (1959); Crawford v. Hathaway, 93 N.W. 781 (Neb. 1903); Stratton v. Mt. Hermon Boys' School, 103 N.E. 87 (Mass. 1913); McDonough v. Russell-Miller Milling Co., 165 N.W. 504 (N.D. 1917); Harris v. Norfold & Western Ry. Co., 69 S.E. 623 (N.C. 1910).

B. Injunction

One equitable remedy for interference with property rights has been the remedy of injunction.[54] However, absent evidence of actual damage to the riparian, courts are reluctant to enjoin a reasonable use of the water.[55] Actual damage may be assumed during times of shortage when a downstream riparian's use of water is reduced or cut off.

However, even in times of abundance, damage may be presumed by the fact of diversion. The Connecticut Supreme Court[56] deemed a lower riparian owner to be injured by any unlawful diversion on the part of an appropriator, regardless of actual use of waters by the lower riparian. Injury is presumed because the riparian owner's right to the natural flow of water running through or along his land may be affected by prescription.

Nevertheless, the *Franco* court specifically states it is not adopting the natural flow theory of riparianism but a reasonableness doctrine.[57] The reasonableness theory holds that the riparian owner may use the stream water for reasonable uses as long as the use does not damage or injure other riparians. However, despite the court's insistence it is following a reasonableness theory and not a natural flow theory, the court still dictates that a minimum flow be maintained as necessary for all riparians with corresponding rights.[58]

Despite language to the contrary, if the natural flow theory is followed in practice, injury may be presumed by the very act of diversion. In the natural flow theory of riparian rights, a riparian landowner is entitled to the natural flow of stream water running through or along his land.[59] Any unlawful diversion of this right, by an upstream riparian or nonriparian, is presumed injurious.[60] Regardless of whether the downstream riparian had need or actual use of the stream water, injury will be presumed because prescriptive rights may attach to the property right invasion.[61] Injunction may be the appropriate remedy for an injured riparian when damages alone will not address the harm.[62]

A city's need of adequate water supply is relevant to determining if an injunction is appropriate.[63] However, when adequate compensation is not dispensed within a reasonable amount of time, injunction is appropriate.[64]

The Nebraska Court in *Wasserburger v. Coffee*[65] held that when the appropriation is asserted by an entity offering a public service, equity refuses to grant the riparian an injunction. Public services, such as those offered by utility companies and municipalities, demand that the greater good of the community be preserved.

Thus, while riparians may be deemed injured and due compensation owed, a city should not be cut off from its vital water supply. Oklahoma municipalities should be allowed continued use of their valuable water supplies. An injunction would cause an unreasonable hardship upon a multitude of individual users. Every city dweller and rural water district user could be affected by water rationing and/or rate increases as the public entities attempt to supply their constituents. If the *Franco* decision stands for the proposition there has been an unconstitutional taking, damages, not injunction, should be the appropriate remedy.

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54. 12 OKLA. ST. ANN. § 1382.
55. Smith v. Stanolind Oil & Gas Co., 172 P.2d 1002 (Okla. 1946).
56. Dimmock v. City of New London, 245 A.2d 569, 572 (Conn. 1968).
57. *Franco*, 855 P.2d at 575.
58. *Id.* at 578.
59. *Id.*
60. *Id.*
61. *Id.*
62. Wisniewski v. Gemmill, 465 A.2d 875, 877 (N.H. 1983).
63. Denial of an injunction is within the court's discretion if doing so would have a detrimental effect on the public. Adams v. Greenwich Water Co., 83 A.2d 177 (Conn. 1968); *see also* Dimmock v. City of New London, 245 A.2d 569 (Conn. 1968).
64. Dimmock v. City of New London, 245 A.2d 569, 573 (Conn. 1968).
65. 746 N.W.2d 738, 747 (Neb. 1966).

V. Adjudications

Prior to the 1963 statutes amending the mixed system of riparian and prior appropriation, title 82, sections 11-14 of the Oklahoma Statutes contemplated stream adjudications, in order to determine what water was available for appropriation.[66] Upon adjudication, the rights and priorities of all affected users were to be finalized.[67] However, only five adjudications proceedings took place and became final.[68] As these adjudications validated water rights, as contemplated under title 82,[69] these were the only rights the prior system recognized under the pre-1963 prior-appropriation system.

Nevertheless, the majority opinion in *Franco* appears to resurrect unused riparian rights on the streams subjected to pre-1963 adjudication. With this comes many questions regarding these previous adjudications. Are these rights which were adjudicated as conclusive still valid? As these adjudications were carried out within the mixed system of riparianism and prior appropriation and before the unconstitutional 1963 amendments[70], they might withstand judicial scrutiny as valid. Even though these adjudications set priorities and gave secure and protected water rights to appropriators as against future riparians[71], they followed the statutory requirements in place at the time. Hence, these five adjudications, with their corresponding water rights, might be held to be exempt from the *Franco*[72] resurrection of riparianism[73] and stand as valid water rights within the mixed system of riparian and prior appropriation rights that *Franco* recognizes.

Nonetheless, only a limited number of riparians were made parties to these five prior adjudications. The parties who owned land on the stream system, yet were not made a party for any number of reasons, may now contest these past determinations of their rights. They were denied their day in court. However, the adjudications followed statutory requirements for securing water rights and adequate notice, at least for prescription, may be said to exist based on constructive notice by the mere fact of the judicial decree itself.[74]

Now that *Franco*[75] reasserts prospective riparian rights,[76] even those individuals whose rights were determined as final may now argue they were denied adequate compensation for these property interests. The opportunity to initiate future water rights, within the reasonableness theory of riparian rights adds, immense value to riparian land. Water is a vital and finite resource. Having the ability to utilize an assessable supply of clear and high quality water makes property more marketable.

The *Franco* court held that the riparian right to initiate future water uses was inadequately protected.[77] Future water uses are an essential attribute for which a person bargains when purchasing land. Water adds immense value to the land. These prior riparians, who had their rights determined

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66. 82 OKLA. STAT. §§ 11-14 (1951); *see* Gay v. Hicks, 124 P. 1007 (Okla. 1912); Owens v. Snider, 153 P. 883 (Okla. 1915).

67. 82 OKLA. STAT. §§ 11-14 (1951).

68. City of Tulsa v. Grand-Hydro, Civ. 5263 (Dist. Ct. Mays County, Okla. Feb. 14, 1938) (Grand River and Spavinaw Creek); *In re* Application (As Amended) and Supplemented, by the City of Tulsa, A Municipal Corporation, for Appropriation of the Waters of Spavinaw Creek, Civ. 22-33 (Okla. Planning & Resources Bd. Sept. 13, 1938) (Spavinaw Creek); City of Oklahoma City v. City of Guymon, Civ. 99028 (Dist. Ct. Oklahoma County, Okla. Dec. 20, 1939) (North Canadian River); City of Durant v. Pexton, Civ. 19662, (Dist. Court Bryan County, Okla.) (Blue River); City of Oklahoma City v. State Board of Public Affairs, Civ. 10217 (Dist. Ct. Atoka County, Okla. Oct. 28, 1958) (North Boggy Creek).

69. 82 OKLA. STAT. § 11-14 (1951).

70. Franco-American Charolaise, Ltd. v. The Oklahoma Water Resources Board, 855 P.2 568 (Okla. 1990).

71. Domestic uses were retained by riparian owners however under riparian law.

72. 855 P.2 568 (Okla. 1990).

73. *Id.* at 571.

74. Notice, by an appropriation properly recorded, was deemed to be constructive notice to all persons. *In re* Hood River, 227 P. 1065, 1075 (Or. 1924).

75. 855 P.2d 568 (Okla. 1990).

76. *Id.* at 576.

77. *Id.* at 577.

in the five adjudications,[78] paid for this benefit when purchasing their land, yet they were not afforded adequate compensation when the court took such rights in the adjudications. They may now wish to assert this claim and seek compensation.

VI. Supplying Water for the Cities

A. Classifying Cities as Riparian or Riparian Users

Among other jurisdictions that maintain riparian water rights, various ways have been found to meet municipal and rural water needs. Florida recognizes riparian rights and declares that land which connects with navigable water entitles the owner of the land to riparian rights.[79] While most cities in Florida obtain their municipal water needs through groundwater, there are times when a city must look beyond groundwater and obtain surface water to meet its their many varied needs.[80] Various jurisdictions hold that if the city is located on a stream, a city may supply domestic water to all its inhabitants under the reasonableness theory, as could any other riparian.[81] For example, Ohio recognizes a city's right to supply its inhabitants domestic needs when a stream is located within the city limits.[82]

However, North Carolina[83] and Virginia[84] maintain that the riparian theory does not contemplate a city supplying domestic water to all of its inhabitants, even if the stream flows through the city limits.[85] These two mid-Atlantic states hold that the riparian doctrine envisioned individuals, families, or even businesses supplying their domestic needs from the abutting stream, but did not envision large metropolitan populations doing so.[86]

Various cities within Oklahoma have rivers and streams running through them. For example, Canton Lake supplies Oklahoma City with municipal water. Canton Lake is carried to Oklahoma City by the North Canadian River, which runs through its city limits. Does this make Oklahoma City a riparian? Additionally, how much of Canton Lake may Oklahoma City use? Does this entitle Oklahoma City only to a "reasonable" use of the water contained therein? A city does not use water for only domestic uses, but must have water for industrial and commercial uses too. Modern urbanization requires an abundance of water for its many uses to sustain life as we know it. In the riparian system of water rights, domestic uses are natural uses that have a preference over other uses.[87] Must Oklahoma City, even if it qualifies as a riparian, distinguish its domestic needs for households from non-domestic needs for industrial and commercial enterprises?

Other jurisdictions have also held that a city with a stream within the city's territorial limits may enjoy riparian privileges to meet its domestic needs.[88] The reasonableness standard should be applied

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78. City of Tulsa v. Grand-Hydro, Civ. 5263 (Dist. Ct. Mays County, Okla. Feb. 14, 1938) (Grand River and Spavinaw Creek); *In re* Application (As Amended) and Supplemented, by the City of Tulsa, A Municipal Corporation, for Appropriation of the Waters of Spavinaw Creek, Civ. 22-33 (Okla. Planning & Resources Bd. Sept. 13, 1938) (Spavinaw Creek); City of Oklahoma City v. City of Guymon, Civ. 99028 (Dist. Ct. Oklahoma County, Okla. Dec. 20, 1939) (North Canadian River); City of Durant v. Pexton, Civ. 19662, (Dist. Court Bryan County, Okla.) (Blue River); City of Oklahoma City v. State Board of Public Affairs, Civ. 10217 (Dist. Ct. Atoka County, Okla. Oct. 28, 1958) (North Boggy Creek).

79. FRANK E. MALONEY ET AL., WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE 166 (1968) [hereinafter THE FLORIDA EXPERIENCE].

80. City of Canton v. Shock, 63 N.E. 600 (Ohio 1902). Because groundwater is easily obtained and there is an abundance of high-quality available, approximately 90% of municipal water needs are supplied through the use of groundwater.

81. *See* DAVID H. GETCHES, WATER LAW 35-37 (2nd ed. 1990).

82. City of Canton v. Shock, 63 N.E. 600 (Ohio 1902).

83. Pernell v. City of Henderson, 16 S.E.2d 449 (N.C. 1941).

84. Town of Purcellville v. Potts, 19 S.E.2d 700 (Va. 1942).

85. THE FLORIDA EXPERIENCE, *supra* note 79, at 166.

86. *Id.*

87. GETCHES, *supra* note 81, at 33-34.

88. City of Canton v. Shock, 63 N.E. 600 (Ohio 1902); THE FLORIDA EXPERIENCE, *supra* note 79, § 56.1.

to municipalities, just as to other riparians.[89] However, the reasonableness standard which allows the city to supply its inhabitants' domestic water does not allow a city to transport such water beyond the corporate limits of the city.[90] Thus, only the actual riparian uses within the public entity's service area should be counted in any balancing against competing riparians.[91]

Even though domestic uses have traditionally been recognized as having priority over other uses[92], some courts have held that the reasonable use standard does not grant riparian status to a municipality supplying water to its citizens.[93] Even if a city may not claim reasonable riparian use for supplying all its inhabitants with water, growth is natural and should be expected. A lower riparian landowner should expect that growth and development is natural and with such growth upstream riparian municipalities will have need of more water.[94] As Oklahoma cities located on streams, such as Oklahoma City and Norman, expand and grow, downstream riparians should recognize and expect that upstream cities' reasonable riparian needs will increase also. This anticiipation of growth should be construed as reasonable within the riparian doctrine.

B. Transferring Water / NonRiparian Cities

In Ohion, even though a city straddling a stream is a riparian for its inhabitants' needs, the Supreme Court of Ohio ruled that a city is liable to lower riparians when a city diverts water from the stream to supply people outside its city limits or transports the water away from the stream for sale as a commercial product to nonriparians.[95] The Ohio court ruled that the city, despite being a riparian, was liable either because the diversion did direct damage by materially diminishing the stream or by using an unreasonable amount of water in comparison to fellow riparians.[96]

Some Oklahoma cities must contend with the reality that they have no basis for claiming riparian status on the stream from which the city obtains its water. For example, Tulsa obtain its water from the Spavinaw Creek. Spavinaw Creek does not flow through the Tulsa city limits. Tulsa relies upon Spavinaw water through a valid appropriation permit obtained in a pre-1963 adjudication. After *Franco*, cities such as Tulsa, with no riparian status, may be in a precarious position.

Nonriparian cities must rely on transporting water to their inhabitants. The Oklahoma legislature has expressed its acknowledgment that municipalities would need to disburse large expenditures to procure water storage and transportation projects to transfer water for out-of-basin use.[97] However, other jurisdictions have held that a city, which was riparian to a local creek, could not commercially sell water for use beyond the limits of the watershed.[98]

Under traditional riparian theory, transporting water from a watercourse locating in one basin to a water-poor locality is deemed as a unreasonable use.[99] This restrictive approach has caused many riparian municipalities and other governmental entities to obtain their needed water through the power of eminent domain.[100] This technique requires substantial financial resources for compensation and raises constitutional questions as to whether the public use the city is claiming fits within the state's eminent domain laws.[101]

89. City of Canton v. Shock, 63 N.E. 600 (Ohio 1902); THE FLORIDA EXPERIENCE, *supra* note 79, § 56.12.

90. City of Canton v. Shock, 63 N.E. 600 (Ohio 1902); THE FLORIDA EXPERIENCE, *supra* note 79, § 56.1; *see also* Harrell v. City of Conway, 271 S.W.2d 924 (Ark. 1954).

91. Harrell v. City of Conway, 271 S.W.2d 924 (1954); BECK, *supra* note 28, § 7.05(c)(1).

92. 82 OKLA. STAT. § 105.2(A) (1981); TEX. WATER CODE ANN. § 11.024(1) (Vernon 1988).

93. Pernell v. City of Henderson, 16 S.E.2d 449, 451 (N.C. 1941).

94. City of Canton v. Shock, 63 N.E. 600, 603 (Ohio 1902).

95. *Id.* at 604.

96. *Id.*

97. 82 OKLA. STAT. § 1086.1 (1981); *see also* Butler, *supra* note 5, at 137 (stating that effective water allocation systems depend upon the transferability of water rights).

98. Harrell v. City of Conway, 71 S.W.2d 924 (Ark. 1954).

99. Butler, *supra* note 5, at 103.

100. *Id.*

101. Burger v. City of Beatrice, 147 N.W.2d 748 (Neb. 1967). A city could only acquire the water by eminent domain when the primary

While Oklahoma has held that riparian land is land which abuts the stream water, a municipality may obtain riparian rights by conveyance of water rights from a riparian owner. Transferability is one of the fundamental rights of property law. A city may purchase water rights from a riparian. However, to supply a city of any size would entail purchasing a multitude of water rights. The conveyance can only be for what the original riparian proprietor had as reasonable riparian rights.[102] What was reasonable for the riparian land, how much water and for what purpose, is what the city would purchase. A city the size of Tulsa might be unable to purchase enough transferable water rights to supply its citizens.

C. Natural Flow Diversion

Despite the *Franco* court's insistence that the opinion does not adopt the natural flow theory, the opinion appears to demand that a minimum flow be maintained for all reasonable riparian needs.[103] This may be compared to the natural flow theory.[104] In other jurisdictions where the natural flow theory is recognized,[105] neither cities or public utility companies may divert stream water from a downstream riparian, even for honorable purposes such as supplying municipal needs.[106] The burden is on the diverter to show a special defense for the diminution of flow and prove that the diversion was not the cause of the downstream riparian's injury.[107] This theory is more stringent upon a city trying to supply its inhabitants with adequate water than a pure reasonableness theory would be.[108] Any diminution in the natural flow to downstream riparians is deemed injurious and subject to penalty and/or injunction.

Under New York law[109], no downstream riparian may take action against a diverting[110] municipality unless notice is served and filed within ninety days after the the diversion occurs.[111] If Oklahoma were to enact similar legislation, cities would only need to feel insecure in their municipal water supply for ninety days. After that time period, lower riparians would have forfeited their right to complain. The enactment of the legislation could be viewed as constructive notice to all riparians of such possible forfeiture. However, it is unclear how the Oklahoma Supreme Court, in light of the *Franco* decision, would react to such a short statute of limitations for riparian rights. By adopting such a short statute of limitations, riparians would lose their right to initiate prospective riparian uses — a right which the *Franco* majority strove to protect as a property right. Moreover, even if the Supreme Court of Oklahoma accetped such a short statute of limitations for suing municipalities that divert water from streams or lakes, the legislation would need to make clear to what remedy — an injunction or an inverse condemnation action — the complaining riparian(s) would be entitled. If the riparians were allowed to obtain an injunction, no municipality could afford to undertake the costs associated with a municipal water supply project on the unpredictable hope that no riparian would complain within ninety days.

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benefit of the condemnation would be to supply domestic needs of the locality's public. *See generally* Harnsberger, *Eminent Domain in Water Law*, 48 NEB. L. REV. 325, 366-69 (1969).

102. Smith v. Stanolind Oil & Gas Co., 172 P.2d 1002 (Okla. 1946).

103. *Franco*, 855 P.2d at 578.

104. The natural flow theory holds that a riparian landowner is entitled to the natural flow of water through or along his land. Any diversion or diminution of this flow is detrimental and injurious to the riparian landowner. Collens v. New Cannan Water Co., 234 A.2d 825, 831 (Conn. 1967).

105. Arkansas holds that under the natural flow doctrine, a riparian may withdraw water for domestic purposes. However, irrigation of crops and factory operation are deemed artificial uses and not appropriate under natural flow theory. Harrell City of Conway, 271 S.W.2d 924, 926 (Ark. 1954); *see also* Collens v. New Cannon Water Co., 234 A.2d 825, 831 (Conn. 1967).

106. *Harrell*, 271 S.W.2d at 926; *see also Collens*, 234 A.2d at 831.

107. *Harrell*, 271 S.W.2d at 926; *see also Collens*, 234 A.2d at 831.

108. *See supra* part IV.B for a discussion of reasonableness and the injunctiion remedy.

109. Hackensack Water Co. v. Village of Nyack, 289 F. Supp 671, 681 (S.D. N.Y. 1968).

110. Diversion was defined as taking water from a stream without returning it for the use of lower riparians. *Hackensack*, 289 F. S upp. at 678.

111. General Municipal Law, N.Y. §§ 50-e, subd. 1, 50-i, subd. 1; Village Law N.Y. § 341.

D. Municipal Cities Use Considered Reasonable Within Riparian Doctrine

As *Franco* specifically held that Oklahoma has adopted a reasonable use riparian doctrine as opposed to a natural flow theory, a city's use should be viewed according to this reasonableness standard. As water is the life-force of urbanization and human life, private consumptive use of water is considered one of the highest priorities of beneficial uses.[112] As cities and rural water districts must supply this life-giving resource to their constituents, a municipal and rural water district's water system must be viewed as reasonable in all but the most unusual of circumstances.[113]

Under Texas's water law, municipal uses are given the highest preference due to the necessity to support human and animal life.[114] Texas recognizes a hierarchy of preferences based on the riparians doctrine that water is necessary for sustaining life.[115] Might the Oklahoma Supreme Court, after *Franco*, provide a preference for municipal domestic use within the renewed riparian system? Would the Oklahoma Supreme Court do so if it faced a factual situation in which a city was about to lose its municipal water supply to riparian landowners?[116]

The Oklahoma Supreme Court has held that use on nonriparian land does not make the use unreasonable per se.[117] Reasonableness of the use depends upon whether such use is for a proper purpose and within the kind of transaction for which public policy requires that the private demands on the stream be subservient.[118]

Reasonableness standards are vague and flexible. What is reasonable for one user in one circumstance may not be reasonable for another. This flexibility and uncertainty creates difficulties in planning for the future.[119] Long-range plans depend upon being able to predict what resources will be available and how secure these rights are.

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112. *See* 82 OKLA. STAT. § 105.2 (1981) (stating that beneficial use shall be the measure to allocate water usein Oklahoma's prior appropriation system). Even within Oklahoma's appropriation scheme, domestic water use was still retained for riparian landowners due to the priority given to domestic consumption.

113. *See* Hudson River Fisherman's Ass'n v. Williams, N.Y.S.2d 379 (N.Y. 1988) (allowing a municipal water supplier to begin to acquire land for a water reservoir project even though the reservoir, when built, would destroy a valuable trout stream). The *Hudson River* court reached this conclusion only after affirming a "trigger" condition prior to reservoir construction beginning so as to insure that the municipal supplier factually and in reality faced a water shortage which the reservoir would solve by providing an additional source of water.

114. TEX. WATER CODE ANN. § 11.024(1) (Vernon 1988); Watkins Land Co. v. Clements, 86 S.W. 733, 736 (Tex. 1905); Smith, *supra* note 1.

115. Smith, *supra* note 1, at 690; *see also* TEX. WATER CODE ANN. § 11.024(1) (Vernon (1988). The statute expresses preferences as:

> [In] order to conserve and properly utilize state water, the public welfare requires not only recognition of beneficial uses but also a constructive public policy regarding the preferences between theses uses, and it is therefore declared to be the public policy of this state that in appropriating state water preference shall be given to the following uses in the order named:
>
> (1) domestic and municipal uses, including water for sustaining human life and the life of domestic animals, it being the public policy of the state and for the benefit of the greatest number of people that in the appropriation of water as herein defined, the appropriation of water for domestic and municipal uses shall be and remain superior to the rights of the state to appropriate the same for all other purposes;
>
> (2) industrial uses, ..."

Id.

116. The *Franco* litigation arises from the attempt by the City of Ada to acquire additional prior appropriation water rights for its municipal water supply. Yet, when one reads the facts of the application, Ada projected a need for the water based on future demand. Ada does not make the claim that without the requested additional water that its citizens will have no water to quench their thirsts, bathe their bodies, and prepare their meals. In truth, the *Franco* litigation has gone on for fifteen years without Ada obtaining any additional water from Byrds Mill Spring. Ada has at no time in this fifteen year litigation filed a pleading arguing that its citizens have actually been deprived of water for domestic needs due to the fact that Ada has not gained access to Byrds Mill Spring. Either Ada has not needed the water for its citizens, based its application for additional stream water on future population growth that never materialized, or located an alternative water supply (most likely from groundwater resources).

117. Smith v. Stanolind Oil & Gas Co., 172 P.2d 1002 (Okla. 1946).

118. *See* Kennebunk, Kennebunkport & Wells Water Dist. v. Maine Turnpike Auth., 71 A.2d 520, 527 (Me. 1950).

119. Butler, *supra* note 5, at 126.

New York has held that reasonable use is generally a question of fact.[120] However, whether the undisputed facts and necessary inferences establish an unreasonable use is a question of law for the court to determine.[121] Factors used to determine the reasonableness include the uses to which the respective parties wish to put the water, the amount required for such use, and whether there are adequate alternatives for such water.[122]

A city's need for water and the fact that seeking an alternative supply would force the city to raise its rates to citizens is a relevant factor which cannot be deemed unreasonable on a motion for summary judgment.[123] These important factors must be weighed by the court. A court might be obligated to apply the doctrine of "equitable apportionment" which entails balancing the equities according to the public and private interests involved.[124]

Nebraska has held that riparian rights may be limited by the reasonable use theory and the importance of public needs.[125] When a riparian's reasonable use of the stream is not impaired, the public interest of supplying public needs necessitates that the water be used to supply public interests. To let the water go unused is considered wasteful when public needs go "unquenched".[126]

The *Restatement (Second) of Torts* recognizes the common law reasonableness theory of riparian rights.[127] It is the *Restatement's* definition of reasonableness which the *Franco* court held to be applicable.[128] Determination of reasonableness is dependant upon considerations of the affected parties' interests, the harm caused by such use, and social values.[129] However, the *Restatement* does not classify a city's use as a domestic use.[130] If in the future, the Oklahoma Supreme Court relies upon the *Restatement (Second) of Torts* for its definition of reasonableness, the *Restatement* could prove decisive for resolving competing municipal and riparian landowner claims to water. The *Restatement* attempted to resolve the competing interests of a municipality and riparian landowners through temporal priority.[131] Municipalities must compensate riparians if the riparian was using the water before the public use began. However, if riparians initiate a use after the public water system began, the riparian would be subordinated to the public system without compensation.[132] This balance attempts to protect small,

120. Hackensack Water Co. v. Village of Nyack, 289 F. Supp. 671 (S.D. N.Y. 1968).

121. *Id.* at 678.

122. *Id.*

123. *Id.*

124. *Id.* at 681.

125. Metropolitan Util. Dist. v. Merritt Beach Co., 140 N.W.2d 626 (Neb. 1966).

126. *Id.* at 637.

127. RESTATEMENT (SECOND) OF TORTS § 850A (1979) (Reasonableness of the Use of Water).

128. *Franco*, 855 P.2d at 575.

129. RESTATEMENT (SECOND) OF TORTS § 850A (1979). Section 850A lists the factors as:

(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, land, investments and enterprises, and
(i) the justice of requiring the user causing the harm to bear the loss.

Id.

130. *Id.* § 850A cmt. c (Domestic Purposes).

131. *Id.* § 857(3).

132. *Id.* § 857(3). The section states:

(3) A nonriparian who is exercising a right created by governmental authority, permit or license to use public or private water is not subject to liability for making a use of a watercourse or lake that will interfere with or prevent the initiation of a subsequent use of water by a riparian proprietor.

Id.

individual riparians from losing water they are using while acknowledging the importance of a secure source of water for the public water supply systems.

If the Oklahoma Supreme Court were to adopt *Restatement* section 857(3) this would alleviate some of the difficulties municipalities now face after *Franco*. Municipalities and rural water districts would have a bright line date upon which to feel secure in their sources of water supply. For those riparians who are using water from the water source that the municipality desires to use as its water supply, the municipality would have to compensate them, either through negotiation or condemnation. For those riparians who thereafter desire to initiate a riparian use, the *Restatement* position would mean that the municipal water supply is a reasonable use that has a preference which trumps this prospective riparian use. Public water supply systems would owe no compensation for this lost opportunity by riparians.

However, *Restatement* section 857(3) appears to conflict with the spirit, if not the plain language, of *Franco*. The *Franco* court held that the riparian right to initiate future use is not lost by nonuse and is a vested right that may not be constitutionally taken away.[133] Nevertheless, if the Court is citing the *Restatement* as controlling for Oklahoma reasonableness standards, the *Restatement* may be the source also for the protection of municipal and rural water district water sources once the municipality receives a permit to obtain water from a particular water source from the Oklahoma Water Resources Board.

If *Restatement* section 857(3) provides a mechanism within Oklahoma's renewed riparian system to protect muncipal and rural water district water supplies, *Restatement* section 857(3) does not resolve the issue of how a public water supply system and riparians relate to one another during times of shortage — the drought which is sure to come. Possibly the Oklahoma Supreme Court would rule that in times of shortage that the public water supply might have a means, through water conservation or water rationing, to absorb the shortage while an individual riparian has less abilithy to absorb the shortage. Hence, the riparian claim to water, particularly for domestic needs, could trump the public water supply during a shortage.[134] Yet, authority also exists for the opposite conclusion. During a time of shortage a municipality might be able to take water, without compensation, in order to supply citizens with their needed water.[135] Additionally, *Franco* held that valid appropriation rights are vested rights.[136] If the public water supply claims its water source based on a permit from the Oklahoma Water Resources Board, the permit as a vested prior appropriation right might give the public water supplier a superior claim, through a public policy preference for municipal domestic uses, over individual riparian claims to water.

E. Groundwater

Oklahoma policy has been to efficiently utilize the state's valuable natural resources. As water is essential to human life and the state's economic future, water is viewed as a valuable resource and should be efficiently regulated and disbursed. One avenue for a city's water needs is through the procurement of groundwater.

However, a city faces potential difficulties in depending upon groundwater as its primary basis of meeting municipal needs. The Oklahoma Supreme Court held in *Oklahoma Water Resources Bd. v. Texas County Irr. and Water Resources Assoc. Inc.*,[137] that groundwater should not be depleted needlessly.[138] Groundwater should be preserved and protected from waste.[139] Municipalities must, therefore, be concerned with the concept of groundwater waste.

133. 855 P.2d 568 (Okla. 1990). This is the fundamental holding of *Franco*.

134. In the its opinion, the *Franco* majority opined that severe conflict between prior appropriators, holding water rights through Oklahoma Water Resources Board permits, and riparians should be rare, occurring only during times of severe drought. *Id.* at 582.

135. Smith, *supra* note 1, at 689.

136. *Franco*, 855 P.2d at 582.

137. 711 P.2d 38 (Okla. 1984).

138. *Id.* at 56 (Kauger J., concurring).

139. Bowles v. City of Enid, 245 P.2d 730 (Okla. 1952).

If cities were to develop available groundwater to meet their regular needs, large-scale pumping could eventually dry up shallow neighboring wells.[140] Individual riparian property owners, protected in their riparian claims by *Franco*, could be harmed by the depletion of groundwater interconnected to surface waters. Thus, while groundwater applications do not take into account neighboring needs, but only whether the applicant's needs are beneficial and non-wasteful,[141] large-scale groundwater depletion might prove to be harmful for neighboring riparian individuals. Consequently, while municipalities might want to supplement their water needs from groundwater sources, stream water could still prove to be the most reliable source for municipal water projects in some instances. Municipalities must take into account any hydrological interconnection between surface water and groundwater and the legal ramifications of that interconnection.

Moreover, Oklahoma has adopted a groundwater system by which the state policy is to mine groundwater aquifers. Hence, depending upon the peculiar characteristics of the aquifer from which the municipality desires to take groundwater, the aquifer could eventually dry up. The allocation system allots water according to how many acres a landowner owns.[142] A city could be guaranteed a specific quantity of water by purchasing a specified number of acres. However, this water supply would be tenuous, depending upon the expected life of the aquifer. Municipalities depending upon ground water supply might be faced with the eventuality of having to obtain entirely new sources of water.[143]

F. Condemnation[144]

Maine recognizes the riparian doctrine of water law. The courts have held that riparian proprietors have recognized rights; however, these rights are limited by law and may be taken for public use.[145] This eminent domain taking may be by the State itself, by a public agency created by the State, or by a private public service corporation upon which the State has conferred such power.[146]

A municipality may exercise its authority to acquire land and/or water rights through purchase or condemnation through the law of eminent domain.[147] The Oklahoma legislature recognized the need to utilize eminent domain for storage or conveyance of waters for beneficial use by including such authority within its water statutes.[148]

One of the first questions that must be addressed is what should a city condemn? Should the city condemn the land itself with all attendant rights, such as water and/or mineral rights, or should the city only condemn the water rights to the land? Condemning the entire land could be more expensive than just condemning the water rights. However, what is land worth without viable water? If the water rights are no longer attached to the property, the landowner might have land with few uses. The resale value would have diminished substantially, if the landowner could sell the land at all. Therefore, the city might need to condemn the entire parcel.

However, if the city condemns the entire parcel, the city could have land it does not need or desire. The city might try to utilize the acquired land and recoup some of the money spent in the condemnation proceeding. The uses could be either income-generating projects or public work projects benefiting the entire population. Public works projects, developed on the acquired land, could be enhanced while the

140. Brief of Amicus Curiae, Oklahoma Municipal League in Support of Petition for Rehearing at 4 (July 1987).

141. 82 OKLA. STAT. § 1020.9 (1991).

142. *Id.*

143. For a fuller discussion of *Franco* and Oklahoma groundwater, see the chapter titled, "The Potential Impact of *Franco* upon Oklahoma Groundwater Law."

144. For a fuller discussion of takings issues after *Franco*, see the chapter titled "The Issues of Taking and Valuation under *Franco*."

145. Kennebunk, Kennebunkport & Wells Water Dist. v. Maine Turnpike Auth., 71 A.2d 520, 528 (Me. 1950).

146. *Id.*

147. Oklahoma has recognized the power of eminent domain for municipalities to obtain a water supply for a long time. *See, e.g.*, 11 OKLA. STAT. §§ 291-293, 305, 563, 670 (1951); 27 OKLA. STAT. § 5 (1951); 60 OKLA. STAT. § 60 (1951); 82 OKLA. STAT. §§ 1001-1019 (1951).

148. 82 OKLA. STAT. § 105.3 (1991).

city obtains its needed water supply. The city might also consider selling the land without water rights at its diminished value.

Moreover, as discussed earlier in Part IV(D), if municipalities can gain protection of its water rights through *Restatement (Second)) of Torts* section 857(3), municipalities would gain also, as a practical matter, the legal position of having to condemn only the land needed for the construction of reservoirs. While some parcels of land condemned for reservoir construction would assuredly have appurtenant riparian water rights for which the city must also pay, the city would not need to pay for prospective riparian rights to upstream riparians, downstream riparians, or the riparians whose lands are being condemned for the reservoir. Consequently, the legal status the Oklahoma Supreme Court gives to *Restatement* section 857(3) is as important for understanding the power of eminent domain for municipalities after *Franco* as for understanding the relationship between municipal water supplies and riparians under the renewed riparian system articulated by *Franco*.

G. Forfeiture / Abandonment

Riparianism might be viewed as an usufructuary right, as opposed to property rights in a concrete possessory sense.[149] In his concurring/dissenting dissenting opinion in *Franco*, Justice Lavender argued that riparians do not own the water, they only have the right to a reasonable use of the water abutting their lands.[150] An unqualified future use of such a scarce natural resource as water, therefore, might be deemed unreasonable and riparian rights might be subject to forfeiture, prescription or abandoment.[151]

In *Oklahoma Water Resources Board v. Franco-American Charolaise, Ltd.*,[152] the Oklahoma Court of Apeals held that nonuse of appropriated water for the statutory period of seven years[153] was not forfeited when nonuse was caused by circumstances beyond the control of the landowner.[154] The court held that the intent of the applicable statute was that a claimant may "show cause why such water right should not be declared to have been lost through non-use".[155] Even though this statute pertains to appropriated rights, it demonstrates the policy of the state that water should be used for the most efficient use and that nonuse is against public policy.

Injury, presumed by an unlawful diversion of a lower riparian's water rights or proven in-fact, might confer prescriptive rights upon the diverter.[156] Even if the elements of prescription could not be satisfied, municipalities might argue that such continued long-term nonuse in the face of another's diversion should establish statuory forfeiture, if applicable to riparian rights, or common law abandonment. Municipalities might argue that the continued use of their valid appropriation permits conferred legal rights to them under any of these three legal theories — prescriptive rights against private riparians, statutory forfeiture, abandoment.

However, these three legal theories are doubtful due to a concern expressed in *Franco*. While municipalities may obtain water rights through prescription, riparians could argue that they were unaware that they needed to object. The 1963 statutes led riparians to believe they had no unused future rights to

149. *Franco*, 855 P.2d at 582 (Lavender, J., concurring in part and dissenting in part).

150. *Id.* at 583.

151. *Id.*; 82 OKLA. STAT. § 105-17 (1991).

152. 646 P.2d 620 (Okla. App. 1982).

153. 82 OKLA. STAT. § 105-17 (1991). The section states:

> To the extent that the water authorized is not put to beneficial use as provided by the terms of the permit, that amount not so used shall be forfeited by the holder of the permit and shall become public water and available for appropriation. When the party entitled to the use of water commences using water but thereafter fails to beneficially use all or any part of the water claimed by him, for which a right of use has been vested for the purpose for which it was appropriated for a period of seven (7) continuous years, such unused water shall revert to the public and shall be regarded as unappropriated public water.

Id.

154. The stream was polluted with salt and acid from an upstream oil company. The landowner successfully argued that this pollution excused his nonuse because to use the water would have damaged his land and crops. *Franco*, 646 P.2d at 621.

155. *Id.* at 621. The court was quoting from *In re* Supreme Court Adjudications, 597 P.2d 1208 (Okla. 1979).

156. Dimmock v. City of New London, 245 A.2d 569, 572 (Conn. 1968).

protect, except for domestic use.[157] If riparians did not know they had rights to protect, they would not know they must object within a timely manner to preserve such unknown rights. Thus, to take away riparian rights under the theories of prescription, statutory forfeiture, or abandoment merely because riparians made no timely objections might appear to the court as unrealistic and unfair. One does not fight to preserve what one does not know one possesses.

H. Surplus Water

In accordance with title 82, section 1086.1 of the Oklahoma Statutes, the Legislature has expressed the intent that surplus water in Oklahoma be used outside the area of origin to the extent that the water exceeds the needs of the people of the area of orign.[158] This legislative policy encourages the efficient use of Oklahoma water becasue the water can be diverted to other uses in Oklahoma before it leaves Oklahoma's geographical boundaries.[159]

Title 82, section 105.12(4) of the Oklahoma Statutes lays out the statutory criteria the Oklahoma Water Resources Board must satisfy before issuing an appropriation permit for water use outside area of origin.[160] The *Franco* Court held that the OWRB is required to determine if there is water available for appropriation outise the basin by looking at in-basin applications pending at the same time, and future in-basin needs as revealed by the five-year review of basin needs made prior to the granting of the application. In-basin needs are only given preference at time of application, if both are pending at the same time. If the out-of-basis application is granted, additional five-year reviews cannot be used to reduce a previously granted appropriation.[161] Once granted, the out-of-basis appropriation is a vested propery right, subject only to temporary divestment by a senior appropriator or a riparian's reasonable use in times of shortage.[162]

These Oklahoma statutes are compatible with the section 857 of the *Restatement (Second) of Torts*[163] model. Section 857(3) contemplates that riparians would have priority to initiate water use upon a stream as long as no public entity had already gained an appropriation permit. However, once the public entity has gained the appropriation permit, the *Restatement* provides that the riparian can no longer establish a use or interfere with the city's rights.[164]

Construing title 82, section 1086.1 together with *Restatement* section 857(3), municipalities might be able to argue, after *Franco*, that riparians in Oklahoma have no claim to surplus waters in the streams, lakes, and reservoirs of Oklahoma.[165] Although the precise definition of surplus waters would have to await further legislative or judicial action, surplus waters would most likely include flood waters. If

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157. *Franco*, 855 P.2d at 577.

158. 82 OKLA. STAT. § 1086.1 (Supp. 1994). Florida, which has a riparian system of water rights, also provides a process by which excess water may be diverted to land beyond riparian property. *See* FLA. STAT. § 373.141 (1967); THE FLORIDA EXPERIENCE, *supra* note 79, § 62.3(b).

159. THE FLORIDA EXPERIENCE, *supra* note 79, § 94.4(a).

160. 82 OKLA. STAT. § 105.12(4) (1991).

161. *Franco*, 855 P.2d at 581.

162. *Id.* at 582.

163. RESTATEMENT (SECOND) OF TORTS § 857 (1979) (Harm by Nonriparian to Riparian Proprietor). The section states:

(1) Except as stated in Subsections (2), (3), and (4), a nonriparian is subject to liability for a use of the water of a watercourse or lake that interferes with the right of a riparian proprietor to use the water.

(2) A nonriparian who holds a grant from one riparian proprietor of the grantor's right to the water of a watercourse or lake is subject to liability to another riparian proprietor for making an unreasonable use of the water that causes harm to the other riparian proprietor's reasonable use of water or to his land.

(3) A nonriparian who is exercising a right created by governmental authority, permit or license to use public or private water is not subject to liability for making a use of a watercourse or lake that will interfere with or prevent the initiation of a subsequent use of water by a riparian proprietor.

(4) A nonriparian who is exercising a public right is not subject to liability for making a use of public waters that causes harm by interfering with the use of the water by a riparian proprietor.

Id.

164. *Id.*

165. *See* Motl v. Boyd, 286 S.W. 458 (Tex. 1926) (holding ruled that riparian rights did not attach to flood (surplus) in a stream).

Oklahoma adopted a policy that surplus waters are not riparian waters, municipalities having a prior appropriation in the surplus water would have a sizeable, secure source of water that could not be threatened or diminished by riparian landowners. Exempting surplus waters from *Franco's* reach might not undermine *Franco's* fundamental constitutional points while simultaneously greatly diminishing *Franco's* unsettling potential impact upon municipal water supplies.

1. Use of a Dam

Under a natural flow theory of riparian water rights, when a city expands, additional water could be obtained by the construction of a dam or reservoir, provided adequate flow is released back into the stream flow.[166] If the dam creates an artificial increase in the flow of the stream, downstream riparians have no cause of action and no complaint against the upstream municipality.[167] Therefore, the city has an adequate and secure supply of water, and downstream riparians have an abundance of stream water available for their use.

Oklahoma cities may seek secure water supplies by the construction of new municipal dams or requesting the federal government to build a dam. Therefore cities may only be liable for compensation to affected riparians for the riparian lands actually flooded. This cost would then be passed to the city's inhabitants through rate increases. If a city may utilize an already built dam,[168] the cost efficiency savings could be passed to the city inhabitants through lower water rates.

However, the greater concern the city must face is whether the city' use of the dam would decrease the flow of the stream. It is when the flow of a stream is diminished that significant conflict between muncipal water supplies and riparian rights come into play. As discussed earlier in Part IV of this chapter, if the flow is diminished, riparians in Oklahoma, after *Franco*, might well have a claim for compensation or the remedy of an injunction against a municipality or rural water district. The central concern of this chapter has been that public water supplies will diminish stream flow making them subject to the loss of supply to riparian claimants. The major emphasis of this chapter has been discussion of potential means by which public water suppliers may obtain an adequate and secure soucre of water in light of this risk of liability to riparian claimants that *Franco* creates.

Additionally, if land is flooded due to dam construction, the riparian landowner can maintain a civil damage suit for damages to the flooded land. However, a city does not need to condemn the riparian's entire tract of land in order to provide just compensation for the flooded portion.[169]

VII. Financing[170]

A. How Will Cities Finance Their Water Supply Projects in the Future?

Oklahoma municipalities have long relied upon the sale of bonds to finance their waterworks projects. This long-established, reliable avenue of financing could be lost or harmed due to the uncertainty *Franco* might produce. If any riparian may assert a future riparian right against an appropriator-municipality or appropriatoer-rural water district and thereby threaten the public's source of water, few municipalities or rural water districts will want to take on such risk.[171] When these public water suppliers do pursue water supply projects, the projects carry greater risks which almost assuredly translates into higher costs. To offset these greater risks, buyers of bonds for public water supply projects will insist upon higher raters

166. Hackensack Water Co. v. Village of Nyack, 289 F.Supp 671, 681 (S.D. N.Y. 1968).

167. *Id.* at 679.

168. For a list of Oklahoma Dams and their location, see tbl. 1 in the chapter titled, "Reservoir Management and Recreation."

169. City of Blackwell v. Murduck, 244 P.2d 817 (Okla. 1952).

170. For a fuller discussion of bond financing, see part VI of the chapter titled "Reservoir Management and Recreation."

171. The irresponsibility of committing public resources to such an unstable and insecure water right, while subjecting these reso' rces to substantial risks, could ensure that few if any funds would be available for water projects. Brief of Amicus Curiae, Oklahoma Municipal League in Support of Petition for Rehearing at 10 (July 1987).

of return through higher interest rates for the public entity. If public entities do not offer higher rates of return, these public entities might not be able to find buyers for these higher risk bonds.[172]

Building dams which do not diminish the natural flow of the stream, if this is possible, could be one way cities would be able to finance water supply projects. If the city could show that the dam would increase the natural flow and that there will be little, if any, actual harm to downstream riparians, damages would be ascertainable. With a finite figure of costs, financing would be obtainable. Banks and financial institutions would be more inclined to invest in when the potential financial risks can be quantified.

B. What Happens if a Public Entity Loses Its Water Rights or Has Financial Difficulty Because of Compensation to Riparians?

The continued economic viability of existing water projects also depend upon the impact of *Franco*. Relying upon water rights acquired through the prior appropriation system, Oklahoma municipalities and rural water districts have invested millions in water supply projects.

For example, the Oklahoma City Water Utilities Trust issued tax-exempt bonds and used the proceeds to construct a comprehensive water system serving Oklahoma City and various other areas in central Oklahoma.[173] The city stated that repayment of the bonds depends upon revenue received from the sale of water to its inhabitants[174] The city argued that reinvigoration of riparian rights through the *Franco* litigation would undermine the certainty of prior appropriation rights upon which the city relied when it sold the bonds.[175] If the city were held hostage by riparians asserting previously unused rights, the stability of the entire financial future might become untenable. Either the city must pay ransom for the continued use of the water the city has come to depend upon through prior appropriation, or scramble to secure alternative means to meet the city's water obligations. As previously discussed, alternatives might not always be available or economically feasible.

VIII. Can Public Entities Lose Their Water Rights?

A. Forfeiture — Nonuse

Even after *Franco*, Oklahoma cities will likely continue to base most of their water rights on prior appropriations acquired from the Oklahoma Water Resources Board. Beneficial use is the basis for appropriation permits. If an appropriator lets the appropriated water rights go unused for seven years, the appropriator could lose these water rights.[176] However, if the appropriator is able to show cause why the water cannot be put to beneficial use within the seven year period, the Oklahoma Water Resource Board may provide, in the permit, the time necessary to put the water to beneficial use.[177]

In other jurisdictions, the forfeiture clause has been held to be constitutional when applied against a municipality.[178] Moreover, several older cases hold that a city can even lose its water rights to another through prescription if the city does not exercise its rights.[179]

However, one strong counterargument to the theory that a city may forfeit its water, by nonuse or by prescription, is the common law concept that the city holds the future water rights in trust for the use

172. Hageman, *supra* note 3, at 195.

173. *See* Brief of Amicus Curiae, City of Oklahoma City and the Oklahoma City Water Utilities Trust, in Support of Petition for Rehearing at 1 (June 4, 1990).

174. *Id.*

175. *Id.*

176. 82 OKLA. STAT. §§ 105.16 to .18 (Supp. 1994).

177. *Id.*

178. *E.g.*, Nephi City v. Hansen, 779 P.2d 673, 676 (Utah 1989).

179. Harris v. Southeast Portland Lumber Co., 262 P. 243, 245 (Ore. 1927); Fresno Canal & Irrigation Co. v. People's Ditch Co., 163 P. 497, 501 (Cal. 1917). *But see* People v. Shirokow, 605 P.2d 859 (Cal. 1980); City of Los Angeles v. City of San Fernando, 537 P.2d 1250 (1975).

and benefit of the its citizens.[180] The public trust doctrine places limits on the private rights in water in order to distribute this vital resource in the most efficient way for the most individuals.

Additionally, the *Franco* court expressed the notion that an appropriator, presumably including public entities, may now lose its prior appropriation to a riparian landowner even if the appropriator has put the water to beneficial use and has continued to utilize these rights beneficially. If a riparian now wishes to assert a previously unused water right, the riparian may do so. After *Franco* a prior appropriator's water rights are subject to divestment depending upon the future demands of riparians for water from the same water source.

B. Future Needs Not Yet Established

A city must plan for long-range growth and structure its water strategy accordingly. This entails needing secure water rights for the future, although no present need for the additional water exists. Whether a city may hold such rights to water in the future in a mixed system of riparian rights and prior appropriation is unresolved. After *Franco*, a riparian may make prospective riparian claims against a present municipal water source, and, additionally, pose uncertain prospective claims against any water source the municipality might identify to meet its future water needs.

Prior appropriation schemes have held that a city may escape forfeiture for nonuse if reasonable cause is shown for not putting the water to beneficial use. A reasonable excuse for present nonuse has been held to include a city planning to meet future requirements for the public supply.[181] If cities are able to hold on to their appropriation permits after *Franco*, they might be able to argue that they hold the water in trust for future generations and thereby protect future water projects for the public.

IX. How Does a City Plan for Future Needs?

If *Franco* really means that unused riparian rights are property rights which cannot be taken without just compensation, municipalities and rural water districts face a very uncertain future about their water supplies. For their present water supplies, the public entities must come to terms with inverse condemnation issues. For future water supplies, the public entities must come to terms with the implications of the "relative reasonableness" determination that the Oklahoma Water Resources Board must make before granting any permits to water. These proceedings will be time consuming, complex, case-by-case determinations. Nevertheless, the court will most likely not deprived a city of its water supply and will give cities a reasonable amount of time in which to make adequate compensation.[182]

Franco-American set out factors that the Oklahoma Water Resources Board must consider before granting a prior appropriation.[183] The OWRB must take into account all prior appropriations, all riparian uses perfected under the 1963 Legislation, all riparian domestic uses, all riparian uses approved as reasonable, and all anticipated in-basin needs.[184] These anticipated uses would be determined from the last five-year evaluation. Both the individualize hearing and the five-year evaluation (which applies to every water basin) are enormous administrative tasks. If the OWRB can accomplish these tasks and legally reach the conclustion that the requested appropriation should issue, *Franco* seems at this point to offer some comfort to municipalities and rural water districts. If the OWRB issues a permit after proper consideration, *Franco* can be read as protecting the prior appropriation evidenced by the permit because

180. Jaqualin Friend, *Nephi City v. Hansen: The Utah Supreme Court Sidesteps Public Trust Principles in Allowing Forfeiture of Municipal Water Rights*, 11 J. ENERGY NAT. RESOURCES & ENVTL. L. 369 (1991).

181. *See, e.g.*, UTAH CODE ANN. § 73-1-4 (1989).

182. Dimmock v. City of New London, 245 A.2d 569, 573 (Conn. 1968); Wilbert L. Ziegler, *Acquisition and Protection of Water Supplies by Municipalities*, 57 MICH. L. REV. 349, 358 (1959).

183. *Franco*, 855 P.2d at 578.

184. *Id.*

he appropriation would be a vested right, subject only to senior appropriators or reasonable riparian uses in times of shortage.[185]

Municipal needs could prove to have priority over many individual non-domestic needs. The social utility of unexercised riparian rights might be proven to be wasteful of the state's precious natural resource. Because water is the lifeblood of a municipality's existence, a riparian's prospective rights to use water might be held to be forfeited. However, *Franco* appears facially to stand for the proposition that unexercised riparian rights are not wasteful, forfeited, or abandoned due to nonuse. The *Franco* court does not give much comfort to municipalities or rural water districts that the Oklahoma law will recognize a preference for the domestic needs of the inhabitants of these public entities. The major emphasis of the *Franco* court through the opinion was the protection of private riparian property rights. Public interests, if defined as the protection of the water supplies of municipalities and rural water districts, did not receive the same emphasis as private riparian rights.[186]

Nevertheless, if on remand, the riparian uses in *Franco* are deemed unreasonable, the remand might give direction to future cases. Even though reasonableness determination would entail a piecemeal litigation process, in time precedent would exist as to what is reasonable and what is not. Eventually, cities and rural water districts would have some predictability by which to judge their water supply. Whether cities and rural water districts can wait for the slow process of adequate precedent to emerge is difficult to predict.

X. Conclusion

However cities and rural water districts handle the challenges which *Franco* presents to their water supplies, these challenges might be seen as a learning and strengthening process. As natural resources become more scarce, other jurisdictions may be forced to reevaluate their practices. Although *Franco* was not a case that necessarily turned upon shortage, but rather a constitutional issue, *Franco* shows how vital our scarce natural resources are. States must learn to allocate these scare resources in challenging and changing times. Far from *Franco* being a return to the past, *Franco* may actually be a glimpse of the future — not just for Oklahoma, but for the entire West where prior appropriation has reigned supreme.[187]

185. *Id.* at 582.

186. *Id.* at 571.

187. *Cf.* Charles F. Wilkinson, *In Memoriam: Prior Appropriation 1848-1991*, 21 ENVTL. L. at v (1991).

Regulatory Structure: The Potential Impact of *Franco*

Rick R. Linker

Table of Contents

I. Introduction

In *Franco-American Charolaise, Ltd. v. The Oklahoma Water Resources Board*,[1] the Oklahoma Supreme Court profoundly altered Oklahoma water law. As one possibile consequence, *Franco* could have a great impact on the administration and regulation of Oklahoma's water resources and its implications might well modify the purpose, powers, and responsibilities of the Oklahoma Water Resources Board (OWRB).[2]

The objective of this chapter is to examine the possible implications of *Franco* on Oklahoma's regulatory and administrative environment. Part II of this paper will discuss the OWRB's present structure and authority to regulate and administer Oklahoma's water resources. Part III will discuss the *Franco* decision and its effects upon the OWRB and Oklahoma's regulatory scheme. Several possible scenarios exist: Oklahoma might return to a dual system of water rights and regulation based on the riparian and prior appropriation systems of water law; Oklahoma might keep its present system of prior appropriation with few modifications; Oklahoma might become a predominately riparian water rights state with a regulatory structure fitting the riparian system. This chapter will discuss the first two possible scenarios in part III.

Part III, section (A) discusses the dual system with emphasis on the new priority scheme established by *Franco*, general adjudications, notice issues, and allocation of authority issues as to administration of

1. 855 P.2d 568 (Okla. 1990).

2. The Oklahoma Water Resources Board is authorized by law to make final adjudications, execute contracts, adopt rules and carry out other powers and duties set forth by law or, for duties authorized by law to be delegated to the Executive Director of the Board or any employee or agent or staff member thereof as assigned by the Executive Director. OKLA. ADMIN. CODE § 785:5-1-2 (1994).

the system. Part III, section (B) discusses the regulatory implications of keeping the current prior appropriation system by either following current Oklahoma legislation or by compensating riparians for taking their right.

II. Authority of the OWRB to Regulate Stream Water Use: Present Regulatory Structure

To understand the possible changes that *Franco* may have on the OWRB, a review of the present regulatory structure is necessary. The OWRB was created to regulate and administer the water resources of Oklahoma. It derives its authority from title 82, chapter 14 of the Oklahoma Statues.[3] Section 1082.2 establishes that the OWRB has authority to "do all such things as in its judgment may be necessary, proper or expedient in the accomplishment of its duties."[4] To carry out its duties, the OWRB has the power as an administrative body to make rules, regulations and orders.[5] When performing its duties, the OWRB must comply with the procedures provided in the Oklahoma Administrative Procedure Act.[6]

Title 82, chapter 1, "Irrigation and Water," establishes a prior appropriation system by which water in Oklahoma is distributed to its users.[7] Under a prior appropriation system, an appropriative water right is acquired by diverting water and applying it to a beneficial use.[8] The amount diverted and applied to a beneficial use generally quantifies the right.[9] The appropriator first-in-time acquires a right superior to the rights of subsequent appropriators.[10] The OWRB administers the prior appropriation scheme through a permit system.

Title 82, section 105.2 defines the right to use water and priorities between users. The first part of section 105.2 provides:

> Beneficial use shall be the basis, the measure and the limit of the right to the use of water; provided, that water taken for domestic use shall not be subject to the provisions of this act. . . . Any person has the right to take water for domestic use from a stream to which he is riparian or to take stream water for domestic use from wells on his premises . . . .[11]

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3. 82 OKLA. STAT. §§ 1085.1 to .30 (1991 & Supp. 1994).

4. *Id.* § 1085.2(1).

5. *Id.* § 1085.2(7).

6. *Id.* § 1085.10. The Administrative Procedures Act is codified in 75 OKLA. STAT. §§ 250 *et seq.* (1991) and *id.* §§ 301 *et seq.*

7. 82 OKLA. STAT. §§ 105.1A .32 (1991 & Supp. 1994).

8. R. Thomas Lay, *The Beneficial Use Requirements of the Appropriative Water Right and the Forfeiture of Rights Through Nonuse*, 37 OKLA. L. REV. 67, 68 (1984). Appropriation means the process under 82 OKLA. STAT. §§ 105 *et seq.* (1981), by which an appropriative stream water right is acquired. A completed appropriation results in an appropriative right. OKLA. ADMIN. CODE §§ 785:5-1-2, 785:20-1-2 (1994). An "appropriative right to stream water" means the right acquired under the procedure provided by law to take a specific quantity of public water, either by direct diversion from a stream, an impoundment thereon, or a playa lake, to apply it to a specific beneficial use. *Id.* § 785:20-1-2.

9. Lay, *supra* note 8, at 68.

10. *Id.*

11. 82 OKLA. STAT. § 105.2 (1991). "Riparian" is defined in *Black's Law Dictionary* as

> Belonging or relating to the bank of a river or stream; of or on the bank. Land lying beyond the natural watershed of a stream is not "riparian." The term is sometimes used as relating to the shore of the sea or other tidal water, or of a lake or other considerable body of water not having the character of a watercourse. But this is not accurate. The proper word to be employed in such connections is "littoral."

BLACK'S LAW DICTIONARY 922 (6th ed. 1991). "Riparian land" is defined as

> [l]and so situated with respect to a body of water that, because of such location, the possessor of the land is entitled to the benefits incident to the use of the water. Parcel of land which includes therein a part of or is bounded by a natural watercourse.

Id.

The first clause of this subsection is a basic principle of appropriation; beneficial use is the basis and the maximum gauge of the right to use water under the appropriation doctrine.[12] In its rules, the OWRB has defined "beneficial use" as

> the use of such quantity of stream or groundwater when reasonable intelligence and reasonable diligence are exercised in its application for a lawful purpose and as is economically necessary for that purpose. Beneficial uses include but are not limited to municipal, industrial, agricultural, irrigation, recreation, fish and wildlife, etc.[13]

The second clause of section 105.2 provides that water taken for domestic use shall not be subject to the provisions of the act. Therefore, a person taking water for domestic use has no legal obligation to apply to the OWRB for a permit. Domestic uses of water are simply beyond the jurisdiction of the OWRB.[14] The OWRB has defined "domestic use" in its rules as

> the use of water by a natural individual or by a family or household for household purposes, for farm and domestic animals up to the normal grazing capacity of the land whether or not the animals are actually owned by such natural individual or family, and for the irrigation of land not exceeding a total of three (3) acres in area for the growing of gardens, orchards, and lawns.[15]

This definition allows the OWRB to quantify with reasonable accuracy the amount of water that will be required for each domestic user. This in turn is subtracted from the amount of water in a stream that is available for appropriation.

Riparian land owners, who can take advantage of this domestic use exemption, are not precluded from applying for a permit to appropriate if they wish to acquire any quantity of water above what is allowed for domestic use. Under the 1963 amendments, riparians were given the chance to convert existing non-domestic riparian uses into permitted appropriation rights by participating in vested rights determination proceedings.[16] After receiving a permit, riparians were subject to the first-in-time, first-in-right principle, as were all other appropriators.

Section 105.2 further provides that "priority in time shall have the better right."[17] Under this system, in times of shortages of water, the older users had the power to cause those junior to them to cease taking water until the claims of all the senior appropriators were satisfied.[18] In order not to deprive water users of their previously vested rights,[19] the subsection states a hierarchy of priorities that take into account priority systems existing before the 1963 amendments. Under the hierarchy, if appropriators heeded the

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12. Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface Under the 1963 Amendments*, 23 OKLA. L. REV. 19, 33 (1970). From 1905 to the present, beneficial use has been the basis of the appropriative right in Oklahoma. Lay, *supra* note 8, at 70; *see* 1905 Okla. Terr. Sess. Laws ch. 21, art. 1, § 1.

13. OKLA. ADMIN. CODE § 785:20-1-2 (1994).

14. The OWRB rules make it claer that water for domestic use is exempt from filing requirements. OKLA. ADMIN. CODE § 785:20-1-6(b).

15. OKLA. ADMIN. CODE § 785:20-1-2 (1994); 82 OKLA. STAT. § 105.1(B).

16. Gary D. Allison, *Franco: Why, What, and How*, *in* WATER WARS: THE RETURN OF THE RIPARIAN, A RENEWED FOCUS ON WATER RIGHTS 1, 30 (1994).

17. 82 OKLA. STAT. § 105.2(B) (1991). The Board defines "priority" as

> an appropriative stream water right, which is governed by the time the right accrues, is the superiority of a right over all later appropriative rights that attach to the same water supply when the aggregate quantities of water available are not sufficient to satisfy the aggregate rights which attach to such a water supply. The date of priority is the date the right accrues.

OKLA. ADMIN. CODE § 785:20-1-2 (1994).

18. Rarick, *supra* note 12, at 40.

19. The Board defines "vested stream water right or vested right" to mean

> the right established by the beneficial use of stream water from a common supply prior to the enactment and pursuant to the provisions of 82 O.S. Supp. 1963, § 1 *et seq.*, and the rules and regulations of the Board.

OKLA. ADMIN. CODE § 785:20-1-2 (1994).

law and filed properly under the old systems of water adjudication, they would not lose their rights. Riparian rights are taken into account but at a priority lower than present appropriators.[20]

The public nature of stream water requires that the sovereign's consent be obtained prior to its use.[21] Any person or entity intending to acquire the right to the beneficial use of water must make an application to the OWRB for a permit to appropriate.[22] The quantity of water to be appropriated must be specified.[23] This allows the OWRB to determine how much water has been appropriated from the stream.

After the application is received, the OWRB requires that the applicant publish notice of his actions.[24] Once this has been done, the OWRB holds a hearing to determine whether it will approve the application.[25] Any interested person may object to any permit application or petition or other subject matter of a hearing.[26] Failure of the applicant or protestants to appear at the hearing constitutes default and abandonment of their interest.[27] Before the OWRB decides on the application, it must determine whether:

(1) "there is unappropriated water available in the stream system;[28]
(2) applicant has a present or future need and intends to put the water to beneficial use;[29]
(3) the use will not interfere with domestic or prior appropriative rights;[30] and
(4) if the application is for the transportation of water for outside the stream system where the water originates, the proposed use does not interfere with existing or proposed beneficial uses within the stream system and the needs of the water users therein."[31]

If the OWRB finds these elements have been established, it can grant the permit.[32]

In granting a permit for transportation of water for use outside the stream system, pending applications within that stream system must be considered first.[33] This gives a priority to in-basin users so that they can adequately supply their beneficial uses. To determine how much water is available in the area, the OWRB must review the needs of the area every five years to determine if water supply is adequate.[34] This review cannot be used to reduce the quantity of water already authorized prior to the review.[35]

Prior to the 1963, the state engineer, who exercised the authority that today resides in the OWRB, could also take into account public interest in deciding to grant or deny an application for water. Title 82, section 25 stated: " [The state engineer] may also refuse to consider or approve an application or to order the publication of notice thereof, if, in his opinion, the approval thereof would be contrary to the

20. 82 OKLA. STAT. § 105.2(B)(6) (1991).

21. Lay, *supra* note 8, at 72.

22. 82 OKLA. STAT. § 105.9 (1991); OKLA. ADMIN. CODE § 785:20-1-6(a) (1994). A "permit to appropriate stream water" means the specific written authorization to construct works and make an appropriation of stream water which is issued to the one whose application for a permit has been approved by the OWRB. Types of permits include regular, seasonal, temporary, term and provisional temporary. OKLA. ADMIN. CODE § 785:20-1-2 (1994).

23. OKLA. ADMIN. CODE § 785:20-1-5(b) (1994).

24. 82 OKLA. STAT. § 105.11(A) (1991); OKLA. ADMIN. CODE § 785:20-5-1 (1994).

25. All hearings must be held in accordance with the governing and applicable provisions of title 82 of the Oklahoma Statutes, 75 OKLA. STAT. §§ 250 *et seq.* and 301 *et seq.* (1991) (Administrative Procedures Act), and the rules of OKLA. ADMIN. CODE § 785:4-1-1 *et seq.* (1994).

26. OKLA. ADMIN. CODE §§ 785:4-5-4(a), 785:20-5-3(a) (1994).

27. *Id.* § 785:4-7-3(c).

28. 82 OKLA. STAT. § 105.12(A)(1) (1991); OKLA. ADMIN. CODE § 785:20-5-4(1) (1994).

29. 82 OKLA. STAT. § 105.12(A)(2) (Supp. 1994); OKLA. ADMIN. CODE § 785:20-5-4(a)(2) (1994).

30. 82 OKLA. STAT. § 105.12(A)(3) (Supp. 1994); OKLA. ADMIN. CODE § 785:20-5-4(a)(3) (1994).

31. 82 OKLA. STAT. § 105.12(A)(4) (Supp. 1994); OKLA. ADMIN. CODE § 785:20-5-6(a)(1) (1994).

32. 82 OKLA. STAT. § 105.12(A)(4) (Supp. 1994); OKLA. ADMIN. CODE § 785:20-5-4(b) (1994).

33. 82 OKLA. STAT. § 105.12(B) (Supp. 1994); OKLA. ADMIN. CODE § 785:20-5-6(a)(2) (1994).

34. 82 OKLA. STAT. § 105.12(B) (Supp. 1994); OKLA. ADMIN. CODE § 785:20-5-6(b) (1994).

35. 82 OKLA. STAT. § 105.12(C) (Supp. 1994); OKLA. ADMIN. CODE § 785:20-5-6(c) (1994).

public interest."[36] This gave the state engineer great discretion in granting and denying permits. Public interest could include, for example, balancing the social utilities of competing uses. Consequently, it was legally possible, though practically inconceivable, that the state engineer facing an application to use water for secondary oil recovery could deny the application if the state engineer determined that the water was more socially beneficial in the public interest to preserve a riparian natural habitat.

The 1963 amendments deleted the public interest as a factor for consideration in the application process to obtain a state permit to use water. From 1963 to the present, the OWRB has had no statutory authority to refuse a permit on the basis of public interest. Only the unavailability of water and the failure to comply with the statutes, rules and regulations gives the OWRB the authority to deny a water permit to a beneficial use of water.[37]

III. The Post-Franco Effect: What Kind of System Does Oklahoma Have

The *Franco* opinion has challenged the prior appropriation regulatory scheme which the legislature created to solve the inherent problems associated with Oklahoma's previous dual system. It must be determined what kind of regulatory system *Franco* may have created. There are three possibilities that exist. First, Oklahoma could have been transformed into a regulated riparian system. The most significant feature that sets regulated riparianism apart from pure riparianism is that direct users of water must have a permit from a state administrative agency.[38] Regulated riparianism is similar to pure riparianism in that the permit applications are judged on whether the proposed use is reasonable.[39] Regulated riparian permit systems are often not complete, leaving some consumers of water to have their disputes resolved

36. 82 OKLA. STAT. § 25 (1961). Public Interest as a factor in the application process to use water in Oklahoma originated in REV. LAWS OF OKLA. § 3647 (1910).

37. Rarick, *supra* note 12, at 50; 82 OKLA. STAT. § 105.12 (Supp. 1994); OKLA. ADMIN. CODE § 785:20-5-4 (1994).

38. Joseph W. Dellapenna, *Regulated Riparianism*, *in* 1 WATERS AND WATER RIGHTS 447, 448 (Robert E. Beck ed., 1991). Sixteen of seventeen regulated riparian states confer the power to administer the permit system on a single administrative agency: ARK. CODE ANN. §§ 15-22-202(1), 15-22-215, 15-22-217 (Soil & Water Conservation Comm'n); CONN. GEN. STAT. ANN. §§ 22a-367(1), 22a-373 (Comm'r of Envtl. Protection); DEL. CODE ANN. tit. 7, §§ 6002(5), 6003(a)(3) (Secretary of the Dep't of Nat. Resources & Envtl. Control); GA. CODE ANN. §§ 12-5-22(1), 12-5-31(a)(1) (Director of the Envtl. Protection Div. of the Dep't of Nat. Resources); IND. CODE ANN. §§ 13-2-1-6(2), (3) (Indiana Flood Control & Water Resources Comm'n); IOWA CODE ANN. §§ 455B.101, 455B.264, 455B.265 (Dep't of Nat. Resources); KY. REV. STAT. ANN. §§ 151.100(2), 151.140 (Nat. Resources & Envtl. Protection Cabinet); MD. NAT. RES. CODE ANN. §§ 1-101, 8-101(f), 8-802(a) (Dep't of Nat. Resources); MASS. GEN LAWS ANN. ch. 21G, §§ 2, 7 (Dep't of Envtl. Quality Engineering); MINN. STAT. ANN. §§ 105.37(2), 105.41(1) (Comm'r of Nat. Resources); MISS. CODE ANN. §§ 49-1-28, 51-3-15(1) (State Permit Bd.); N.J. STAT. ANN. §§ 58:1A-3(c), 58:1A-7(a) (Dep't of Envtl. Protection); N.Y. ENVTL. CONSERV. LAW §§ 3-0301, 15.0109, 15.501 (Dep't of Envtl. Conserv.); N.C. GEN. STAT. §§ 143-214, 143-215.13, 143-215.15 (Envtl. Mgt. Comm'n); VA. CODE ANN. §§ 62.1-242, 62.1-247 (State Water Control Bd.); WIS. STAT. ANN. §§ 30.01(1), 30.18, 144.01(2), 144.026 (Dep't of Nat. Resources).

39. Dellapenna, *supra* note 38, at 449. Most statutes contain detailed lists of the factors that the administering agency must weigh to determine if the use is reasonable. *Id.* at 495. Reasonableness criterion that frequently occur in statutes are:

(1) threats to the public health, safety, or welfare;
(2) probable injuries to others;
(3) probable effects on other waterbodies or watersheds;
(4) probable general effects on the water source;
(5) probable economic and other values to be generated by the proposed use;
(6) probable ecological effects of the proposed use;
(7) the nature and size of the water source;
(8) the apparent necessity for the proposed diversion;
(9) the compatibility of the proposed use with state or other public water plans;
(10) other relevant factors;
(11) the time of year when the proposed withdrawals will be made;
(12) historic preservation values.

Id. at 495-97.

under pure riparian rights.[40] But when permits are required, the rights of competing users are determined by permits and not by a riparian type judicial-balancing test.[41]

It is unlikely that the *Franco* court had any intention to lead Oklahoma into regulated riparianism. Further, a complete statutory overhaul would be required to give the OWRB the power to administer such a system.[42] It is more reasonable to conclude that *Franco* has reinstituted the dual system of water rights and their administration as existed prior to 1963. In the alternative, it is also possible that *Franco* may not have any radical effect, allowing the state to follow the present statutory prior appropriation system. These latter two possibilities are discussed sectons of part III.

A. Dual System

The *Franco* controversy arose when the City of Ada (Ada) applied for a permit to appropriate additional water from Byrd's Mill Spring. Several riparians objected, complaining that the legislature can not validly abrogate the riparian owner's right to initiate reasonable uses in stream water without affording compensation.[43] In deciding this issue the court determined that the common law riparian right is a private property right[44] and that the riparian right is much broader than the 1963 prior appropriation system protects.[45] Riparian rights include a right to assert a use at any time as long as it does not unreasonably interfere with another riparian's use.[46] "A riparian right is neither constant nor judicially quantifiable in futuro."[47] Additionally, the Court noted that "yesterday's reasonable use by one riparian owner may become unreasonable tomorrow when a fellow riparian owner asserts a new or expanded use."[48] The court remanded the case to the trial court to determine whether the proposed uses were reasonable.[49]

The court held that the 1963 water law amendments were constitutionally infirm because they abolished the right of riparian owners to assert their vested interest in the prospective reasonable use of the stream.[50] However, the Court did not disestablish the appropriative right.[51] Thus, both the appropriative right and riparian right are in coexistence. Theoretically, prior appropriation is the antithesis of the doctrine of riparian rights.[52] However, dual systems mix appropriative and riparian rights together to determine who has a superior right. As mentioned above, the basic principle behind appropriative rights is that a person may acquire an exclusive right to use a specific quantity of water at a certain time

40. Dellapenna, *supra* note 38, at 448.

41. *Id.* at 449.

42. All current Oklahoma statutes provide for a prior appropriation system of administering water rights. However, it is possible that the OWRB can promulgate regulations to adapt the current system into a regulated riparian scheme. Title 82, §§ 1085.2 and 1085.6 grant broad enough powers to the OWRB for it to promulgate rules and regulations to administer a regulated riparian system. Title 82, § 1085.2 states:

> In addition to any and all other authority conferred upon it by law, the Oklahoma Water Resources Board shall also have authority:
>
> (1) Generally to do all such things as in its judgment may be necessary, proper or expedient in the accomplishment of its duties.
>
> . . .
>
> . . . .
>
> (7) To make such rules, regulations and orders as it may deem necessary or convenient to the exercise of any of the powers or the performance of any of the duties conferred or imposed upon it by this or any other law.

82 OKLA. STAT. § 1085.2 (1991). Additionally, title 82, § 1086.2 states: "For the purpose of effectuating the provisions of this act. . . , the Oklahoma Water Resources Board is hereby authorized, empowered, and directed: (2) To adopt such rules and regulations as may be necessary to effectuate the purpose of this act." *Id.* § 1086.2.

43. Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 855 P.2d 568, 576 (Okla. 1990).

44. *Id.*

45. *Id.* at 577.

46. *Id.*

47. *Id.* at 573.

48. *Id.* at 577.

49. *Id.*

50. *Id.*

51. *Id.*

52. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES 5-37 (Mary Ellen Ilich ed., 1994).

by applying it to a beneficial use without reference to the locus of the use.[53] Temporal priority determines who gets water when there is not enough for all.[54]

Under riparianism, water rights are dependant on ownership of land adjacent to a stream.[55] Conflicts between competing riparians are resolved by accommodating their uses to each other or by eliminating the uses that unreasonably interfere with other uses.[56] This is done by ad hoc determinations; temporal priority has no role.[57] The ability to maintain a water use or initiate a prospective use is only limited by reciprocal or correlative rights.[58] This reciprocity creates uncertainty because the riparian right is never fixed.[59] During times of shortage, water is allocated equitably among all reasonable riparian uses.[60]

Resolving conflicts between incompatible uses, when one is based on riparian right, and the other on appropriative right, has created problems because of the two different bases of decision-making.[61] The only way to coordinate the systems is to treat one system of rights as superior to the other.[62] Riparian rights can be treated as an appropriative right in an appropriative system (the "appropriative approach"). Alaska, Kansas, North Dakota, Oregon, South Dakota, Texas and Washington chose to follow this appropriation system.[63] Or appropriative rights can be treated as permissive nonriparian uses (the "riparian approach"). California and Nebraska follow this system.[64] The *Franco* Court adopted parts of the dual regimes of water rights that are maintained in California and Nebraska.[65] However, the Court did not specifically address whether it wished to adopt the appropriative or riparian system. It appears that the Court adopted the appropriative approach when treating existing uses but adopted the riparian approach when dealing with new permit applications.

1. Priority For Existing Incompatible Uses

Franco expressly dealt with priority between existing incompatible uses. The court concluded that riparian owners have a vested interest in the prospective reasonable use of the stream, "which interest is not subject to prior appropriations."[66] The Court held that to the extent that Title 82, section 105.12 does not preserve this vested interest, it violates article 2, section 24 of the Oklahoma Constitution.[67] The Court then stated,

> Should a riparian owner assert his (or her) vested right to initiate a reasonable use of the stream and should the water in the stream be insufficient to supply that owner's reasonable use, we hold that the appropriator with the last priority must either release water into the stream sufficient to meet the riparian owner's reasonable use or stop diverting an amount sufficient to supply the riparian owner's reasonable use until there is water sufficient to satisfy both interests.[68]

53. *Id.* Appropriative rights are defined by the time of use in that the rights are often seasonable. *Id.*
54. Dellapenna, *supra* note 38, at 403.
55. Tarlock, *supra* note 52, at 5-37.
56. Dellapenna, *supra* note 38, at 403.
57. *Id.*
58. Allison, *supra* note 16, at 7.
59. *Id.*
60. *Id.* at 12.
61. Dellapenna, *supra* note 38, at 404.
62. *Id.*
63. *Id.*
64. *Id.*
65. Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 855 P.2d 568, 577-578 (Okla. 1990). In Lux v. Haggin, 10 P. 674 (Cal. 1886), the Supreme Court of California decided that riparian and appropriative water rights are both recognized in the state.
66. *Franco*, 855 P.2d at 582.
67. *Id.*
68. *Id.*

The court thus created a new priority system wherein the prior appropriation permit system establishes priorities between appropriators but all appropriators are subject to the superior right of riparians. The court made riparian rights superior to appropriative rights without mentioning that appropriative rights are permissive nonriparian rights. Thus, it appears that the Court adopted a an approach to conflicts between riparian rights and prior appropriation rights in which riparian rights are always superior to prior appropriations.

This new priority system can be explained clearly with an example. On one stream there are two appropriators, *A1* and *A2*, who applied for permits in 1980 and 1981 respectively. *A1* is superior in time to *A2* under the first-in-time, first-in-right appropriative system. If there is a shortage, *A2* must surrender his water to *A1*. Located on the same stream is riparian landonwer, *RLO*, who began diverting water in 1990 for a reasonable use on riparian land. Under the *Franco* priority scheme, if there is a shortage, *A2* must first surrender water rights to *RLO*. If a shortage still exists on the stream after *A2* has stopped taking water, *A1* too must surrender water rights to *RLO* so that *RLO* can have water for reasonable riparian uses. Understandably, this priority scheme causes great concern to appropriators. Now, it is irrelevant that *A1* and *A2* began diverting water before *RLO*. It is also irrelevant that *A1* and *A2* relied on their permits, under the 1963 water law statutes, to give them a secure water supply, subject only to superior appropriators. Future appropriators too would not be able to rely on their permits to secure a specific amount of water. Water available today may not be available tomorrow because the rights of riparians are not quantifiable, according to the court.[69] Riparians could assert a greater use divesting appropriators at any time.

In addressing these concerns, the court concluded that there will be insufficient supply for everyone's needs only during rare occurrences.[70] The court noted that water needs will not be threatened if the OWRB conducts thorough studies of future in-basin needs every five years and denies all applications for appropriations which threaten those needs.[71] However, the court may not have realized the grave problems that this new priority system could cause. The greatest problem might arise when a riparian exerts for a first time a use that substantially interferes with a city's appropriative use that was applied for many years before. For example, the City of Tulsa began diverting water from the Spavinaw Creek for municipal purposes in April 1924. It applied to the state engineer for a permit to do so on May 11, 1922. After notice was given as provided by law and hearings were held, the state engineer issued a permit for the appropriation of the entire flow of the creek on November 28, 1922. Ever since, Tulsa has relied upon the Spavinaw Creek as its principle water supply. Today, under the *Franco* reasoning, a riparian could initiate a water use for the first time, and, if reasonable, could use water the city relied on to meet its municipal needs. The implications of this are far-reaching. Everything from the city's financing of water projects to its very existence could be put into jeopardy. Cities must have a reliable water supply.

2. Cutoff Dates

To remedy the dilemma of riparian rights being superior to prior appropriative rights, Oklahoma could follow the *Wasserburger v. Coffee*[72] approach. In *Wasserburger*, the Nebraska Supreme Court ruled that no new riparian rights could be created after the 1895 enactment of their appropriation statutes.[73] The Court recognized the continuing validity of unused riparian rights on land first patented into private ownership before the cutoff date.[74] Thus, in the above example, the City of Tulsa would be able to ascertain which riparian uses had priority over the City: those initiated before the cutoff date. In addition,

69. *Id.* at 573.
70. *Id.* at 582.
71. *Id.*
72. 141 N.W.2d 738 (Neb. 1966).
73. *Id.* at 745.
74. *Id.*

Tulsa could assume that no riparian would be able to assert a future use after the cutoff date that would divest the City of its water supply.

Because the *Franco* court wrote approvingly of the reasoning of *Wasserburger*, it might seem to follow that Oklahoma too would have a cutoff date on the year of enacting its appropriation legislation. However, that the *Franco* court envisioned such a cutoff system, despite speaking favorably of *Wasserburger*, seems completely inconsistent with *Franco's* fundamental holding. If the Oklahoma Supreme Court were to adopt the *Wasserburger* cutoff approach, the most obvious cutoff date is June 10, 1963, the effective date of the adoption of the water law amendments purporting to move Oklahoma fully to a prior appropriation system. Even though all riparian uses prior to that date were superior, the cutoff would be in direct conflict with *Franco* because riparian uses initiated after the date would be inferior to appropriative rights. The fundamental holding of *Franco* is that the 1963 water law amendments are unconstitutional because these amendments attempted to take away the vested riparian right to initiate future, prospective uses of water from riparian landownwers.

3. Priority for New Appropriative Uses: The Relative Reasonableness Approach

For new appropriation permit applications, the *Franco* court adopted the "relative reasonableness" approach of *Wasserburger*.[75] In *Wasserburger*, a riparian initiated a private lawsuit to enjoin upper irrigators who were exhausting a stream pursuant to appropriation permits. The Nebraska Supreme Court stated,

> An appropriator who, in using water pursuant to a statutory permit, intentionally causes substantial harm to a riparian proprietor, through invasion of the proprietor's interest in the use of the waters, is liable to the proprietor in an action for damages if, *but only if, the harmful appropriation is unreasonable in respect to the proprietor*. The appropriation is unreasonable unless its utility outweighs the gravity of the harm.[76]

This recognizes competing appropriative rights as lawful nonriparian uses whose priority must be determined against riparian uses.[77] This negates the traditional riparian notion that all nonriparian uses are unreasonable per se against a lawful riparian use.[78]

The *Franco* court remanded the case to the trial court with instructions for the trial court to balance the riparian owners' uses against those of the City through relative reasonableness.[79] The court also instructed the OWRB to approve the City's appropriation only if there is surplus water after providing for (1) all prior appropriations, (2) all riparian uses perfected under the 1963 amendments, (3) all riparian domestic uses, (4) all anticipated in-basin needs, and (5) all riparian uses approved as reasonable on remand.[80] In other words, the *Franco* court agreed that the OWRB could grant prior appropriation applications, but only if surplus water existed in the stream.

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75. *Id.* at 745-46.

76. *Id.* (emphasis added). The Nebraska Court continued:

> In evaluation of the utility of the appropriation causing intentional harm to a riparian proprietor, the following factors are to be considered: (1) The social value which the law attaches to the use for which the appropriation is made; (2) the priority date of the appropriation; and (3) the impracticability of preventing or avoiding the harm. . . . In evaluation of the gravity of intentional harm to a riparian proprietor through the appropriator's use of the waters, the following factors are important: (1) The extent of harm involved; (2) the social value which the law attaches to the riparian use; (3) the time of initiation of the riparian use; (4) the suitability of the riparian use to the watercourse; and (5) the burden on the riparian proprietor of avoiding the harm.

Id. at 746.

77. Dellapenna, *supra* note 38, at 407.

78. *Id.*

79. *Franco*, 855 P.2d at 578.

80. *Id.*

In determining whether surplus water exists, the Court held that the OWRB must consider every riparian owner and appropriator on the entire stream and maintain minimum flow necessary to allow for diversion by these users.[81]

Prior to the *Franco* decision, the OWRB considered the first four claims to water listed above when approving permits. The Court, by ruling that the 1963 amendments were unconsitutional, added the fifth claim that must be considered — prospective reasonable riparian uses. However, this is in conflict with Nebraska's *Wasserburger* approach. In Nebraska, riparian rights are not a consideration of the Nebraska Department of Water Resources when deciding whether to grant a permit.[82] The Nebraska Department of Water Resources only considers whether water has already been diverted by prior appropriators. Riparian rights only come into question when there is a private lawsuit initiated in the Nebraska judicial system. In contrast, the *Franco* decision requires the OWRB to consider the riparian right when initially granting a permit.

The distinction in Nebraska between the administrative prior appropriation system and the riparian claims protected through the judicial system shows the dilemma the OWRB faces in Oklahoma after *Franco*. Faithfully following the instructions from *Franco*, when someone files for a prior appropriation, the OWRB could attempt to ascertain the potential riparian claims on the stream, while knowing full well that its authority is limited to a prior appropriation permit system. Thus, the OWRB could legitimately conclude that when it issues a prior appropriation permit that each permit much carry two legends. Legend one would warn prior appropriators that the rights granted under the permit are subject to readjustment in judicial proceedings should a riparian file a suit claiming a reasonable riparian use and asserting that the OWRB had failed to account adequately for the claimed reasonable riparian use. Legend two would warn prior appropriators that in times of shortage (e.g. severe drought) that riparians can file judicial lawsuits forcing prior appropriators, beginning with the most junior appropriator, to cease using water until all reasonable riparian uses are satisfied. With legends like these, the OWRB might honestly worry, after *Franco*, whether it administratively manages very much of Oklahoma's stream and lake water.

a) General Adjudication

For the OWRB to determine anticipated in-basin needs, and all reasonable (in the abstract) riparian uses, the OWRB might conclude that a general adjudication is the most sensible way to accomplish this task. A water rights adjudication is an action to determine all respective water rights on a stream system.[83] It is similar to a quite title action except that it determines the rights of water right holders among themselves and not between a class of claimants and a single tract of land.[84] To use South Dakota as an example, South Dakota law defines the the function of an adjudication to:

· Confirm those rights evidenced by previous court decrees when those rights have not been forfeited, abandoned or otherwise lost;

· Adjudicate the validity of all canceled and uncancelled permits, certificates of construction or licenses or other documents or orders purported to be granted by or under the authority of the water management board or its predecessors, including the state engineer, and not heretofore adjudicated;

· Determine the extent and priority of and adjudicate any interest in any water right or right to use the water of the river system or on all other sources not otherwise represented by the aforesaid permits, licenses, certificates, documents, orders or decrees;

· Establish, in whatever form determined to be the most appropriate by the court, one or more tabulations or lists of water rights or rights to use water which tabulations or lists may include a notation of the water right or right to use water adjudged to each party, the priority, the amount or rate, the

81. *Id.*

82. Norman W. Thorson, *Administering a Dual System of Appropriative and Riparian Rights — The Nebraska Experience, in Water Wars: The Return of the Riparian, A Renewed Focus on Water Rights* 1, 14 (1994).

83. TARLOCK, *supra* note 52, at 7-2.

84. *Id.*

purpose, the periods or place of use, and, as to water used for irrigation, the specific tracts of land to which it shall be appurtenant together with other conditions as may be necessary to define a right and its priority.[85]

Texas provides a good example of how a general adjudication is performed. The Texas Water Commission is authorized to bring adjudications of all rivers throughout the state.[86] To collect information for the adjudication, all users who do not already have permits are required to file their claims.[87] The Commission issues to those participating in the adjudication "certificates of adjudications" which authorizes the use of water."[88] Riparian claims are recognized only to the extent that reasonable beneficial use of water has been made during the four-year period immediately preceding enactment of the statute.[89] Any claim not filed is extinguished.[90] Nonuse under either an appropriative or riparian system is considered waste.[91] Texas makes exceptions to the rule by not requiring certificates or permits for domestic uses or pond stock watering.[92] In contrast to Oklahoma, the Texas Supreme Court upheld the constitutionality of phasing out riparian rights.[93] One possibly significant difference between the Oklahoma 1963 water law amendments and the Texas statutes phasing out riparian rights is that the Texas law allowed a four-year period during which riparians could beging to make reasonable uses of their riparian waters. Possibly the OWRB should seek legislative approval for a Texas-style statute and litigate the constitutionality of this new legislation.

However, if Oklahoma stays with a riparian-based dual system, a general adjudication would have a different purpose than it would in the appropriation based system. In a riparian based system, the adjudication could be used to determine which riparian uses are reasonable and the minimum flow of water necessary to supply all of these uses. In determining which uses are reasonable, the OWRB could use the factors of reasonableness set out in the remaind from the Coal County District Court to the OWRB.[94] After the minimum flow is calculated, the OWRB could determine whether there would be enough water to grant a permit. Even though the adjudication would be used for this innovative purpose, the present statutory structure appear broad enough to give the OWRB authority to initiate the adjudication.[95] Title 82, section 105.6 states:

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85. S.D. CODIFIED LAWS § 46-10-2.3 (1987).

86. Frank F. Skillern, *Texas*, *in* 6 WATERS AND WATER RIGHTS, *supra* note 38, at 407, 409.

87. *Id.*

88. *Id.* at 409-10.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 409; *see In re* Adjudication of Water Rights of Upper Guadalupe Segment, 642 S.W.2d 438 (Tex. 1982).

94. *In re* Remand of Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., No. C-81-23, from District Court of Coal County, Oklahoma to OWRB. (document set forth in the *Documents* portion of this book.) The District Court of Coal County on remand to the OWRB set out the following factors to determine what use was a reasonable use.

(1) The size of the stream;
(2) custom;
(3) climate;
(4) the season of the year;
(5) the size of the diversion;
(6) the place and method of the diversion;
(7) the type of use and its importance to society (beneficial use);
(8) the needs of other riparians;
(9) the location of the diversion on the stream;
(10) the suitability of the use to the stream; and
(11) the fairness of requiring the user causing the harm to bear the loss.

Id. at 2-3; *see* RESTATEMENT (SECOND) OF TORTS § 850A (1979).

95. 82 OKLA. STAT. § 105.6 (1991).

> When the Board determines the best interest of the claimants to the use of water from a stream system will be served by a determination of all rights to the use of water of such system, the Board may institute a suit on behalf of the state for the determination of all rights to the use of such water and shall diligently prosecute the same to a final adjudication.[96]

In light of title 82, section 105.6, another legitimate regulatory response of the OWRB to the *Franco* decision might be to initiate general adjudications on the streams and lakes of Oklahoma. While this would be a massive, costly, multi-year undertaking, possibly a general adjudication which determined water rights, reserved water for future riparian claims, and quantified the amount of surplus water available for prior appropriation would be an appropriate regulatory response of the OWRB to *Franco*.

b) Prospective Uses

If the OWRB completed a general adjudication today, it would become immediately obsolete if tomorrow a riparian exerted a new use above what was anticipated by the OWRB. Any new use would change the availability of water in the stream system and thus change what was a reasonable minimum flow for each riparian. Concerning the minimum flow requirement, the Court stated in dicta:

> Since we hold here that the reasonable use doctrine, not the natural flow doctrine, is controlling, the OWRB shall maintain a flow in the stream sufficient to supply the riparian owners' reasonable use which may or may not be the "natural flow." For example, should the trial court find the riparian owners' use of the stream for the preservation of wildlife is a reasonable use, the OWRB shall maintain a flow in the stream sufficient to support wildlife. . . . *[W]e will not presume to tell the OWRB how much water must be left in the stream to supply each reasonable use.*[97]

This dicta states that it is the job of the OWRB to determining the quantity of water needed to satisfy reasonable uses. However, it does not state how the OWRB is to accomplish this duty. To successfully complete a general adjudication and to keep it current, the OWRB must find a way to determine the quantity of water from all uses, including prospective riparian uses, to provide adequate minimum flow.

In Washington, a water right holder could hold rights based on custom, prior appropriation, riparian rights, or other claims.[98] To clarify the system, the Washington legislature mandated quantification of all water rights.[99] Under this scheme, a statement of claim establishes prima facie evidence of the water quantity and priority, while failure to state a claim results in waiver and relinquishment of prior rights.[100] This system has withstood takings challenges.[101] The OWRB too could administer a similar system. Presently, it has the authority to send out water use reports to "every holder of a valid water right to complete and return to the OWRB."[102] This regulation could be broadened to include riparians within the phrase "every holder of a valid water right." This modification would not interfere with the direct language of *Franco*.

The ability of the OWRB to quantify riparian water use, however, may be thwarted by the *Franco* opinion. In *Franco*, when the Oklahoma Supreme Court adopted the California Doctrine, it was not willing to subordinate prospective riparian rights to appropriations. This conflicts with the practice in California. In *In re Waters of Long Valley Creek Stream System*,[103] the California Supreme Court sustained a decree of

96. *Id.*
97. *Franco*, 855 P.2d at 579 n.56 (emphasis added).
98. Grant D. Parker, *Washington*, *in* 6 WATERS AND WATER RIGHTS, *supra* note 38, at 447, 452.
99. *Id.*; *see* Water Right Claims Registration Act, WASH. REV. CODE ch. 90.14.
100. Parker, *supra* note 98, at 452.
101. *Id.*; *see* Department of Ecology v. Adsit, 694 P.2d 1065 (Wash. 1985).
102. OKLA. ADMIN. CODE § 785:20-9-5(a)(1) (1994).
103. 599 P.2d 656, 660-63 (Cal. 1979).

the Water Resources Control Board which subordinated a riparian's prospective use of water to prior appropriations and previously initiated riparian rights. The decision converted all riparian rights to appropriative ones, defined vested rights as those based on the actual use of water, and made future rights new appropriations.[104] The Board was given the court's approval to quantify unused riparian rights in making a general determination of the water rights attached to a water source.[105]

In reality, the Oklahoma Supreme Court adopted the California position prior to the *Long Valley Creek* decision. Before the *Long Valley Creek* decision, California courts had refused to abrogate unused riparian rights.[106] A riparian could initiate a new use at any time.[107] This acknowledgment of prospective rights will hinder the complete quantification of water rights, thus effectively preventing a general adjudication of all water rights from any particular source.[108] To avoid this problem, the OWRB has one option. In determining the quantity of water needed to satisfy minimum flow requirements, including prospective rights, the OWRB could set the quantity at the maximum reasonable amount that a riparian could use. This would prevent the adjudication from becoming obsolete if a riparian initiated a new use, because the use would already be compensated for. Unfortunately, this solution would promote waste because many of the riparians would not use their maximum reasonable amount of water. The water would go unused and escape into other states.

c) Notice

An adjudication is designed to bind all water rights claimants on a stream by forcing all of them to participate in the adjudication and to be bound by the final decree.[109] Water adjudications have been described as *in rem* or *quasi in rem*.[110] Because water rights are property rights, holders are entitled to due process when a state attempts to abolish or redefine the right.[111] The OWRB requires that notice must be published in a newspaper of general circulation in the county of the point of diversion and in a newspaper of general circulation published within the adjacent downstream county.[112] The reach and type of this notice have been brought into question by the *Franco* decision.

A general adjudication suit to establish rights can affect an entire stream. The court stated in *Franco* that when determining if there was available water for appropriation, "the OWRB must take into account the last riparian owner and the last appropriator on the stream and maintain the minimum flow necessary to allow for diversion by these users."[113] Because all of the users on the stream must be taken into account in this process, it follows that all of their rights are being affected. Thus, to have an adjudication binding upon these individuals, they must receive proper notice to give them the opportunity to participate in the proceeding. Even though an adjudication may be broken into basins or sub-basins, as a general rule, every claimant of water on the stream is interested in a final adjudication.[114] Further, even though waters from the area being adjudicated will not reach downstream users because of carriage losses, the downstream users still must get notice.

104. *Id.*; TARLOCK, *supra* note 52, at 3-58.1.

105. *Long Valley Creek*, 599 P.2d at 660-63; Dellapenna, *supra* note 38, at 388.

106. Dellapenna, *supra* note 38, at 388.

107. *Id.*

108. *Id.* at 390.

109. TARLOCK, *supra* note 52, at 7-11.

110. *Id.*

111. *Id.* at 7-12; U.S. CONST. amends. V, XIV; OKLA. CONST. art. II, § 7 ("No person shall be deprived of life, liberty, or property, without due process of law.").

112. 82 OKLA. STAT. § 105.11(A) (Supp. 1994); OKLA. ADMIN. CODE § 785:20-5-1 (1994).

113. *Franco*, 855 P.2d at 578.

114. TARLOCK, *supra* note 52, at 7-14.

1) Sufficient Notice

In *Harry R. Carlile Trust v. Cotton Petroleum*,[115] the Oklahoma Supreme Court faced the issue whether notice from the Oklahoma Corporation Commission by publication was adequate for a hearing on a spacing application. The court held that the statutorily prescribed publication notice was insufficient when the identities of holders of producing mineral were known or could have been ascertained with due diligence.[116] The court noted that the Due Process Clause in Article 2, section 7 of the Oklahoma Constitution has a definitional sweep that is coextensive with its federal counterpart.[117] When the names and addresses are reasonably ascertainable from sources available at hand, "communication by mail or other means reasonably certain to insure actual notice is deemed to be a constitutional prerequisite in every proceeding which affects either a person's liberty or property interests."[118] Finally, the Oklahoma Supreme Court held:

> the face of an administrative proceeding must affirmatively show a diligent but unsuccessful effort to reach the affected party by better process. In short, courts may not presume publication service alone to be constitutionally valid when the judgment roll or record of an administrative proceeding fails to show that the means of imparting better notice were diligently pursued but proved unavailable.[119]

The ability to ascertain the names and addresses of individuals in a particular 640-acre drilling and spacing unit is uncomplicated compared to the ability to find the names of every water rights holder on an Oklahoma stream system. There are no reported Oklahoma cases directly on point dealing with notice to riparian landowners. However, in *DuLaney v. The Oklahoma State Department of Health*,[120] the Court held that based on their water- related property interest, adjacent landowners were entitled to notice and an opportunity to be heard when a party applies for a permit to operate a solid waste disposal site. The crux of the case focused on whether the landowners were entitled to individual hearings and not upon whether notice by publication was sufficient. The facts of the case do not state which type of notice was given, but it can be assumed publication notice by newspaper was used. The operative statute at that time was tit. 63, section 2258.2) of the Oklahoma statutes which provided: "An applicant for a permit for a new disposal site, upon the filing of the application with the Department, shall give notice by one publication in two newspapers local to the proposed disposal site of opportunity to oppose the granting of such permit by requesting a formal public meeting."[121] The court did not directly address whether the publication notice was sufficient but quoted the language from *Carlile* discussing the requirements for notice.[122] This shows that the court was mindful of the notice requirements and yet did not strike down the language of section 2258.2 as unconstitutional.

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115. 732 P.2d 438, 443 (Okla. 1986), *cert. denied*, 483 U.S. 1007 (1987).

116. *Id.* at 443.

117. *Id.* at 444 n.25. The U.S. CONST. amend. 14, § 1 provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. 14, § 1. The Oklahoma Constitution provides: "No person shall be deprived of life, liberty, or property, without due process of law." OKLA. CONST. art. 2, § 7; *see* McKeever Drilling Co. v. Egbert, 40 P.2d 32, 36 (Okla. 1935); *In re* Rich, 604 P.2d 1248, 1251 (Okla. 1979). The federal minimum due process standards are laid out in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318-20 (1950). In *Mullane*, the United States Supreme Court provided the standard for constitutionally adequate notice as that which is "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314.

118. *Harry R. Carlile Trust*, 732 P.2d at 444.

119. *Id.*

120. 868 P.2d 676, 680 (Okla. 1993).

121. 63 OKLA. STAT. § 2258.2 (Supp. 1983).

122. *Id.* at 681.

Other state adjudication statutes providing for publication notice have been held to be constitutionally defective when the names of water rights holders can be determined from public records.[123] For example, Washington can determine the names of all users because it requires registration of water rights.[124] Thus, Washington requires notice by summons.[125] Wyoming and Nebraska too have good water records and require registered letters be sent to each water right holder.[126] California requires mailed notice to persons known to the Board to own land that appears to be riparian. However, for those water users difficult to locate, publication notice will suffice.[127] Oklahoma does not have the same detailed records on water users as many other western states with prior appropriation systems. Thus it is unclear whether constitutional standards of due process would require the OWRB to develop detailed records on water users or whether notice published in a newspaper of general circulation in the county of the point of diversion and in the adjacent downstream county, supplemented by personal notice to those known riparians, would be sufficient.[128] However, giving publication notice to the next county on a stream system will not suffice if there are other users in adjacent counties whose rights will be affected by an adjudication. To be safe, the reach should be expanded to give notice to all users on the entire stream system.

The OWRB currently has the discretion to require the applicant to publish notice in any other county it feels necessary to reach all interested parties.[129] The OWRB could simply require that applicants prove that they have published notice once a week for two consecutive weeks in all the affected counties.

In the limited situation where the OWRB knows of particular water users, the more reliable process by mail must be employed. If for some reason the judiciary determines that Oklahoma has sufficient records and that the OWRB can determine with due diligence all who own riparian land, then process by mail must be used for everyone. This would be extremely expensive and place a huge administrative burden on the OWRB to track down all of the current owners and lessees of water rights.

2) Retroactive Invalidation

If the court holds that publication notice is inadequate for OWRB application proceedings, past general adjudications and permit applications could be rendered void if the holding were applied retroactively. In *Harry R. Carlile Trust*,[130] the court held that the new notice standard is to apply prospectively to new spacing units formed after the effective date of this opinion, and that all spacing orders made by the Commission prior to the effective date of this opinion shall be left unaffected. The court noted that the United States Constitution neither prohibits nor requires that a judicial decision have retroactive operation.[131] To determine whether the court would withhold retroactivity when a new constitutional rule is pronounced, a test was used considering the following factors: (1) the purpose of the new rule; (2) the extent of reliance on the old doctrine; and (3) the burden likely to be imposed on the administration of legal process by the increased volume of curative juridical actions.[132]

If the Court decided that notice by mail were required today in a water rights context, the court again would apply the above test. First, the purpose of the more stringent rule would be clear; due process must be afforded to water rights holders. Much is at stake for riparians. Under the present statutory structure,

123. TARLOCK, *supra* note 52, at 7-13; *see* Schroeder v. City of New York, 371 U.S. 208 (1962).

124. TARLOCK, *supra* note 52, at 7-14.

125. WASH. REV. CODE ANN. § 90.03.130 (1992).

126. TARLOCK, *supra* note 52, at 7-13.

127. *Id.* at 7-15; *see* CAL. WATER CODE § 2527 (Supp. 1994).

128. 82 OKLA. STAT. § 105.11(A) (Supp. 1994); OKLA. ADMIN. CODE § 785:20-5-1 (1994).

129. 82 OKLA. STAT. § 105.11(A) (Supp. 1994); OKLA. ADMIN. CODE § 785:20-5-1 (1994).

130. *Harry R. Carlile Trust*, 732 P.2d at 448.

131. *Id.* at 445.

132. *Id.* This is consistent with the current jurisprudence of the U.S. Supreme Court. See Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971) (holding that federal courts must consider three factors when deciding whether to give retroactive or prospective effect to a new rule in a federal civil case: (a) whether a new rule establishes a new principle of law not clearly foreshadowed; (b) whether retroactive application will advance or retard operation of the new rule; and (c) whether nonretroactive application is necessary to avoid injustice or hardship).

failure of a riparian to appear at a permit hearing results in default and abandonment of their interest.[133] This is similar to the purpose of the rule in *Carlile* where the Court wished to afford neighboring landowners due process. Second, the extent of reliance on the old doctrine is as great as it was in *Carlile*. The OWRB and appropriators justifiably relied upon the legislatively-prescribed procedural norms sanctioned by enactments which have been in force for many decades.[134] Finally, if the new rule was applied retroactively, the holding would have a terrible impact on the past administration of Oklahoma's water resources. Like in *Carlile*, it would result in blanket invalidation of innumerable proceedings creating a destabilizing effect on all water dependent activities.[135] As the *Carlile* court found, another court faced with these facts should find that the new standard will only be applied prospectively.

4. Who Determines Disputes Between Riparians and Appropriators?

In Nebraska, there is no mechanism to resolve disputes between riparians and appropriators other than to seek judicial relief.[136] There is also no statutory guidance on how to solve disputes in California. In Oklahoma, the OWRB also has no express authority to preside over riparian disputes.[137] The OWRB does not even have authority to preside over impairment of appropriated rights by another. Title 82, Section 105.5 provides:

> Any person having a right to the use of water from a stream. . . whose right is impaired by the act or acts of another, or others, may bring suit in the district court of any county in which any of the acts complained of occurred.[[138]] Provided, however, that nothing herein contained shall be construed to empower district courts to recognize rights to use the water of a stream unless such rights have heretofore been established pursuant to this act or are claimed under Section 60 in Title 60 of the Oklahoma Statutes.[139]

The statute does not specifically address full riparian rights but expresses a clear intent by the legislature to not give the OWRB powers to hear disputes between water users. The statute mandates that the proper venue for such disputes are in the courts. If Oklahoma initiated a dual system, unless the legislature changed the statutory authority of the OWRB, disputes about riparian rights, arising outside the context of riparians contesting an application for a prior appropriation, apparently must be brought as judicial proceedings between the water uses in conflict. Additionally, riparians bringing suit against those who interefere with their riparian rights accords with the common law in which a judicial determination was the method to determine whether a particular riparian use was reasonable.[140]

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133. OKLA. ADMIN. CODE § 785:4-7-3(c) (1994).

134. 82 OKLA. STAT. § 105.11(A) (Supp. 1994); OKLA. ADMIN. CODE § 785:20-5-1 (1994).

135. *Harry R. Carlile Trust*, 732 P.2d at 445-46. In holding the rule to not be retroactive, the *Carlile* Court stated:

> Were we to pronounce today that *Cravens* had retroactive effect on all previous orders that established spacing units, whether comprised of non-producing or producing leaseholds, our holding would have an adverse impact on the administration of the Commission's adjudication process. It would result in blanket invalidation of countless proceedings. All drilling and spacing orders made under the existing statutory provisions would at once fall as void. A multitude of drilling and spacing units in Oklahoma would no doubt be affected. Oil-and-gas leases held by production from wells located within the unit but outside the demised premises would be threatened with cancellation. In short, a pronouncement with full retrospective scope would doubtless have a destabilizing effect on industry-wide activities.

Id.

136. Eric Pearson, *Nebraska*, *in* 6 WATERS AND WATER RIGHTS, *supra* note 38, at 261, 265.

137. Administering agencies have no authority to adjudicate private damage claims or to provide general equitable relief. Dellapenna, *supra* note 38, at 508. In State v. Kuluvar, 123 N.W.2d 699 (Minn. 1963), administering agencies were held to have no power to act in any capacity to protect private riparian rights; the agency could only protect public interests. Generally speaking, executive and administrative officers, boards, departments and commissions have no powers beyond those granted by express provision or necessary implication. 16 C.J.S. *Constitutional Law* § 215 (1984).

138. 82 OKLA. STAT. § 105.5 (1991); OKLA. ADMIN. CODE § 785:20-11-5 (1994).

139. 82 OKLA. STAT. § 105.5 (1991).

140. TARLOCK, *supra* note 52, at 3-66; F. MALONEY ET AL., A MODEL WATER CODE 156 (1972) [hereinafter MODEL WATER CODE]. The

5. Problems Relating to Existing Permits

If Oklahoma initiates a dual system of rights, then the present appropriator will be subject to an entirely new priority system. The present appropriator will lose priority to reasonable riparian uses. After an adjudication of all rights on a water system, the OWRB should, for administrative convenience, amend the appropriator's permit to reflect his new priority. The OWRB has the authority to initiate action to amend a permit.[141] Until it is determined what system the state will adopt, the OWRB should place new permit applicants on notice that their priority may be subject to change.

B. Maintaining the Status Quo: The Prior Appropriation System

Two different scenarios exist that may allow Oklahoma to keep its prior appropriation system.

1. Following the 1993 Amendment Until Overruled

After the *Franco* holding was readopted and reissued by the Oklahoma Supreme Court in Apir. 1993, the Oklahoma legislature passed emergency legislation, title 82, section 105.1A to become effective on June 7, 1993.[142] This statute was passed as a direct response to the *Franco* opinion. This section states the purpose of the law and the legislative intent behind it. It provides:

> It is the intent of the Oklahoma Legislature that the purpose of Section 105.1 through Section 105.32 of this title is to provide for stability and certainty in water rights by replacing the incompatible dual system of riparian and appropriative water rights which governed the use of water from definite streams in Oklahoma prior to June 10, 1963, with an appropriation system of regulation requiring the beneficial use of water and providing that priority in time shall give the better right. These sections are intended to provide that riparian landowners may use water for domestic uses and store water in definite streams and that appropriations shall not interfere with such domestic uses, to recognize through administrative adjudications all uses, riparian and appropriative, existing prior to June 10, 1963, and to extinguish future claims to use water, except for domestic use, based only on ownership of riparian lands.[143]

Section 105.1A clearly states that the purpose of title 82, sections 105.1 through 105.32 is to exterminate riparian rights except for domestic use, to replace the incompatible dual system of riparian and appropriate water rights with an appropriation system of regulation, which would require the beneficial use of water and provide priority that first-in-time is first-in-right.[144] On June 14, 1993, the court rejected a request for a rehearing of the case filed by the City of Ada, despite the fact that the new legislation was recently passed.

With the *Franco* case resolved at the level of the Oklahoma Suprme Court, the City filed a new application for a prior appropriation permit from Byrds Mill Spring. The protestants against the original Ada application responded to the new application by filing for a writ from the District Court of Coal County prohibiting the OWRB from proceeding with the new Ada application. The Coal County court granted the writ of prohibition and, in addition, remanded the entire matter back to the OWRB for further proceedings on the original Ada application. The OWRB was instructed to take evidence on whether

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common law judicial determinations of disputs about riparian rights is, of course,in stark contrast to regulated riparian systems in which an administering agency decided who among competing applicants will receive the right to use water. The agency could also be required to resolve matters between permit holders (riparian and non-riparian), or approving transfers of permits. Dellapenna, *supra* note 38, at 493.

The authors of the *Model Water Code* believe that due to the judiciary's lack of expertise and the inefficiency of an ad hoc approach, the courts are structurally not as capable of uniformity in the application of the law as a single centralized agency. MODEL WATER CODE, *supra*, at 157.

141. OKLA. ADMIN. CODE § 785:20-9-4(h)(1) (1994).

142. 82 OKLA. STAT. § 105.1A (Supp. 1994).

143. *Id.*

144. *Id.*

certain uses asserted by the riparian parties were reasonable riparian uses which took precedence over any prior appropriation that might be granted to Ada.[145]

However, as noted above, section 105.1A extinguished riparian claims and was enacted subsequent to the readoption and reissuance of the Supreme Court decision in April 1993. Thus, the City argued in the remand proceeding before the OWRB that the hearing to determine reasonableness of the riparian's use was moot.[146] The protestant argued that the statute was an invalid attempt by the legislature to abolish constitutional rights and constitutional principles expressed by the judiciary.[147]

The OWRB agreed with the City. The OWRB Hearing Examiner ruled that, as an administrative agency, the OWRB must presume section § 105.1A to be constitutional.[148] The Hearing Examiner concluded that every statute is constitutionally valid until a court of competent jurisdiction declares otherwise and appeals have ended.[149] Administrative agencies do not have the power to determine constitutionality of legislation.[150] Until section 105.1A is held unconstitutional by the judiciary, the OWRB will continue to administer its permit system as it always has and Oklahoma will remain a prior appropriation state.[151]

Depending upon the outcome of the litigation about section 105.1A, the OWRB could continue to be, as it has been since 1963, an agency that administers a prior appropriation system of water rights because riparian rights have been extinguished in Oklahoma.

2. Compensating for the Takings

If the judiciary determines that the 1963 and the subsequent 1993 amendments to Oklahoma's water law result in impermissible takings, another way that Oklahoma may remain a true prior appropriation state is by paying for those takings. If the state decided to do this, the water again would belong to the state. To appropriate water, an applicant would have to obtain a permit in the same manner as is done today. None of the powers or duties of the OWRB would need to be altered to administer this system.

This approach is unlikely because the amount of compensation would be nearly impossible to quantify if riparians are allowed to keep their unexercised water use rights.[152] It is also questionable which riparians on a stream system qualify for compensation.[153] The *Franco* court determined that the OWRB must take into account the "last riparian and the last appropriator on the stream" when determining what amount of water that must be available to maintain the minimum flow.[154] In a withdrawn *Franco* opinion from 1987, the court opined that all counties on a stream must be considered when determining available water.[155] This might mean that the court would require that every

145. *In re* Remand of Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board, No. C-81-13 (Dist. Ct. Coal County, Okla. 1994). The riparian protestants asserted the following uses as reasonble riparian uses:

(1) Use of the stream flow for the enhancement of the value of the riparian land for recreation;
(2) use for the preservation of wildlife;
(3) use for fighting grass fires; and
(4) use for lowering the body temperature of the riparians' cattle on hot summer days.

Id.

146. OWRB Hearing Examiner's Report at 4 (found in the *Documents* protion of this study).

147. *Id.*

148. *Id.*

149. *Id.* at 5.

150. *Id.*

151. On June 1, 1995, as this study was in the final editing stages, the District Court of Coal County, on an appeal of the OWRB Hearing Examiner's decision of presumed constitutionality, ruled that § 105.1A (Supp. 1994) is unconstitutional. Whether the OWRB or any prior appropriators intend to appeal the district court's ruling to the Oklahoma Supreme Court is unknown as this study goes to press. For the district court decision, see the *Documents* portion of this study.

152. Todd S. Hageman, Note, *Water Law: Franco-American Charolaise, Ltd. v. The City of Ada and the Oklahoma Water Resources Board: The Oklahoma Supreme Court's Resurrection of Riparian Rights Leaves Municipal Water Supplies High and Dry*, 47 OKLA. L. REV. 183 (1994).

153. *Id.*

154. *Franco*, 855 P.2d at 578.

155. Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 58 OKLA. B.J. 1406, 1410-11 (1987), *withdrawn and substituted,*

downstream riparian in the state be compensated. It is unlikely that the OWRB would be involved in these proceedings to determine who is entitled to compensation and by how much.[156]

855 P.2d 568 (Okla. 1990).

156. For a fuller discussion of the compensation issues that would arise if the State of Oklahoma, or its subdivisions, tired to use the power of eminent domain to extinguish riparian rights, see the chapter titled "The Issues of Taking and Valuation under *Franco*."

The Issues of Taking and Valuation Under Franco

Terrell S. Crosson

Table of Contents

I. Introduction

"Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them."[1] When the Supreme Court of Oklahoma handed down its decision in *Franco-American Charolaise, Ltd. v. Oklahoma Water Resource Board*,[2] this statement may have rang especially true to prior appropriators in Oklahoma. Appropriators, even those the most senior, now find their interests subject to riparian rights, which were thought to have been abolished in Oklahoma in 1963.

1. United States v. Chandler-Dunbar, 229 U.S. 53, 69 (1913).
2. 855 P.2d 568 (Okla. 1990), *readopted and reissued*, 64 OKLA. B.J. 1197 (Okla. 1993).

A. Facts

Until 1963, Oklahoma had a dual system of water rights. Prior appropriation and riparian rights both existed in the state.[3] Moreover, the Oklahoma Supreme Court had not decided any cases dealing with the respective rights of an appropriator versus a riparian on the same watercourse. In 1963, this dual system changed when the Oklahoma Legislature passed two bills affecting the substance and procedure of Oklahoma water law.[4] Using House Bill 662 as the substantive bill, the Oklahoma legislature amended title 60, section 60 of the Oklahoma Statutes and added title 82, section 1-A to the Oklahoma Statutes.[5] The revised sections provided in part that as to water in a definite stream, riparians had a claim to use the water in the future only for domestic purposes.[6] This was an attempt by the Oklahoma legislature to limit the doctrine of riparian rights in Oklahoma. A riparian lost the ability to initiate all future uses except those defined as domestic uses.[7]

The dispute in this case started when the City of Ada applied to the Oklahoma Water Resources Board to increase its appropriation of water from Byrd's Mill Spring. The Board granted Ada 5340 acre feet from Byrd's Mill Spring, all that was available for appropriation. In-basin riparian owners and appropriators appealed the Board's decision to the Coal County District Court. In turn, when the Coal County District Court held for the in-basin riparians and appropriators, the City of Ada and the Board appealed to the Oklahoma Supreme Court. The Supreme Court entered its first decision in 1987, five years after the appeal was filed. This decision was not finalized; a rehearing was granted. The Suprem Court entered a second decision in 1990. In response to petitions for rehearing, the Supreme Court withheld issuing a mandate finalizing the 1990 decision for three years. In 1993 the Supreme Court readopted and reissued the 1990 opinion.[8]

B. Holding

The *Franco* court held that the 1963 substantive water law amendments were unconstitutional because they abolished the future right of a riparian to initiate a reasonable use other than for domestic purposes.[9] When the Supreme Court denied a rehearing on its readopted and resissued *Franco* decision on June 14, 1993,[10] Oklahoma became the first and only state to move back to riparianism from prior appropriation.

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3. WELLS A. HUTCHINS, THE OKLAHOMA LAW OF WATER RIGHTS 13 (1960).

4. *See generally* Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface Under the 1963 Amendments*, 23 OKLA. L. REV. 19 (1970).

5. 1963 Okla. Sess. Laws ch. 205, at 268.

6. 60 OKLA. STAT. § 60 (Supp. 1963). The revised section stated:

> Ownership of water—Use of running water: The owner of the land owns water standing thereon, or flowing over or under its surface but not forming a definite stream. The use of ground water shall be governed by the Oklahoma Ground Water Law. Water running in a definite stream, formed by nature over or under the surface, may be used by him for domestic purposes as defined in Section 2(a) [tit. 82, § 1-A] of this Act, as long as it remains there, but he may not prevent the natural flow of the stream, or of the natural spring form which it commences its definite course, nor pursue nor pollute the same, as such water then becomes public water and is subject to appropriation for the benefit and welfare of the people of the State, as provided by law; . . . .

Id. Title 82, § 1-A read as follows:

> Right to use water—Domestic use—Priorities. (a) Beneficial use shall be the basis, the measure and the limit of the right to the use of water; provided, that water taken for domestic use shall not be subject to the provisions of this Title. Any natural person has the right to take water for domestic use from a stream to which he is riparian or to take stream water for domestic use from wells on his premises, as provided in Section 1 [tit. 60, § 60] of this Act . . . .

82 Okla. Stat. § 1-A (Supp. 1963).

7. 82 OKLA. STAT. § 1-A (definding domestic use). The section states:

> "Domestic Use" means the use of water by a natural individual or by a family or household for household purposes, for farm and domestic animals up to the normal grazing capacity of the land, and for the irrigation of land not exceeding a total of three (3) acres in area for the growing of gardens, orchards and laws, and water for such purposes may be stored in an amount not to exceed two years supply.

Id.

8. 58 OKLA. B.J. 1406 (May 19, 1987), *withdrawn and substituted*, 855 P.2d 568 (Okla. 1990), *readopted and reissued*, 64 OKLA. B.J. 1197 (Apr. 12, 1993).

9. *Franco*, 855 P.2d at 577.

10. 64 OKLA. B.J. 1197 (June 14, 1993).

Shortly after the Supreme Court issued it April 1993 *Franco* decision, the state legislature passed another statute meant to blunt the impact of *Franco* and to reiterate that water law in Oklahoma is a prior appropriation system of water rights.[11] The obvious intent of this statute was to abolish the riparian doctrine of water rights in Oklahoma once and for all. The *Franco* decision and the new legislation take our state into uncharted waters for Oklahoma water law.

C. Issues Left Unresolved

This chapter will examine and expound upon several key issues left unresolved by *Franco* and the subsequent legislative response. If the *Franco* case once again reaches the Supreme Court, for a determination of the constitutionalilty of the 1993 legislative response, the Oklahoma Supreme Court ruling will almost assuredly adopt one of three positions.

First, the court could hold that the new legislation is constitutional; therefore, the state legislature has abolished future riparian rights in Oklahoma, other than those provided by statute for domestic purposes. If in fact the court does this, Oklahoma will have prior appropriation as the sole system of water rights, and the problem of conflicting rights is solved without further analysis. Riparian rights would be integrated into the Oklahoma prior appropriation system, as adopted by the Oklahoma legislature beginning in 1963.

The second position depends largely on the litigation strategy of the riparian parties to this case. Riparians could argue that the 1993 statute is unconstitutional, echoing the arguments for unconstitutionality made against the 1963 statutes. If the Oklahoma Supreme Court agrees that the 1993 statute is unconstitutional, the court will render a decision reaching the same result as in the 1990 *Franco* decision. Consequently, Oklahoma will have some form of a dual water rights system, a system in which riparians rights are dominant over prior appropriative rights. If this option is chosen by the court, Oklahoma will face the problem of how the two systems will interact and if it is possible to reconcile the two systems.

The third possible position is the principal focus of this chapter. Alternatively, the riparians might use a different approach to litigation. Riparians would argue that in *Franco* the court held the riparian right to be a vested right that cannot be abrogated by the legislature.[12] Subsequently in June 1993, the legislature passed a new statute with the intent of abrogating the riparian right.[13] Therefore, riparians would argue that there has been a taking of private property without compensation; thus, the riparians would seek compensaton for their rights taken. In effect, the riparians upon reltigation might turn the *Franco* dispute into an inverse condemnation claim.[14] The issues raised by this takings analysis are briefly outlined below.

The first issue is whether *Franco* and the subsequent reaction of the Oklahoma legislature didi or will result in one (or several) constitutional taking(s). This section of the analysis will deal with the issues of

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11. 1993 Okla. Sess. Laws ch. 310, at 1625. The statute provides:

Section 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 105.1A of Title 82, unless there is created a duplication in numbering, reads as follows:

It is the intent of the Oklahoma Legislature that the purpose of Section 105.1 through Section 105.32 of this title is to provide for stability and certainty in water rights by replacing the incompatible dual systems of riparian and appropriative water rights which governed the use of water from definite streams in Oklahoma prior to June 10, 1963, with an appropriation system of regulation requiring the beneficial use of water and providing that priority in time shall give the better right. These sections are intended to provide that riparian landowners may use water for domestic uses and store water in definite streams and that appropriations shall not interfere with such domestic uses, to recognize through administrative adjudications all uses, riparian and appropriative, existing prior to June 10, 1963, and to extinguish future claims to use water, except for domestic use, based on ownership of riparian lands.

Id.

12. *Franco*, 855 P.2d at 577.

13. 82 OKLA. STAT. § 105.1A (Supp. 1993). *See supra* note 11 for the text of the 1993 statute.

14. *See* Canada v. City of Shawnee, 64 P.2d 694 (1936). *Canada* conccerned (a dispute between a plaintiff landowner and the defendant City concerning rights in groundwater. Upon rehearing, after finding for plaintiff as the water rights holder, the supreme court turned t!.e case into an eminent domain dispute and remanded for a determination of what the City owed the plaintiff in just compensation for the property rights in groundwater taken by the City.

both legislative and judicial takings possibly stemming from the 1990 *Franco* decision, the related legislation, and the early stream adjudications in Oklahoma.

The second issue assumes a taking did occur at some point in time. The chapter attempts to identify what was actually taken. This will involve determining the nature of the riparian right in Oklahoma. Of particular importance is whether the taking is of riparian rights in water or the riparian lands themselves.

The third and fourth issues addressed in this chapter involve the time at which the taking occurred and the identity of the taker. Several possibilities exist for both issues. This chapter discusses these possibilities concerning the time of the taking and the identity of the taker.

All of the preceding issues on "takings" lead to the final section of the paper. If *Franco* does implicate a taking, the final issue invariably becomes the issue of valuation. How should the Oklahoma Supreme Court value the riparian rights that have been taken? The final section of this chapter addresses this topic. Due to the nature of the riparian right, valuation will prove to be a very complicated issue. Customary valuation methods may or may not be appropriate; therefore, the chapter will analyze both established methods and the new alternatives for the valuation of natural resources that have been introduced in the field of environmental law.

II. The Takings Issues Under Franco

If *Franco* is in fact relitigated as a takings case, several issues must be addressed. Because the issues raised by *Franco* are novel to the State of Oklahoma, the sources of law on this subject are limited. Oklahoma law is analyzed where available, as well as law from other jurisdictions where helpful analogies can be drawn. The following sections attempt to identify and discuss some of the relevant issues that will be crucial to the outcome of the takings question in the State of Oklahoma.

A. Possible Takings Under Franco

Three possible takings issues arise from the outcome of the *Franco* decision, together with the 1963 statutes, the 1993 legislative response to *Franco*, and the early stream adjudications. The primary taking issue central to the *Franco* case itself is the possibility of a taking of riparian rights by the actions of the Oklahoma legislature. This issue will be developed throughout the remainder of this chapter. The remaining two takings issues are further removed from the *Franco* decision itself. These two issues are related to the concept of judicial takings. The chapter will examine the possibility of a judicial taking of prior appropriative rights. Finally, the chapter will discuss the issue of a judicial taking of riparian rights.

1. Legislative Action and the Taking of Riparian Rights

This issue addresses the possibility of new *Franco* litigation arguing that the 1993 legislation is a taking of private property rights in stream water. The argument that the 1993 legislative action constitutes a taking has merit. Analogies can be draw between this *Franco* new litigation and the holding and reasoning of the court in the 1990 *Franco* decision. By analyzing how *Franco* was decided in 1990, it is possible to discuss how the Oklahoma Supreme Court would evalute takings arguments in the *Franco* relitigation context involving the 1993 legislative response.

The argument that the 1993 legislative response to the 1990 *Franco* decision is a taking becomes persuasive when one notes the similarities between the 1963 statute and the 1993 statute. The language of the 1963 statute, as ultimately codified, is very similar to the language of the 1993 statute with respect to the cutoff date of June 10, 1963 for the initiation of riparian uses other than for domestic purposes.[15] Under both statutes, the riparian loses the ability to initiate future reasonable uses after June 10,1963, except for those which were defined under the 1963 legislation to be domestic uses.[16] Moreover, riparian

15. *Compare* 82 OKLA STAT. § 105.2(A), (D) (1991) *with* 82 OKLA. STAT. § 105.1A (Supp. 1994).
16. 82 OKLA. STAT. §§ 105.1(B), 105.2(A) (1991).

uses initiated prior to 1963 are worked into the priority system and actually become appropriative uses.[17] This means that the quantity limitation on the riparian right that prior to 1963 was governed only by reasonableness is now limited to a specific quantity. Whereas prior to 1963 riparians could change their water use from one activity to another governed only by a reasonableness inquiry, both statutes now limit water usage to the precise activity specified by the water user in the permit issued by the Oklahoma Water Resources Board. Changes between uses can now only be made by complying with statutory and regulatory procedures relating to the changes in purpose, place of use, and method of diversion. This loss of the right to change use is analogous to the loss of the right to initiate a future use. Finally, in times of shortage, the riparian right was curtailed on the basis of reasonableness between water users. For example, two equally reasonable riparian users would likely reduce their consumption pro rata in a shortage situation. When riparians' uses are transferred to the prior appropriation system, the water right is curtailed on the basis of temporal priority and a reasonableness comparison between water uses is irrelevant.

When these attributes of the riparian right were abrogated by the 1963 statute, the *Franco* court ruled the statute unconstitutional because the statute took vested property rights.[18] Unless the Oklahoma Supreme Court is willing to overrule (impliedly or explicity) its 1990 *Franco* decision, the court will likely respond to the 1993 legislation as it did to the 1963 legislation. Indeed, the 1993 legislation can be viewed as signifiying nothing except a crystal clear legislative disavowal of riparian rights including the action of the Supreme Court readopting and reissuing its 1990 *Franco* opinion. However, there is no indication that the Supreme Court is or should be more willing to heed the 1993 disavowal of riparian rights than the Supreme Court was willing to heed the 1963 disavowal of riparian rights. As the court did with the 1963 legislative action, the Supreme Court can respond to the 1993 legislation as an unconstitutional taking of vested property rights and feel, rightfully, that the court has served as the protector of constitutional rights to private property.

Moreover, the Supreme Court is likely to respond to the 1993 legislation the way the court responded to 1988 legislation that explicitly abrogated claims to water based on the riparian system of water rights.[19] As an alternative constitutional defect, the *Franco* court held that the legislature had not expressly abrogated riparian water uses in the 1963 statutes. Hence, the court ruled that riparians had not been given adequate notice which would have allowed them to validate prior riparian uses of water in accordance with procedures established in the 1963 legislation.[20] Although the legislature made the abrogation express in 1988, the *Franco* court ruled that this 1988 legislation was too late to be effective because the time for validation of water claims under the 1963 statutes had long since passed.[21]

2. Taking of Appropriative Rights

The *Franco* court held that the 1963 water law amendments were unconstitutional because they abolished the right of a riparian to initiate a future reasonable use, other than for domestic purposes.[22] From 1963 until the time the *Franco* decision became final in June 1993, the statutory and regulatory law of this state provided that water rights existed only within the prior appropriation system of water rights.[23] If the court, upon relitigation of *Franco,* holds that the 1993 legislative response is unconstitution-

17. 82 OKLA STAT. § 105.2(B) (1991). Pre-1963 riparian uses are recognized in priority (B)(6), but are subordinate to the previous five listed priorities. Consequently, persons claiming pre-1963 riparian uses of water lose legal status vis-à-vis pre-1963 prior appropriation claimants. *See generally* Gary D. Allison, *Franco-American Charolaise: The Never Ending Story,* 30 TULSA L.J. 1 (1994).

18. *Franco,* 855 P.2d at 577.

19. 82 OKLA. STAT. § 105.2(D) (1991).

20. 1963 Okla. Sess. Laws ch. 205 § 4, at 268. Section 4 of chapter 205, which gave all persons claiming priorities a minimum of one year to establish their priority, never became a codified section. Section 4 was printed in the Oklahoma Statutes only as part of the historical information to title 82, § 1-A, which sets forth the statutory scheme for priorities. 82 OKLA. STAT. § 1-A (Supp. 1963).

21. *Franco,* 855 P.2d at 577.

22. *Id.* at 577.

23. 82 OKLA. STAT. § 105.2 (1991).

al, Oklahoma will again face a dual system of water rights. As a result of this ruling, it can be anticipated that riparians will attempt to initiate new uses on Oklahoma's stream systems.

Water, like other natural resources, is limited, particulary in the more arid western parts of the state. Although water constantly flows into and out of the stream systems, the streams are finite in their quantity. If riparians initiate consumptive uses, the volume of water available for appropriators will be reduced. Appropriators may then lose water, which they have currently been putting to beneficial use in accordance with a state water permit lawfully obtained after 1963, to riparians initiating new uses in reliance upon the *Franco* decision. Whether this loss rises to the level of a unconstitutional taking of prior appropriation rights is an issue which the Oklahoma courts may have to face.

a) Analysis from the Opinion

The issue must be examined of why appropriators may lose water. This depends upon the relationship of appropriative rights and riparian rights after *Franco*. The *Franco* opinion itself gives some guidance on how this relationship will work. The court expressly stated that the appropriative right is a vested right that may not be permanently divested except for nonuse after notice and a hearing.[24] The court further stated that this appropriative right is subject to senior appropriative rights and reasonable riparian rights in times of shortage.[25] The opinion stated that in times of shortage, the appropriator must curtail his use of water until there is a sufficient quantity to meet the uses of the senior appropriators and the reasonable uses of riparians.[26] This is referred to as a temporary divestment.[27] As in any appropriative system, a prior appropriator is always subject to senior appropriators. This means that on the records an appropriator may have a priority right for a certain quantity of water, but if the stream is over-appropriated, he may never receive any water. Moreover, even if the appropriator is the most senior, his right is subject to reduction in quantity all the way down to zero acre feet riparians initiate reasonable uses that exhaust the water supply. Under *Franco*, reduction of an appropriator's right in order to recognize senior appropriative claims and future reasonable riparian uses does not qualify as permanent divestment of a property right. Without a permanent divestment, the *Franco* decision indicates that no taking of property rights has occurred.

The *Franco* court further stated that its decision followed the approach of Nebraska in *Wasserburger v. Coffee*[28] and adopted the doctrine of relative reasonableness for disputes between an appropriator and a riparian.[29] Nebraska has a dual rights system and has encountered problems very similar to that in the *Franco* case. In *Wasserburger* the plaintiffs were cattle ranchers who asserted riparian rights against defendants holding appropriative rights for irrigation.[30] The riparians complained they could no longer water their cattle from the stream because the appropriators had exhausted the supply. The defendants argued that the plaintiffs had to claim to water for their cattle because their riparian rights had been abrogated by statute. In a detailed analysis, the Supreme Court of Nebraska tried to reconcile the two competing systems.

The Nebraska court found that the appropriation system was inaugurated by statute in Nebraska in 1895[31] but that no act of the legislature had abolished pre-existing riparian rights.[32] With regard to pre-existing riparian rights, the Nebraska court found that the quantity of riparian land was limited to that amount of land considered riparian before April 4, 1895, and that any land severed from the original

24. *Franco*, 855 P.2d at 580-82.
25. *Id.*
26. *Id.*
27. *Id.*
28. 141 N.W.2d 738(Neb. 1966).
29. *Franco*, 855 P.2d at 578.
30. Wasserburger v. Coffee, 141 N.W.2d 738 (Neb. 1966).
31. *Id.* at 738.
32. *Id.* at 744.

parcel was no longer riparian.[33] Under these conditions, the Nebraska court gave a limited recognition to plaintiffs' riparian rights to stream water.

Returning to the precise dispute between the plaintiffs (riparian ranchers) and the defendants (prior appropriator irrigators), the Nebraska court held that an appropriator who intentionally causes damage to a riparian by invading his interest in the use of the water is liable for damages, but only if the appropriation is unreasonable when compared to riparian's use.[34] The court stated that the appropriation is unreasonable unless the utility of the appropriator's use outweighs the gravity of the harm to the riparian.[35] Balancing these factors, the court found that a cause for damages had been established.[36] On the facts in *Wasserburger*, the right of the riparian was superior and an injunction was issued against the appropriators.[37]

Applying this relative reasonableness inquiry of *Wasserburger*, the appropriator will still likely lose water. Appropriative uses are often for water use on a nonriparian tract. Under case law interpreting riparian rights, the Oklahoma Supreme Court ruled that a use of water on a nonriparian tract is not per se unreasonable.[38] However, when a reasonable use on a riparian tract is balanced against a nonriparian use, the riparian use prevails. This means that in most cases, if not all, a riparian use will prevail over an appropriative use in the relative reasonableness inquiry. The *Franco* court specifically held that the appropriator must defer to the reasonable riparian use.[39] The court classified this deference as is a temporary divestment.[40]

Taking into account the *Franco* distinction between temporary and permanent divestment, it is clear no taking has occurred when an appropriator must reduce water usage to accomodate the initiation of a reasonable riparian right. The appropriator still possesses the prior appropriation as a legally-recognized right on the records of the Oklahoma Water Resources Board. When and if the available quantity of water increases, the prior appropriator may again assert his right and divert water. The prior appropriation has always been a conditional right dependent upon the amount of water available for appropriation. Therefore, if a riparian initiates a new use, the appropriator's right is not "taken" in the constitutional sense because it was always conditioned on the water being available for appropriation.

b) The Judicial Takings Argument

While the *Franco* decision would not find a "taking" of prior appropriation rights, is the *Franco* decision itself an unconstitutional taking of property rights? No precedent exists in Oklahoma on the subject of judicial takings. Professor Barton Thompson, author of an article on judicial takings,[41] argues that conceptually judicial opinions could rise to the level of a "taking," but that the United States Supreme Court is unlikely to find that judicial changes affecting property rights do rise to that level.[42]

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33. *Id.* at 745.

34. *Id.*

35. *Id.* at 745-46. As listed by the court, the factors for determining the utility of the appropriation included the social value which the law attaches to the use for which the appropriation is made, the priority date of the appropriation, and the impracticability of preventing or avoiding the harm.

As for the factors determining the gravity of the intentional harm to the riparian use, the court listed the extent of harm involved, the social value which the law attaches to the riparian use, the time of initiation of the riparian use, the suitability of the riparian use to the watercourse, and the burden on the riparian proprietor of avoiding harm.

36. *Wasserburger*, 141 N.W.2d at 746.

37. *Id.* at 747-48.

38. Smith v. Standolind Oil & Gas Co., 172 P.2d 1002, 1005 (Okla. 1946).

39. *Franco*, 855 P.2d at 582.

40. *Id.* at 582.

41. Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990).

42. *Id.* at 1541. For other articles discussing the concept of judicial takings, compare Martinez, *Taking Time Seriously: The Federal Constitutional Right to be Free from "Startling" State Court Overrulings*, 11 HARV. J.L. & SOC. POL'Y 297 (1988) with Lamb, *Robi son v. Ariyoshi: A Federal Intrusion Upon State Water Law*, 17 ENVTL. L. 325 (1987) *and* Chang, *Unraveling Robinson v. Ariyoshi: Can Courts "Take" Property?*, 2 U. HAW. L. REV. 57 (1979).

One jurisdiction has squarely faced the issue as to whether judicial change in the system of water rights is a taking. In *Baumann v. Smrha*,[43] the State of Kansas had to defend the abrogation of the riparian right by the Kansas Supreme Court. The attack was made in Federal court under the Fourteenth Amendment. In *Baumann*, the federal court faced the issue of whether a Kansas prior appropriation statute, applied to groundwaer, met the due process criteria of the Fourteenth Amendment. The federal district court held that the act was constitutional.[44] The interesting part of the case for this chapter is the court's discussion of the riparian rights doctrine. The court stated that the power of a state to reject or modify the riparian rights doctrine in favor of prior appropriation had long been settled.[45] As to previous Kansas law recognizing riparian rights, the court stated that no vested right could be found in the Kansas court decisions.[46] The court also said that even if a state court establishes a rule of property, a subsequent departure from that rule is not by itself a taking without due process.[47]

Arguably, the *Baumann* case can be distinguished from *Franco* because it applies to the abolition of common law riparian rights rather than statutory prior appropriation rights. Moreover, the holding implies that with some other factors present, a taking may be found. However, the opinion does not state what these other factors would be. Still, Oklahoma riparians would likely argue in support of *Franco* that the thrust of *Baumann* was that courts have the power to define or depart from previously recognized property rules. Indeed, as discussed with respect to the language of the *Franco* decision itself, the *Franco* majority seeminly felt that the opinion did not change the conditional nature of the prior appropriative right. Hence, the prevailing jurisprudence at this point seems to reject the idea of a judicial taking. Yet, the concept of a judicial taking remains a distinct, separate, and possibly significant issue.[48]

3. The Adjudications as a Taking of Riparian Rights

Under prior appropriation statutes in existence prior to 1963,[49] a hydrographic survey and an adjudication of rights in the stream was required before any prior appropriation rights were finally established. These statutes required a hydrographic survey and adjudications of existing rights to establish what water was available for appropriation. Only four stream adjudications went to trial from statehood to 1963.[50] All of these decrees came from district courts, and none were appealed to the Oklahoma Supreme Court. None of the decrees followed exactly the appropriation statutes as to priority awarded to claimants in the adjudications; none of the final adjudications adhered precisely to the statutory scheme of appropriative priorities.[51] Instead, various priorities were assigned on the basis of use, filing, or some equitable reason. None of the decrees recognized or dealt with riparian rights.[52] Riparian uses presented to these district courts may have received a priority under these adjudications, but there was no mention of future riparian rights.[53]

These adjudications present a unique situation. As a result of the *Franco* opinion, the validity of the priorities established by these adjudications is in serious doubt. *Franco* did not expressly overrule or even directly address these adjudications. However, the lack of consideration of riparian rights in these adjudications might give rise to challenges, based on *Franco*, by riparians on these stream systems. The

43. 145 F.Supp. 617 (D.Kan. 1956), *aff'd*, 352 U.S. 863 (1956).

44. *Id.* at 625.

45. *Id.* at 624.

46. *Id.* at 625.

47. *Id.* at 625.

48. Hawaii has had litigation about judicial takings in connection with judicial changes to its water law. *See* Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977), *aff'd*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986), *dismissed upon remand*, 887 F.2d 215 (9th Cir. 1989).

49. 82 OKLA. STAT. §§ 1-35 (1951).

50. Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface in the Pre-1963 Period*, 22 OKLA. L. REV. 1, 37-44 (1969) [hereinafter Rarick, *Pre-1963 Period*].

51. *Id.*

52. *Id.*

53. *Id.*

impact of a challenge to the validity of these adjudications would be immense because these adjudications established water rights in streams for the municipal water systems of Tulsa, Oklahoma City, and several other smaller cities and towns.

Although available, none of the municipalities involved in these adjudications used the power of condemnation to get these water rights. No condemnation issues were involved in these adjudications. If these adjudications were declared invalid, the source of water for Oklahoma's major cities would be at risk. Condemnation of water rights by the municipalities might be their only option. The condemnations would be complex; the costs would likely be enormous. Therefore, these municipalities deriving an appropriation from these adjudications have a vital interest in knowing whether *Franco* undermines the validiaty of the appropriations decreed in these adjudications.

The second problem faced by municipalities who have water rights established by these adjudications is assuring the certainty of an adequate water supply for future growth. As noted above, the adjudication decrees did not follow the statutory scheme regarding the awarding of priorities. Of most importance to the present discussion, the adjudications did not follow the statute as to the requirement that the appropriated water be put to an actual beneficial use.[54] Municipalities were given priorities for water in certain quantities that would serve as a reserve for future growth and development.[55] If riparians are allowed to initiate new uses on these stream systems, then not only water put to present use by the cities but also water reserved for future expansion would possibly be put at risk. As each riparian initiates a new use, the riparian might likely be dipping into water the municipalities thought they had obtained in the adjudications for future municipal growth.

After the holding of *Franco*, riparians may attempt to attack the validity of these adjudications on several grounds. Riparians could argue that the adjudications constituted a judicial taking. This judicial taking theory would be a similar argument as outlined above for prior appropriators after the *Franco* decision. The riparians could argue that, as the *Franco* court stated, the riparian right is a vested property right.[56] Moreover, Oklahoma decisions prior to the adjudications recognized the riparian right.[57] The adjudications ignored possible riparian rights in determining the interests in the stream systems.[58] No compensation was given to the riparians for their rights. There is precedent in Oklahoma for a court to turn a water rights case into a condemnation case where a municipality with the power of eminent domain is involved.[59] In the *Canada* case, the court held that equity will usually afford this issue to be tendered when one party holds this power.[60] Therefore, the riparians could argue that the adjudications were a taking of private property without compensation.

The judicial taking theory encounters the same problems here as discussed earlier with respect to prior appropriators making a judicial taking claim against the *Franco* decision. There is no authority under Oklahoma law for the judicial taking concept. Second, the persuasive authority of the *Baumann v. Smrha*,[61] holding that no vested property right exists in the decisions of courts, applies even more forcefully in this situation where riparians are attempting to claim a judicial taking. If riparians attacked the adjudications as a judicial taking, the facts are similar to those in the *Baumann* case. In both cases the rights allegedly taken are riparian rights. In *Baumann*, Kansas was changing from common law riparianism to a statutory system of prior appropriation. In the Oklahoma adjudications, the district courts adjudicated claims to water without reference to riparian rights existing under common law in Oklahoma and awarded prior appropriation rights under an Oklahoma statutory scheme. Hence, the *Baumann* decision, while only persuasive authority and based on the Kansas Constitution, would likely be followed in Oklahoma. Yet,

54. *Id.*
55. *Id.*
56. *Franco*, 855 P.2d at 576.
57. *See* Chicago, R.I.& P. Ry. Co. v. Groves, 93 P. 755 (Okla. 1908); Broady v. Furray, 21 P.2d 770 (Okla. 1933).
58. Rarick, *Pre-1963 Period, supra* note 50, at 37-44.
59. Canada v. City of Shawnee, 64 P.2d 694 (1936).
60. *Id.* at 700.
61. 145 F.Supp. 617, 625 (D.Kan. 1956), *aff'd*, 352 U.S. 863 (1956).

the issue of a judicial taking in these stream adjudications could find its way to the courts depending on the outcome of any relitigation of the *Franco* case.

Riparians contesting the pre-1963 stream adjudications could also argue a denial of due process. Riparians might argue that they did not have adequate notice of the adjudications or that their rights were at issue. When these adjudications occurred, the relevant Oklahoma statute required that notice be published in a newspaper of general circulation, once a week for four consecutive weeks.[62] Of the four adjudication, only one district court, in the Spavinaw adjudication, even mentioned notice requirements and the court did so by simply indicating that the State Engineer complied with the statutory requirement concerning publication in a local county newpaper.[63] The district court provided no discussion of the constitutional or due process standards for adequate notice. This appears to be the only reference to any notice requirements in the adjudications.[64] Whether these adjuciations satisfied constitutional standards concerning adequate notice to persons whose rights may be affected is a serious, unresolved question.

Riparians might also attack these pre-1963 adjudications by arguing that the riparians were not properly joined as parties to the adjudications and, therefore, were not bound by the decrees. By definition, a stream adjudication is meant to be a final disposition of all water rights on that stream. The 1905 statute provided that all persons who claim a right to use water in a stream system shall be made parties to the suit.[65] The statute is unclear whether "claims" include only those making present use, or also those who may initiate a future use. Riparians at common law had a right to claim water by the initiation of reasonable uses in the future. Arguably, "claim" under the statute must include the initiation of a future use. This fact would dramatically expand the parties in these adjudication suits. Every person who owned riparian land along the stream being adjudicated potentially would be a claimant under the statute who must be joined to the lawsuit.

The statute seems to require that persons must affirmatively file a claim for the water to gain recognition of water rights during the stream adjudication.[66] They did not know to file a claim and join the adjudication, however, if they did not receive notice. Riparians could argue that no right was claimed because adequate notice was not given. Consequently, notice would have to reach every landowner who could initiate a riparian use in the future, which could well include riparians in counties other than where the State Engineer published the newspaper notice about the stream adjudication. Thus, the argument about proper joinder simultaneously becomes an argument about expanded notice to a large number of potential claimants.

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62. 82 OKLA. STAT. § 23 (1951). The section provided in part:

> Upon the filing of an application which complies with the provisions of this Chapter and the rules and regulations established thereunder, the State Engineer shall instruct the applicant to publish notice thereof, in a form prescribed by him, in some newspaper of general circulation in the stream system, once a week for four consecutive weeks. Such notice shall give all essential facts as to the proposed appropriation, among them, the places of appropriation, and of use, amount of water, the purpose for which it is to be used, name and address of applicant and the time when the application will be taken up by the State Engineer for consideration . . . .

Id.

63. City of Tulsa v. Grand-Hydro, No. 5263 (Dist. Ct. Mayes County, Okla. Feb. 14, 1938), *in* JOSEPH F. RARICK, THE RIGHT TO USE WATER IN OKLAHOMA 37-45 (2nd ed. 1984) [hereinafter RARICK, RIGHT TO USE WATER]; *In re* Application by the City of Tulsa, No. 22-33 (Okla. Planning & Resources Bd. Sept. 13, 1938), *in* RARICK, RIGHT TO USE WATER, *supra*, at 47-51.

64. In addition to the Spavinaw adjudication cited in the preceding footnote, the other adjudications were City of Oklahoma City v. City of Guymon, No. 99028 (Oklahoma County, Okla. Dec. 20, 1939); City of Durant v. Thomas E. Pexton, No. 19662 (Dist. Ct. Bryan County, Okla. 1955); City of Oklahoma City v. State Board of Public Affairs, No. 10217 (Atoka County, Okla. Oct. 28, 1958). Portions of the decress of these adjudications are in RARICK, RIGHT TO USE WATER, *supra* note 63, at 51-70.

65. 82 OKLA. STAT. § 13 (1951). The section provided in part:

> In any suit for the determination of a right to use the waters of any stream system, all parties who claim the right to use such waters shall be made parties. When any such suit shall have been filed, the court shall by its order, duly entered, direct the State Engineer to make or furnish a complete hydrographic survey of such stream system as hereinbefore provided, in order to obtain all data necessary to the determination of the rights involved . . . .

Id.

66. *Id.*

Riparians attacking these adjudications also have the argument that the adjudication statute did not contemplate an adjudication relating to riparian rights. The pre-1963 statutes made no mention of riparian rights although Oklahoma water law recognized riparian rights until 1963. In addition, prior to an adjudication, the statute required a hydrographic survey to obtain the data necessary to make the adjudicative determinations.[67] This was not done in any of the adjudications. Existing riparian rights were not ascertained nor did the district courts enter any findings concerning the availability of water for appropriation by the municipalities seeking the adjudications. If common law riparian rights are not contemplated within the statute and riparian rights were not adjudicated, riparians can argue that their rights remained untouched by these stream adjudications.

4. The Adjudications as Inverse Condemnation

Riparians desiring to attack the four adjudications, which occured prior to 1963, might adopt the strategy of claiming that municipalities using water in reliance upon these adjudications have in effect condemned riparian water rights. If riparians were to make this argument, riparains would not be directly attacking the decrees entered at the close of the adjudication. Rather, riparians would focus on the date of the initiation of water use either by the municipalities, exercising rights awarded in the adjudication decrees, or by the riparians themselves.

Under the prior appropriation statutes in effect before 1963, prior appropriators had the power of eminent domain to acquire the right to use water.[68] Municipalities, as prior appropriators under the adjudications, thus had the power of eminent domain to acquire riparian rights. When municipalities have the power of eminent domain but do not use it when they take private property, Oklahoma caselaw holds that the landowner's remedy is an inverse condemnation proceedings.[69] With the above referenced statements of Oklahoma law at the time of the adjudications, riparian can build the following argument.

Riparians would assert and prove that that municipalities have diverted water from the stream systems in question. Riparians would secondly assert and prove that as a result of this diversion, riparians have lost a portion of their rights. Riparians would need to show that they have lost an actual amount of water from the stream. Riparians could show this actual loss by porving that insufficient water exists to satisfy past reasonable riparians uses or that insufficient water exists to allow them to initate prospective, planned reasonable riparian uses of the water on riparian lands. The causation element is then established for the loss of riparian rights. Riparians would thirdly show that although the muncipality causing the loss of water in the stream could have used the power of eminent domain, the municipality did not institute condemnation proceedings. Therefore, riparians can institute inverse condemnation proceedings to recover compensation for the rights taken.

A major problem for riparians making the above argument is the length of time which has elapsed since the adjudications occurred. In an inverse condemnation action in which a taking is found to have occurred, the court-adopted limitations period for filing an action is fifteen years.[70] All of the adjudications as court cases were more than fifteen years ago. However, while most initiations of the use of water by the municipalities based on the decrees from these adjudications also occurred more than fifteen years ago, there are several ways that riparians might blunt the statutes of limitations against their taking claims.

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67. *Id.*

68. *Id.* § 2. The section provided in part:

> Any person, corporation or association may exercise the right of eminent domain to acquire any right to use water for beneficial purposes, and to acquire right of way for the storage or conveyance of waters for beneficial use, including the right to enlarge existing structures and use the same in common with the former owner. Such right of way shall in all cases be so located as to do the least damage to private or public property, consistent with proper and economical engineering construction. Such rights may be acquired in the manner provided for by law for the taking of private property for public use.

Id.

69. Oklahoma City v. Local Federal Sav. & Loan Ass'n, 134 P.2d 565 (Okla. 1943).

70. Rummage v. State, 849 P.2d 1109 (Okla. 1993).

In the *Franco* decision the Oklahoma Supreme Court held that riparians had not been given adequate notice that the 1963 legislation abrogated riparian water rights.[71] If riparians could convince the Oklahoma courts that the adjudications similarly gave insufficient notice to riparians that their rights were being affected by the litigation, riparians might be successful in tolling the fifteen year statute of limitations on inverse condemnation until such date as riparians had reasonable notice — had reasonable discovery — that they needed to take action to protect their private property from being taken by the municipalities. As to the precise date by which riparians should have had reasonable notice that their riparians rights were being taken, the author of this chapter does not need to make this determination. But assuredly the date by which the riparians had reasonable notice will be a factual issue of significant dispute between municipalities trying to protect their appropriations under the adjudications and riparians attacking these adjudications and their resulting initiation of water usage by municipalities.

Riparians rights are not lost through nonuse. Hence, the adjudication decrees themselves do not take riparian waters. Riparians rights are lost only when interfered with because insufficient water exists to satisfy riparians claims. Hence, riparians would argue that muncipalities inversely condemn riparian water rights only when municipalities initate water uses under the adjudicate decrees that interferr with pre-existing riparian water uses. If the streams adjudicated prior to 1963 have had abundant water to meet all water needs, riparians would claim that the fifteen year statute of limitations has not yet begun to run. Riparians would be at significant risk of the statute of limitations applying to their inverse condemnation claims only if the riparian had been using the water in the stream and was forced to cease using water from the stream after the adjudication. So long as municipalities have not exhausted surplus water in the adjudicated stream, riparians should argue that the statute of limitations on inverse condemnation claims has no applicability.

Riparians rights include the right to intiate reasonable uses of water in the future. Even if streams have been overutilized in the past, individual riparians could argue that they have not had any riparian rights taken until such time as they try to initiate a water right on the overutlized stream. Riparians could thus argue that the fifteen year statute of limitation begins to run only when the riparian attempts to use water on an adjudicated stream *and* learns that insufficient water exists to fulfill the desired reasonable riparian use. Onced this occurrs, if the riparian can prove the elements of an inverse condemnation claim, the riparian would have fifteen years thereafter to pursue the inverse condemnation claim against a muncipality taking water from the stream pursuant to a decree from a pre-1963 adjudication.

B. What Was Taken? The Nature of the Riparian Right in Oklahoma

1. Attributes of the Riparian Right

If a taking of riparian rights did occur as a result of the *Franco* case and the subsequent response of the Oklahoma legislature, the court must resolve the issue of what rights were actually taken. This issue becomes very important to the topic of valuation. Before any compensation can be paid, each element of the property rights taken must be identified. The nature of the riparian right must be examined to determine the attributes of that right in Oklahoma.

The riparian right has been recognized by common law in Oklahoma to a large extent without any mention of statutory authority.[72] The *Franco* case itself provides some information on the nature of the riparian right. The *Franco* court held that the norm in Oklahoma would be the modified common-law riparian right to reasonable use.[73] This was illuminated somewhat by the court's reference to the controlling Oklahoma statute on common-law rights, which states that the common-law remains in effect in Oklahoma as modified by the state constitution, statute, or judicial decision.[74] Other than the 1963

71. *Franco*, 855 P.2d at 577.

72. WELLS A. HUTCHINS, THE OKLAHOMA LAW OF WATER RIGHTS 17 (1960).

73. *Franco*, 855 P.2d at 575.

74. *Id.* at 576 n.39 (referring to 12 OKLA. STAT. § 2 (1981) ("The common law, as modified by constitutional and statutory law, judicial decisions and the conditions and wants of the people, shall remain in force in aid of the general statutes of Oklahoma . . . .")).

statutes, there is no current statutory language on riparian rights. Since the *Franco* court held these 1963 statutes to be invalid,[75] the riparian right does not seem to be modified by Oklahoma statutory law. The reference to judicial decisions would refer to the riparian rights cases in Oklahoma.[76]

The *Franco* court stated that the riparian right is a real property right.[77] The riparian right arises from the ownership of land.[78] The riparian right attaches only to those lands which touch the stream.[79] The riparian right is a usufructuary right.[80] This means that the right is in the use of the water and not the water itself as property. The court went on to state that the riparian right was not constant and that the right was not judicially quantifiable in the future.[81] Unlike the appropriative right, the riparian right is not limited in quantity. The only limit that applies to the quantity is the reasonableness of the use. The riparian right allows new uses to be initiated at any time in the future, so long as those uses are reasonable. This is in sharp contrast to the appropriative system, which is based on temporal priority. A new riparian use will be evaluated only on the basis of reasonableness. In times of shortage, the riparian will share pro rata with other reasonable riparian uses.

In discussing and analyzing the nature of the riparian right in Oklahoma, the *Franco* court acknowledged that the early cases included some language that infers the adoption of the "natural flow" doctrine of riparian rights.[82] The *Franco* court attempted to reconcile these cases and then held that the reasonable use doctrine was controlling under Oklahoma Law.[83]

The *Franco* court cited *Chicago, R.I.& P. Railway Co. v. Groves*[84] as the first case in which the Oklahoma Supreme Court recognized the common-law riparian right.[85] In the *Groves* case the court held that a landowner could not obstruct water flowing in a definite channel to the injury of a lower riparian.[86] The *Franco* court then cited *Broady v. Furray*[87] as establishing the reasonable use theory in Oklahoma.[88] In support of the reasonable use theory, the court cited section 850 of the *Restatement (Second) of Torts* as authority for the proposition that if one riparian can show no injury because of another's use, then that use is reasonable, even if the flow of the stream is diminished.[89]

2. Reasonableness

The previous section gives a basic idea of the attributes of the riparian right in Oklahoma. However, to determine what has actually been taken in a given instance, the uses to which that particular riparian right was being or could be put must be established. To phrase the question another way, we must determine which riparian uses will be considered as reasonable under Oklahoma law. The *Franco* court remanded the case back to the trial court for the determination of this very issue.[90] The plaintiff's uses in the *Franco* case to be considered on this point were listed as "use of the streamflow for the enhancement of the value of the riparian land, for recreation, for the preservation of wildlife, for fighting grass fires,

75. *Franco*, 855 P.2d at 577.
76. *See, e.g.*, Nunn v. Osborne, 417 P.2d 571 (Okla. 1966); Barker v. Ellis, 292 PP.2d 1037 (Okla. 1956); Smith v. Stanolind Oil & Gas Co., 172 P.2d 1002 (Okla. 1946).
77. *Franco*, 855 P.2d at 576.
78. *Id.* at 573.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 574-75.
83. *Id.* at 575.
84. 93 P. 755 (Okla. 1908).
85. *Franco*, 855 P.2d. at 574.
86. *Groves*, 93 P. at 759-60.
87. 21 P.2d 770 (1933).
88. *Franco*, 855 P.2d at 574.
89. *Id.* at 574 n.25; RESTATEMENT (SECOND) OF TORTS § 850 (1979).
90. *Franco*, 855 P.2d at 577.

and for lowering the body temperature of their cattle on hot summer days."[91] Whether these uses will be considered as reasonable is yet to be seen.

One dispute about reasonableness may arise from domestic uses as they were defined in the 1963 statutes which the *Franco* court declared unconstitutional.[92] Domestic riparian uses were expressly preserved in the 1963 statutes, but the definition of domestic uses was expanded beyond the riparian domestic uses recognized at common law. Domestic uses at common law includes "those that meet the domestic needs of the riparian landowner, such as drinking, washing, and watering small gardens or a few livestock."[93] Historically, domestic used did include the storage right for surface water, large gardens, or water for livestock up to the grazing capacity of the riparian land. Storage or consumpitve use of water for large gardens or livestock operations are more likely artificial uses in the riparian system of water rights. Hence, after *Franco* it is unclear in Oklahoma whether domestic riparian uses have been acceptably modified by the 1963 statutes to be more expansive than common law domestic riparian uses or whether domestic riparian uses are those traditionally recognized by the common law.

The riparian cases in Oklahoma give some guidance on what will be considered reasonable by the courts. Besides domestic use, these early cases specifically discussed few other uses.[94] However few they may be in number, the uses discussed are important to our analysis.

Because the *Restatement (Second) of Torts* was cited with approval in *Franco*, as well as earlier Oklahoma cases on the subject of riparian rights, it should be referenced to help clarify the likely contours of the concept of reasonableness.[95] The reliance by the *Franco* on section 850A of the *Restatement* reasonably leads to the belief that the court will also rely on section 847 of the *Restatement* in defining the uses of water in Oklahoma. In section 847, the *Restatement* defines the phrase "use of water".[96] This is broken down into two broad categories — direct utilization and uses in place.[97]

As for direct utilization, the *Restatement* comment states that these include withdrawing water for domestic consumption, irrigation, stock watering, commercial or industrial purposes and harnessing the flow of a stream for power.[98] The comment goes on to state that storage of water in a reservoir for future

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91. *Id.*

92. 82 OKLA. STAT. §§ 105.1(B), 105.2(A) (1991). The *Franco* court did not specifically rule that the 1963 statutory definition of domestic uses was unconstitutional.

93. DAVID H. GETCHES, WATER LAW 33 (2nd ed. 1990).

94. Markwardt v. Guthrie, 90 P. 26 (Okla. 1907) (recognizing the following riparian uses: domestic use, access to water for livestock, irrigation for a garden, and fishing); Broady v. Furray, Okla., 21 P.2d 771 (Okla. 1933) (holding that fish hatchery is reasonable use); Smith v. Stanolind Oil & Gas CO., 172 P.2d 1002 (Okla. 1946) (holding that nonriparian use is not per se unreasonable, and acknowledging a riparian's right to increase the number of livestock which will use the water, install pumping facilities for irrigation, and to make any use of the water which will be beneficial to the premises); Baker v. Ellis, 292 P.2d 1037 (Okla. 1956) (stock watering).

95. *Franco*, 855 P.2d at 574 n.25; RESTATEMENT (SECOND) OF TORTS § 850 (1979).

96. RESTATEMENT (SECOND) OF TORTS § 847 (1979). The section provides in part:

> The term "use of water," as used in this Chapter, includes both a direct utilization of the water itself by withdrawal or impoundment and the use and enjoyment of the water in place. It does not include the pollution of water or the utilization of a watercourse or lake to transport or dilute wastes.
>
> Comment:
>
> a. Direct utilization. The phrase "use of water" includes a direct use of streams, lakes, ground water or surface water. Withdrawing water from a surface or underground source for domestic consumption, irrigation, stock watering, commercial or industrial purposes and harnessing the flow of a stream for power are all uses of water. The storage of water in a reservoir for later use for these purposes is also a use of water.
>
> b. Uses in place. Uses of water in place include using the water in a stream or lake for navigation, transportation, fishing, bathing, boating or other commercial and recreational activities and for scenic and aesthetic enjoyment.
>
> c. Pollution. The phrase "use of water" in this Chapter does not include pollution of water as defined in s 832, Comment f. The withdrawal of water from a stream for use in manufacturing processes is a use of water covered by this Chapter but the return of the water to the stream in a polluted condition is not.

Id.

97. *Id.*

98. *Id.*

use in any of the above ways is also a direct utilization.[99] Oklahoma, through judicial decision, has previously recognized several of these direct uses.[100] Under a common law system, the fact that these particular uses were once found reasonable almost assuredly meant that they will again be found reasonable in a given situation.

Two direct utilizations of water — water power and commercial/industrial usage — mentioned in the *Restatement* have not been specifically addressed by prior Oklahoma decisions.

The early Oklahoma opinions make no reference to riparians using the stream for power purposes. By contrast the *Restatement* specifically lists the harnessing of a stream for power. If this is a reference to the use of the stream for mill purposes, it is likely an issue that is somewhat outdated. In the early years of our nation and even into the early years of Oklahoma statehood, the use of water power for mills was quite common. Today, the use of water power for mills on an individual basis is relatively rare. Even if this is a contemplated use of water in this state, the conditions of the stream regarding flow, size, and location must be correct for this to be a viable option.

The other possible use of the stream for water power is for the generation of electricity. The generation of electricity through water power for individual use by riparians on tract is possible. For example, the electricity could be used for domestic use or powering irrigation equipment. Individual riparians will not likely be able to generate electricity for sale, due to the regulation of public utilities. In addition to the conditions of the stream regarding flow, size, and location, the factor of cost will still likely foreclose this as a viable option.

The generation of hydroelectric power by power companies is a possible riparian use.[101] However, they cannot unreasonably store or release water to the detriment of other riparians.[102] Although water is limited with on-tract uses under the reasonableness inquiry, the electricity itself generated by water power can be sold off-tract.[103] Power companies could use this approach in Oklahoma, but there are problems. Under the reasonable use rule of *Franco*, the power companies would have to share with other riparians in times of shortage. Their water supply would also always be subject to the initiation of future uses by other riparians. Due to the uncertainty of the supply, power companies would likely look for another way to obtain water rights such as through condemnation.

The second direct utilization not specifically identified in any of the Oklahoma cases is use of the stream for commercial or industrial purposes. One Oklahoma case allowed the riparian to use the water for a fish hatchery.[104] This is probably the only possible use that Oklahoma has recognized that would qualify under the *Restatement* as a commercial use. Moreover, the Oklahoma Supreme Court has also recognized the right of a riparian to sell water for off-tract use by a commercial enterprise.[105] While commercial uses of water by riparians on-tract will assuredly (in the abstract) be reasonable uses of water after *Franco*, the commercial use of water off-tract may well be highly questionable as a reasonable *riparian* use of water. The *Franco* decision has left the status of off-tract uses of water very uncertain within Oklahoma's version of riparian rights.

The *Restatement* section 847 identifies another category of water uses as "uses in place". These uses include navigation, transportation, fishing, bathing, boating, or other commercial or recreational

99. *Id.*

100. Markwardt v. Guthrie, 90 P. 26 (Okla. 1907) (recognizing the following riparian uses: domestic use, access to water for livestock, irrigation for a garden, and fishing); Broady v. Furray, Okla., 21 P.2d 771 (Okla. 1933) (holding that fish hatchery is reasonable use); Smith v. Stanolind Oil & Gas CO., 172 P.2d 1002 (Okla. 1946) (holding that nonriparian use is not per se unreasonable, and acknowledging a riparian's right to increase the number of livestock which will use the water, install pumping facilities for irrigation, and to make any use of the water which will be beneficial to the premises); Baker v. Ellis, 292 P.2d 1037 (Okla. 1956) (stock watering).

101. GETCHES, *supra* note 93, at 39.

102. *Id.*

103. *Id.*

104. Broady v. Furray, 21 P.2d 771 (Okla. 1933).

105. Smith v. Stanolind Oil & Gas. Co., 172 P.2d 1002 (Okla. 1946).

activities.[106] The *Restatement* also includes scenic or aesthetic enjoyment as a use in place.[107] Oklahoma has only previously recognized fishing as a riparian use listed in this section of the Restatement.[108] Recreational uses and aesthetic uses will likely be the most controversial. Although the *Franco* court expressly stated that it was not determining the reasonableness of any of the uses argued, the opinion did acknowledge the fact that other jurisdictions have found a recreational use to be reasonable.[109] If these instream uses are recognized in Oklahoma, they will present very interesting, difficult problems for valuation in any taking or eminent domain situations.

When the issue in dispute turns from reasonableness in the abstract to reasonableness as a comparison factually between two riparian uses, the *Franco* court listed the factors to be applied in Oklahoma when determining the issue of reasonableness.[110] The court went on to cite section 850A of the *Restatement (Second) of Torts*[111] with approval as an aid in making this factual determination.[112] The comments to the *Restatement* help to explain how these factors are to be applied. The riparian plaintiff in an action must first establish that his use is reasonable. In evaluating the plaintiff's claim that his use is reasonable, *Restatements (Second) of Torts* factors (a) through (d) are employed.[113] These four factors are the primary test of reasonableness. If the plaintiff satisfies these four factors, the defendant must meet the same test

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106. RESTATEMENT (SECOND) OF TORTS § 847 cmt. b (1979).

107. *Id.*

108. Markwardt v. Guthrie, 90 P. 26,(Okla. 1907) (recognizing the following riparian uses: domestic use, access to water for livestock, irrigation for a garden, and fishing); *see also* Broady v. Furray, 21 P.2d 771 (Okla. 1933) (holding fish hatchery, a commercial use, to be a reasonable use). The *Broady* decision might be a good argument for nonconsumptive commercial use of water.

109. *Franco*, 855 P.2d at 578 n.53. In note 53, the court cited five cases where courts in other jurisdictions decided that recreational use was a reasonable riparian use.

110. *Id.* at 576 n.40 ("Reasonableness is a question of fact to be determined by the court on a case-to-case basis. Factors courts consider in determining reasonableness include the size of the stream, custom, climate, season of the year, size of the diversion, place and method of diversion, type of use and its importance to society (beneficial use), needs of other riparians, location of the diversion on the stream, the suitability of the use to the stream, and the fairness of requiring the user causing the harm to bear the loss.").

111. RESTATEMENT (SECOND) OF TORTS § 850A (1979). The section states:

> The determination of the reasonableness of a use of water depends upon a consideration of the interests of the riparian proprietor making the use, of any riparian proprietor harmed by it and of society as a whole. Factors that affect the determination include the following:
>
> (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,land, investments and enterprises and
> (i) the justice of requiring the user causing harm to bear the loss.

Id.

112. *Franco*, 855 P.2d at 576 n.40.

113. RESTATEMENT (SECOND) OF TORTS § 850A cmt. a. The comment states:

> a. Determination of reasonable or unreasonable use. The reasonableness or unreasonableness of a use of water by a riparian proprietor must be determined by a court or jury from a number of points of view and upon the consideration of a number of factors. A conflict arising out of a claim of harm to one riparian proprietor caused by the water use of another proprietor involves an examination of the use or interest alleged to be harmed, the use causing the harm, the effect that the latter has upon the former and the effects upon society, the economy and the environment of making the uses and of resolving the conflict.
>
> In a suit between two riparian users of water the reasonableness of both uses is in issue. The plaintiff, in order to show he has a right that has been violated, must establish that his use of the water is reasonable. (See § 850, Comment c). This will normally call for the application of the first four factors stated in this Section. Clause (a) requires that the use be made for a beneficial purpose; Clause (b) that it be suited to the water source in question. Clauses (c) and (d) require the use to have both economic and social value. If the use serves no beneficial purpose and requires an inordinate amount of water, factors (a) and (b) are not met. If the product of the use has only slight or trifling economic value and the use has destructive or harmful side effects on other persons or the public, factors (b) and (c) are not met.

Id.

for defendant's use.[114] If the defendant's use is found unreasonable, the inquiry stops and plaintiff wins.[115] If the court finds the defendant's use to be reasonable under the first four factors, the court applies the remaining five factors to each use.[116] This is the basic process for determining reasonableness.

After the *Franco* court laid out this basic test for the reasonableness of a riparian use, it held that the rights of the riparian and the appropriator are to be determined by relative reasonableness in situations where surplus water exists.[117] The court adopted this principle from the Nebraska case of *Wasserburger v. Coffee.*[118]

The *Wasserburger* court held that the appropriation is unreasonable unless its utility outweighs the gravity of the harm to the riparian's use.[119] The court listed three factors to determine the utility of the appropriation: the social value which the law attaches to the use for which the appropriation is made; the priority date of the appropriation; and the impracticability of preventing or avoiding the harm.[120] The *Wasserberger* court then listed five factors to be considered in evaluating the gravity of harm to the riparian: the extent of harm involved; the social value which the law attaches to the riparian use; the time of initiation of the riparian use; the suitability of the riparian use to the watercourse; and, the burden on the riparian proprietor of avoiding harm.[121]

In times of shortage, the riparian's right to initiate a reasonable use in the stream prevails over the appropriator.[122] The *Franco* court held that the riparian has a vested interest in the prospective reasonable use of the stream.[123] If a riparian wishes to initiate a reasonable use and sufficient water is not available, the appropriator with the last priority must either release sufficient water into the stream to meet the riparian's use, or the appropriator must stop diverting water from the stream.[124] In light of these holdings of *Franco*, it is clear that the test of relative reasonableness between an appropriator and a riparian in Oklahoma will only come into play where there is adequate (surplus) water for both uses. Thus, the conflict between the appropriator and the riparian is about intereference, not about who gets to use the water itself.

With this information, it is still not possible to predict which riparian uses will be found to be reasonable. Because this is a question of fact, it will vary based on the above factors. A use which may be found reasonable in one situation will be unreasonable when placed in another setting.

3. Riparian Rights or Riparian Land?

The final takings issue is whether riparian rights or riparian land would be the subject of the taking. This issue is also very important to the problem of valuation. To address this issue, one can begin by asking, must riparian land be condemned to acquire the riparian water rights?

In a recent Missouri case, the Missouri Court of Appeals addressed this question as applied to groundwater.[125] The court concluded that the water rights were not severable and that they could not be valued separately from the land for condemnation purposes.[126] In reaching its decision, the Missouri Court of Appeals examined the attributes of groundwater rights in Missouri. The court held that the right

114. *Id.*
115. *Id.*
116. *Id.*
117. *Franco*, 855 P.2d at 578.
118. 141 N.W.2d 738 (Neb. 1966).
119. *Id.* at 745-46.
120. *Id.* at 746.
121. *Id.*
122. *Franco*, 855 P.2d at 582.
123. *Id.*
124. *Id.*
125. City of Blue Springs v. Central Dev. Ass'n, 831 S.W.2d 655 (Mo. Ct. App. 1992).
126. *Id.* at 659-60.

to groundwater in Missouri is a usufructuary right.[127] Moreover, the court applied what it called the "comparative reasonableness rule", derived from the *Restatement (Second) of Torts*, to the dispute.[128]

The *Franco* discussion of the attributes of the riparian right is substantially similar to the Missouri court's analysis of groundwater rights. Therefore, the Missouri case becomes an important persuasive authority for concluding that any condemnation or inverse condemnation to obtain riparian rights in Oklahoma would have to be of the riparian land. Of course, the Missouri case is not binding precedent in Oklahoma and Oklahoma courts could choose to distinguish groundwater rights from surface water riparians rights. Public policy might call for such a distinction particularly when one realizes that when a municipality condemns land over a aquifer much less land would ordinarily be affected than if it had to condemn all of the riparian land along a stream system that arguably would be affected by its diversion.

Unlike the Missouri court, the Supreme Court of Oklahoma might conclude that riparians water rights are severable from riparian lands for the purpose of condemnation. In the *Franco* opinion in response to the argument that the legislation was a reasonable regulation of water rigths, the court wrote: "That contention is inapposite when, as here, the use of stream water is not just restricted but is taken for public use."[129] The court imiplies in this sentence that the taken right is the right to use water (the riparian water right) and not the riparian land itself. To lend further support to this interpetation of the quoted sentence, one should recall that the statute granting municipalities the power to condemn for waterworks grants the power of condemnation both as to land and as to water rights. The statute iteself distinguishes between land and water rights.[130] Considering this authority, the result will likely be that a takings claim in Oklahoma will be for the riparian rights themselves, not for the land to which they are appurtenant.

If riparian water rights are severable for riparian lands in Oklahoma, the following relationship between prior appropriation rights and riparians rights becomes a possibility. If a municipality condemns riparian rights in Oklahoma, the water right it obtains is not a riparian right. The riparian right is simply extinguished. Municipalities cannot be a riparian in Oklahoma by definition. All condemnation does is to stop the owner of the riparian land from ever being able to assert their riparian right. Once condemned, the water returns to the onwnership of the State of Oklahoma and becomes water available for appropriation. In conjunction with or prior to the condemnation proceedings, the municipality has applied to the Oklahoma Water Resources Board for the water rights which will be condemned. The municipality thereby acquires a prior appropriation that is freed from use or possible use under riparian claims without ever owning riparian rights.

Because *Franco* acknowledges a dual system of water rights in Oklahoma, the relationship between the water right condemned and the water right acquired is different in Oklahoma than Missouri. In Missouri, if the municipality condemns water rights in groundwater, the municipality must obtain a right to use groundwater under the comparative reasonableness rule. This is the only rule that applies to groundwater in Missouri. The right to use groundwater is always tied to the land. If Oklahoma had only the riparian rights system, all water rights would be tied to the land. If all water rights were tied to ownership in land, the result obtained in Missouri would be more likely. But Oklahoma recognizes prior appropriation rights in water, which carry the attribute of severability from the land from which the water is acquired.

127. *Id.* at 658.

128. *Id. See generally* Julie J. McNitt, *New Chapter in Missouri Percolating Groundwater Law: The Non-severability of Water Rights From Land*, 50 MO. L. REV. 235 (1994).

129. *Franco*, 855 P.2d at 577.

130. 11 OKLA. STAT. § 37-103 (1991).

C. When Did the Taking Occur?

If a taking of riparian rights did occur, when did the taking occur? Leaving aside the takings issue in the pre-1963 stream adjudications, discussed earlier in this chapter, there are at least three possible dates a taking could have occurred. Before discussing the possible dates of the taking, however, it is important to articulate the three reasons why the time of taking matters.

1. Why the Time of Taking Matters

First, the date of the taking is relevant for determining when the time has expired for bringing the action. While no statutory limitations provision for inverse condemnation exists in Oklahoma, the Oklahoma court of appeals decided that an inverse condemnation action must be brought within fifteen years.[131] The court explained the decision by stating that any shorter period would allow an entity to gain title to property in less that the prescriptive period under Oklahoma law.[132] Even if a taking can be shown to have occurred, if more than fifteen years have passed, the action may be barred.

Second, the date of the taking is important because of economic valuation. The value of what is taken is determined as of the date of the taking.[131] Values change; values have changed considerably since 1963 to the present. The values in 1963 were likely much lower than today. Hence, the date of the taking would likely have a dramatic impact on the size of the compensation award.

The date of the taking may also have implications for the amount of total compensation the taker must pay. Governmental takers must pay interest in inverse condemnation situations. This prejudgment interest is due for the date of the taking to the date of the court's judgement that a taking has occurred.[132] The proper amount for prejudgment interest in an inverse condemnation case is six percent.[133] The accrual of this interest could significantly increase the actual payout of the taking entities under this scenario.

Third, the date of the taking is also relevant in determining who should receive the condemnation compensation. Condemnation proceedings are "proceedings in rem" against the property.[134] The award, when made, belongs to those who had an interest at the time of the taking. Therefore, the owners of riparian property on the date of the taking must be the parties that will be compensated.[135] Practical difficulties do arise depending on this date. If the date of the taking were established as 1963, locating the owners of the property at that time might well prove difficult. Titles will have been transferred and former owners will have moved. Some property owners will have died during this period and their property has been divided between heirs. Finding heirs only complicates the problem of locating those entitled to the condemnation compensation

2. The Possible Dates of the Taking of Riparian Water Rights

a) 1963

The first possible date for the taking is the passage of the 1963 water law amendments. If *Franco* had been litigated as a takings case from its beginning in 1980, those claiming that a taking had occurred would assuredly have claimed 1963 as the date of the taking. Riparian rights to initiate a future use existed before 1963 and the legislature meant to abolished future riparian rights from 1963 forward. Moreover, the *Franco* opinion specifically states that the legislature tried to take riparian water rights for public use in 1963 through the 1963 amendment to title 60, section 60 and title 82, section 1 of the

131. Rummage v. State, 849 P.2d 1109, 1112-13 (Okla. Ct. App. 1993).
132. *Id.* at 1113.
131. 27 OKLA. STAT. § 16 (1991).
132. Carter v. City of Oklahoma City, 862 P.2d 77, 81 (Okla. 1993).
133. *Id.* at 81; *see also* 15 OKLA. STAT. § 266 (1991); State v. Berry, 495 P.2d 401 (Okla. 1972).
134. Grand River Dam Auth. v. Gray, 138 P.2d 100 (Okla. 1938).
135. *Id.*

Oklahoma Statutes.[136] Due to the facts leading up to *Franco* and this language from the opinion itself, 1963 seems, at first glance, to be the date of the taking.

Several factors argue against 1963 being the date of the taking. *Franco* was not decided as a takings case, rather the *Franco* court held the 1963 amendments were unconstitutional.[137] If the 1963 amendments are no longer the law in this state as they relate to the abrogation of riparian rights, any effect the amendments would have to take the rights were voided.

Leaving aside the constitutional status of the 1963 amendments, the court and the riparian claimants might not find the date of 1963 a good choice for the date of the taking. As a practical matter, the riparians are likely to oppose the 1963 date because it has been more than thirty years since the 1963 amendments took effect. This will lead to major statute of limitations problems. Moreover, in light of the *Franco* opinion as readopted and reissued in 1963, it would seem a strange outcome for the Supreme Court of Oklahoma to rule, in additional litigation relating to *Franco*, that the riparians actually lost all the substantive claims granted in the 1990 *Franco* opinion because of tardiness in pressing their taking claims. Even if the Supreme Court were willing to treat the original *Franco* litigation as preserving the takings claim, the original litigation did not begin until 1980. Under the fifteen year statute of limitations for bringing inverse condemnation claims, the year 1980 is already seventeen years after 1963. The Supeme Court of Oklahoma is unlikely to take away with one hand what had shortly before been given with the other.[138]

In addition, riparians might well worry about the practical implications of 1963 as the date of taking upon the issue of valuation and the issue of who has the rightful claim to receive the condemnation award. Hence, riparians can be counted upon in any condemnation proceedings emerging from the Franco situation vigorously to oppose 1963 as the date of taking.

By contrast, the potential defendant takers might well find the 1963 date in their favor: the limitations period of fifteen years would likely foreclose an action; even if the action survived, the valuation at 1963 values would likely be significantly lower; and, defendants would only have to pay riparians with a provable claim who came forward to assert their claim, which undoubtedly will be a lower number in 1993 than would have been true in 1963. On the other hand, if the Franco situation leads to future litigation on the takings issues, the defendant takers may find the attempt to identify and notify the proper persons in the litigation too costly and difficult if 1963 were the relevant date. Moreover, if 1963 were the relevant date, defendant takers must take into account the interest that would to be owed on the value of the property taken from the date of taking to the date of the court's judgement.

b) At the Time of the Initiation of Use

The second possible date for the taking is the time of actual initiation of use by prior appropriators for prior appropriative rights either confirmed or granted in accordance with Oklahoma's water law after the 1963 amendments.[139]

The initiation of use argument would say that, although prior appropriators gained the authority to claim Oklahoma's water in 1963, prior appropriators did not actually take riparian water rights until riparians were physically deprived of water. In most condemnation actions, the condemnor physically takes possession of the property. Condemnors would physically take possession of riparian water when they divert the water from the stream and consume it under a prior appropriation permit from the Oklahoma Water Resources Board. Obviously, the date of taking would thus vary for each prior appropriator and each riparian's claim.

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136. *Franco*, 855 P.2d at 577.

137. *Id.*

138. If the Supreme Court of Oklahoma were willing to rule against riparians on the statute of limitations as a takings defense by the state, the supreme court would be wiser to uphold the 1963 amendments as constititutional, declare that riparians rights were abolished in 1963, and reconfirme that prior appropriation rights granted by the Oklahoma Water Resources Board since 1963 are valid, legal, stable water rig .ts.

139. For prior appropriators who claim prior appropriations under pre-1963 adjudications, Part II(A)(4) of this chapter discusses the date of taking issue for these adjudications.

Adoption of the date of intiation of use which physically deprives riparian's of their water as the appropriate date for the taking carries several implications. If surplus water exists in a particular stream, the prior appropriator has not physically taken any riparian's water and hence no taking, as of yet at least, has occurred. No taking could occur until the demand for water on a particular stream exceeds the supply of water within the stream. If a particular application for a prior appropriation in the future would deprive a riparian of water by exceeding the supply, it may well be that part of the application process before the Oklahoma Water Resources Board would be equivalent to a condemnation proceeding of riparian rights. For post-1963 prior appropriations that have already taken water from riparians, the precise date of the initiation would be important in deciding questions about the limitations period, the valuation date, the amount of total compensation owed, and the names of the persons entitled to the compenstion award.

c) 1993

The third possible date for the taking is the effective date of the 1993 legislative response to *Franco*. The interplay between the actions of the court and the legislature makes this option highly possible. If the April 1993 *Franco* decision nullified the 1963 water law amendments, 1963 cannot be the date of the taking. Between the April decision and the June 1993 legislative action, riparian rights existed in Oklahoma as they had always existed. At this point in time, the modified common law riparian right, as described in *Franco*, existed in Oklahoma as if there had never been any lapse in its recognition. Consequently, when the legislature acted in June 1993 clearly and unequivocally to abolish riparian rights, the legislature took these common law riparian rights as of the date that the legislation became effective.[140] While the language of the 1993 statute purports to extinguish riparian rights from June 10, 1963 forward, the court could ignore this attempt at a retroactive taking. The court could rule that the purported retrocative taking is simply a validation of all prior appropriations under the 1963 water law statutes. With respect to the date of taking, however, the court could hold that the date of the taking of the common law riparian rights is the date of clear, unequivocal abolition of riparian water rights which occurred on the effective date of the 1993 legislation — June 7, 1993.[141]

Adoption of 1993 as the date of the taking solves several problems in the any takings litigation. Limitations issues about when the actions had to be brought disappear. The riparians who are the parties to the condemnaton were the riparian landowners as of 1993. Riparians receive 1993 values for the riparian rights.

Establishing the date of taking at 1993 does provide a litigation approach that does not seem to be an option if 1963 or the date of the initiation of use were adopted as the date of the taking. As will be discussed more fully later in this chapter, the 1993 date might permit the litigation of takings in a class action suit that joins all riparians in the State of Oklahoma.

D. Who Took the Riparian Rights? Identification of Liable Parties

The identification of the taker is also a crucial component of the takings issue. If compensation is owed for a taking, the party owing the payment must be identified. Additionally, riparians will be concerned with the identity of the taker because not all the possible candidates have the same ability to pay. Furthermore, the potential taker must have the power of eminent domain before a reverse condemnation or takings suit can be filed. While title 82, section 105.3 gives any person, corporation, or association the power of eminent domain to acquire rights-of-way for the storage or conveyance of water, this statute does not specifically mention the condemnation of water rights because it contemplates that the water rights will come from the public waters as acquired through the prior appropriation system of water rights. To similar effect in Oklahoma are statutes granting eminent domain power to water-power

140. 82 OKLA. STAT. § 105.1A (Supp. 1994).

141. The *Franco* opinion contains language chastising the legislature for not expressly abolishing riparian rights in the 1963 legislation. *Franco*, 855 P.2d at 577.

companies, and to private persons or corporations for agricultural, mining, and sanitary purposes.[142] Hence, it is unclear whether private parties or private corporations have the power of eminent domain to condemn water rights in Oklahoma.[143] No doubt exists that the state of Oklahoma and municipalities have the power of eminent domain to obtain water rights.[144]

1. The State of Oklahoma as the Taker

The State is a strong candidate for being identified as the taker of riparian rights. Afterall, it can be argued that the action of the legislature, either in 1963 or 1993, extinguished the riparian right to the initiation of future uses of water for riparians lands. Once the legislature abolished future riparian rights, the state acquired the water as public water to be granted to prior appropriators who apply for a water permit from the Oklahoma Water Resources Board. Hence, the state, through the legislature, not only extinguished riparian rights but the state also acquired the former riparian water as part of the public water of the State of Oklahoma. An analogous situation exists with respect to Oklahoma's forfeiture of water rigths statute where after forfeiture, the water goes back to the ownership of the state.[145]

The fact that prior appropriators acquire their water rights from the state's public waters protects them from being identified as the taker of riparian rights. A prior appropriator never gets the riparian right or any attribute of it. All the appropriator gets a water right from the state through a permit process if, and only if, the Oklahoma Water Resources Board determines that unappropriated public water exists in the stream or lake which the applicant proposes as the source of the water. Therefore, the state must be the party who took the riparian right because the riparian rights ceased when it passed into the state's dominion as public water.

2. Prior Appropriators as the Taker

If the taking occurs on the date of the initiation of use, prior appropriators themselves become more likely candidates as the taker of riparian rights. As discussed earlier in this chapter, if the date of the initiation of use by the prior appropriator is the date of the taking, the choice of this date implies that the 1963 or 1993 statutes authorized the extinction of riparian rights but that such extinction does not occur until the riparian suffers a physical taking of water. A physical taking occurs when prior appropriators divert nonsurplus stream or lake water to fill their prior appropriation permit obtained from the state.

However, unless private persons or private corporations have the power of eminent domain, they could not be identified as takers of riparian rights because they would lack the ability to force a riparian to transfer riparian rights to them through condemnation proceedings. Consequently, private parties could acquire a prior appropriation either in circumstances where surplus water exists in the stream identified as the source of the water (but these rights would be subject to divestment to future riparian claims) or when private parties have purchased the extinction of riparian rights as part and parcel of their application process for a prior appropriation permit.

By contrast, municipalities can condemn water rights under the power of eminent domain.[146] Hence, when municipalities seek a prior appropriation from a source which does not have surplus water, the municipality is acquiring a water right to the detriment of riparians. When a municipality acquires water rights from a nonsurplus stream, the municipality must either reach a negotiated sale of the water from riparians or use the power of eminent domain to acquire the riparian rights.

Even if the municipality were seeking a prior appropriation from a stream with surplus water, the muncipality would want to protect this prior appropriation from divestment by riparians initiating reasonable uses of the water in the future. Consequently, municipalities would want to use eminent

142. 27 OKLA. STAT. §§ 4, 6 (1991).

143. *See generally* 1 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 269-83 (1971).

144. Bowles v. Enid, 245 P.2d 730 (1952) (holding that the power of eminent domain exists for city to obtain groundwater rights).

145. 82 OKLA. STAT. § 105.17 (1991).

146. 11 OKLA. STAT. § 37.103 (1991).

domain power to extinguish the riparian right to initiate future uses of water. By eliminating the riparians as future claimants to water, the municipality protects its prior appropriation and secures its municipal water supply.

The difficulty with identifying a municipality as the taker of riparian rights relates to the fact that Oklahoma has had a dual system of water rights. If the municipality only condemns riparian water rights, as opposed to riparian lands, the municipality does not appear to acquire any riparian rights. Condemnation extinguishes the riparian right in water and frees the water for appropriation from public waters. Riparians rights in Oklahoma appear to be either attached to riparian lands or extinguished by condemnation. When it is extinguished, the water goes to the state to be part of the public waters. Municipalities would claim, therefore, that they cannot be identified as the taker of riparian rights because they acquire prior appropriative rights from the public waters of the state.

III. The Valuation Issue

Assuming the Supreme Court of Oklahoma rules that a taking of riparian rights has occurred, the court must determine the legal standards for valuing these taken rights. This question has not previously been faced in Oklahoma.[147] Several valuation methods exist. This chapter will attempt to show the relative strength and weakness of each method.

In Part II(B)(3), this chapter discussed whether what is condemned in Oklahoma would be the riparian land or riparian water rights. As the earlier discussion noted, the most likely outcome in Oklahoma is that the riparian water rights will be severed from the land and extinguished by condemnation. After a taking, riparian rights for that land, which physically abuts the stream or lake, would no longer exist in Oklahoma. This means that water previously put to use under the riparian system would become public waters governed by the prior appropriation system of water rights.

Even if the riparian right is severed, *Franco* defines this right as one in real property.[148] The statute authorizing municipalities to condemn either land or water rights for municipal water supplies provides the same procedures for both condemnations.[149] Taking these two authorities together seems to establish the fact that the Oklahoma law on the condemnation of real property applies.

The standard set by the Oklahoma Constitution is "just compensation."[150] In turn by statute, the Oklahoma legislature has defined "just compensation" to include the value of the property taken, or if only a part of the tract is taken, any injury caused to the part not taken is also included.[151] This statute follows the procedure for evaluation called the "before and after test."[152] In *Oklahoma Turnpike Authority v. Burke*[153] the Supreme Court of Oklahoma recognized that evidence of specific elements that contribute

147. Oklahoma does have two cases which addressed the use of the power of eminent domain to obtain groundwater rights. Neither case expressed any opinion about the standards by which to value the groundwater rights that would be taken. Canada v. City of Shawnee, 64 P.2d 694 (Okla. 1936); Bowles v. City of Enid, 245 P.2d 730 (Okla. 1952).

148. *Franco*, 855 P.2d at 573.

149. 11 OKLA. STAT. § 37.103 (1991).

150. OKLA CONST. art. 2, § 24.

151. 27 OKLA. STAT. § 16 (1991). The section states:

> A. In every case wherein private property is taken or damaged for public use, the person whose property is taken or damaged shall be entitled to just compensation.
>
> B. "Just compensation", as used in subsection A of this section, shall mean the value of the property taken, and in addition, any injury to any part of the property not taken. Any special and direct benefits to the part of the property not taken may be offset only against any injury to the property not taken. If only a part of a tract is taken, just compensation shall be ascertained by determining the difference between the fair market value of the whole tract immediately before the taking and the fair market value of that portion left remaining immediately after the taking.

Id.

152. DONALD G. HAGMAN & JULIAN CONRAD JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 2 .13 (2d ed. 1986).

153. 415 P.2d 1001, 1002 (Okla. 1966).

to the depreciation of the market value may be admitted and that damages should equal the fair market value of the tract before the taking, less the fair market value of the tract after the taking. If the riparian right is a right in real property, this case indicates that the correct mode of valuation is that of the riparian land before the taking, less the value of the land after the taking without riparian rights.

"Market value" or "fair market value" is generally defined as the price which land will bring when both the buyer and seller are willing, but not obligated, to sell after all elements concerning value are duly considered.[154] Substantially similar definitions have been used in Oklahoma, as evidenced by the early case of *Blincoe v. Choctaw, O. & W. R. Co.*[155] In *Blincoe*, the court held that a jury instruction, which included a similar definition of market value and instructed the jury not to consider "boom, speculative or fancy" values, was proper.[156]

As a general rule, a landowner is not entitled to the enhanced value that has been created by government need for his property.[157] In *Eichman v. Oklahoma City*, the city was seeking to condemn the defendant's land for the purposes of a reservoir.[158] At trial, the district court gave an instruction to the jury that damages should not be determined on the basis of use as a reservoir site, unless there was an independent market for the defendant's property as such. In addition, the district court informed the jury they must reasonably believe that the lands needed to create the reservoir site, including the defendant's parcel, could be practicably united to achieve this purpose, without the intervention of eminent domain, for this independent market to exist. The Supreme Court of Oklahoma held that this instruction was proper because in accord with the general rule.[159]

Highest and best use means the property should be valued at the best and most valuable use to which the property is adapted.[160] In *Lloyd v. State*,[161] the defendant's land was being condemned to facilitate the construction of the Broken Arrow Expressway in Tulsa, Oklahoma. The plaintiff presented witnesses who testified that due to the locality of the property in question, current zoning, and their experience with the zoning commission, the value of defendant's property before the taking was primarily for residential purposes. The defendant contended that prior to the condemnation proceeding, the property had value as a commercial site. The court noted that the range of inquiry regarding fair market value rests largely in the discretion of the trial court.[162] The court further stated that in determining market value, not only the uses to which the property has been put by the present owner are to be considered, but also its adaptability to all present or prospective purposes to which it may reasonably be applied.[163]

The concept of the reasonable use comes into the equation at this point. Although the question of which riparian uses are reasonable will be decided on a case-by-case basis as the takings dispute arise, some analysis can be made of how the reasonable use aspect of riparian rights affects valuation. The *Lloyd* cases showed how property is to be valued at the highest use to which it is reasonably suited. The *Lloyd* analysis can be applied to riparian rights through an illustration.

Assume the taking at issue relates to isolated farm land bordering a stream. The likely highest and best use of the land is for agriculture. With this in mind, assume that irrigation is found to be a reasonable prospective use on that stream. The value of the riparian right in this case would likely be the value of the possibility of irrigation — i.e., the value of the land with the future ability to irrigate, less the

154. 29A C.J.S. *Eminent Domain* § 124 (1992).

155. 83 P. 903 (Okla. 1905); *see also* Tulsa v. Creekmore, 29 P.2d 101, 103-04 (Okla. 1934) (holding that fair market value which constitutes the measure of compensation for land condemned for public use means the amount of money which a purchaser willing, but not obliged to buy will pay a seller willing, but not obliged to sell, taking into consideration all uses to which the land is adapted and might in reason be applied).

156. *Blincoe*, 83 P. at 909.

157. United States v. Cors, 337 U.S. 325, 333-34 (1949).

158. 202 P. 184 (Okla. 1921).

159. *Id.* at 186.

160. EDWIN M. RAMS & GEORGE L. SCHULTZ, CONDEMNATION APPRAISAL HANDBOOK 79 (5th ed. 1967).

161. 428 P.2d 216 (Okla. 1967).

162. *Id.* at 263.

163. *Id.* at 265.

value of the land with out that ability. A prospective use for industrial purposes would likely not be found reasonable in this situation due to the inaccessibility of the land to the infrastructure needed for industrial use.

When determining the fair market value of real property, three valuation methods exist: the comparable sales approach, the cost or replacement cost less depreciation approach, and the capitalization of income approach.[164] A recent sale of the subject property itself is the best evidence of market value, if the transaction was at arm's length.[165] Evidence of offers to buy or sell are generally not considered adequate evidence of market value.[166] When evidence of the recent sale of the property is not available, the appraiser has to fall back to the three traditional methods of valuation.

The most preferred method of evaluation of market value is the sales comparison approach.[167] When there are enough sales, there is very little reason to dwell on any of the other approaches.[168] To employ the sales comparison approach, the appraiser must first engage in a detailed market research project.[169] In this stage of the process, the appraiser assembles all of the information available involving recent sales of comparable properties in the area of the subject.[170] Six factors will then be used by the appraiser to determine which of these sales best matches the characteristics of the property being condemned: the time interval between the sale date and the appraisal date, motivation of sale transactions (distressed sales), location (including proximity to roads, schools, etc.), similarity of highest and best use positions (including intensity of utilization of that use), physical similarities and dissimilarities, and economic similarities and dissimilarities.[171]

In the context of valuing riparian rights in Oklahoma, the comparable sales approach has several problems. There are no of comparable sales. The problem is simply that as of this date, there is no active market in riparian rights as they stem from riparian land ownership in Oklahoma. Since 1963 until the *Franco* decision, nobody purchased land thinking they acquired riparian rights because the state statutes said that riparian rights, asided from domestic riparian rights, did not exit.

Moreover, until the reasonable use of riparian rights for a particular tract is defined, the market is unlikely to reflect the correct value that these riparian rights add to the land. Even if reasonable riparian uses could be identified satisfactorily, the problem of finding arm's length transactions will exist. The first lands that are taken will likely not be usable in the valuation of other lands because of the idea that a condemnation or taking is not an arms length sale.

Locality will play some role in determining those uses deemed reasonable. For example, a riparian tract in a rural agricultural area will not likely rise to an industrial use as being the highest and best use for that property. On balance, the sales comparison approach will not likely be a viable alternative in determining market value.

The cost approach is the second traditional method of real estate valuation. This approach attains an estimate of value based on the depreciated reproduction cost of improvements and the market value of the bare land.[172] This may work for improved real estate, but in the valuation of riparian rights, it has virtually no application. The value of the vacant land is based on the comparable sales and involves the same difficulties as discussed in the preceding paragraph. One commentator has suggested a similar approach which would, in the absence of other sources of information, place a value on the water right based on the cost of creating a water supply similar to the water right being valued.[173] This would

164. HAGMAN & JUERGENSMEYER, *supra* note 152, § 20.9.
165. *Id.*
166. *Id.*
167. NATIONAL ASS'N OF INDEP. FEE APPRAISERS, AN INTRODUCTION TO CONDEMNATION APPRAISING app. A, at 9 (1992).
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. John C. Peck & Kent Weatherby, *Condemnation of Water and Water Rights in Kansas*, 42 KAN. L. REV. 827, 863 (1994).
173. Kenneth J. Burke, *Water Rights Valuation and Appraisal*, 37 ROCKY MTN. MIN. L. INST. §§ 24.10[2](e) (1991).

theoretically allow the riparian to replace the water source he has lost. Instead of concentrating on the value of the water right lost, this approach focuses on the cost of returning the riparian to his former position with alternative supplies of water.

Although problematic, another approach would be to use tap fees, system development fees, and related charges to approximate the fair market value of water rights in the area.[174] One problem of this approach is that while it may return the riparian to his former position for the time being, the future remains uncertain. The fees for water taps or other supplies might change in the future. Also, the certainty of his supply might differ from that he enjoyed under his riparian right.

The final traditional method of valuation is the capitalization of income approach. This may be the preferred traditional valuation method for water rights.[175] This method can be used to determine the income potential of the property for use with the appurtenant water rights, less that without the water right, to achieve the gross income.[176] The costs for management, skill, and other expenses are then deducted.[177] At this point in the method, a capitalization rate is developed to arrive at value.[178]

This capitalization of income technique will likely work, at least with consumptive uses. Discounting formulas can be used to arrive at the present value of the future rights. The main problem with this method is its application to nonconsumptive or alternative uses. In *Franco*, the aesthetic, recreational, and "belly cooling" uses, which were remanded for reasonableness, all fall within this category. It is unlikely that these uses could be directly attributable to income. Therefore, in this situation, the income approach falls short of being ideal.

Two alternative, nonmarket valuation techniques exist: inferential valuation and contingent valuation.[179] These techniques will be mentioned here but currently are not an available alternative in Oklahoma. Under Oklahoma law, compensation must be based on market value. Moreover, no other state has adopted either of these two nonmarket valuation techniques as the valuation method in condemnation cases.

The inferential approach uses the data on consumption of market goods to infer the value of non-market goods.[180] For example, the value of a recreational use could be derived from the expenditures by consumers in money and time to enjoy a recreational experience.[181] This analysis may be difficult to apply, and it may still provide problems in finding analogies in the marketplace for some riparian uses.

In contingent valuation, researchers administer questionnaires on values, interactive bidding, or the creation of temporary or experimental markets to elicit values.[182] The idea is to create a hypothetical situation in which individuals reveal the values they place on the resources to be valued.[183] Contingent valuation has been used in environmental litigation to evaluate instream recreational opportunities.[184]

IV. Possible Scenario for Resolution Through Class Action

As discussed throughout this chapter, many variables will come into play in determining if in fact riparian rights were taken and, if they were, how they are to be valued. Although many scenarios could play out through these variables, this chapter will present one possible scenario. To develop the scenario, several assumptions must be made explicit.

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174. *Id.* § 24.10[3](a).
175. John C. Peck & Kent Weatherby, *Condemnation of Water and Water Rights in Kansas*, 42 KAN. L. REV. 827, 865 (1994).
176. *Id.*
177. *Id.*
178. *Id.*
179. Bonnie G. Colby, *Estimating the Value of Water in Alternative Uses*, 29 NAT. RESOURCES J. 511, 514 (1989).
180. *Id.*
181. *Id.*
182. *Id.* at 514-15.
183. *Id.*
184. *Id.*

Asume that the court finds that the State of Oklahoma is the party who has taken the riparian rights. Assume the date of the taking to be 1993. With these three assumption, the best scenario exists for a class action to resolve the takings and valuation issues discussed in this chpater.

If riparians were to initiate a class action suit for the taking of riparian rights, the Oklahoma court would have to decide the following factual issues. The court must determine the scope of riparian rights on every stream system in the state, an admittedly formidable task. The court must also determine the extent of riparian land on each stream system being deprived of riparian rights through the class action. The court must ascertain the total average annual stream flow for each stream system. Determining the scope of riparian rights, the extent of riparian lands, and the annual flows of each stream is necessary before the court can determine what riparian rights the class action will extinguish. Once the rights have been defined, the court can finally address the valuation issue.

Note that the class action envisioned is a stream-by-stream class action. Riparian rights are relative rights based upon the reasonable use of the riparian as it relates to the reasonable uses of other riparians. Riparians can also initiate a future reasonable use at any time. The riparian right fluctuates in amount based upon the reasonableness of the use, the impact upon the uses of other riparians, and the total amount of water available at any given time. In light of these attributes, the class action must determine the rights of all riparians on the stream system at one time. If this is not done, the use of water by any riparians whose rights are not determined could increase and change in their effect upon other riparian rights, as well as the effect of other riparian rights on them. This is due to the nature of the riparian right being unlimited in quantity or quality by law. The only limits are based upon the physical capabilities of the stream system itself and the reasonableness of the right compared to other riparian rights.

The court's goal will be to resolve this situation in a manner that is fair and equitable to all riparians on the stream. Hopefully, this can be done using the following procedures. First, court should divide the average annual flow of the stream system by the total amount of riparian land in that stream system.[185] By this division, the court gives an equitable portion of the stream to each particular riparian tract for one year.

The court could now value the water supply for one year based upon the cost of obtaining the water from another source. By so doing, the court would reach a specific dollar amount.[186]

The riparian right is a continuing right for the riparian land so long a the land retains its riparian character. The previous calculations give the value of the right for this year. What about the value of the right for future years? To determine this the court could apply present value formulas based on the time value of money. The value of the right for future years will be discounted at an appropriate interest rate to determine the value in today's dollars. The court must choose an appropriate period of time for the discounting, possibly a period of time until the value of the future right becomes de minimis.[187] By using this discounting method, the court calculates a lump sum figure for the value of the riparian rights for a particular tract of riparian land.

This is one suggestion of how a class action suit could be used in the takings litigation for riparian rights. It is not perfect by any means. However, the strong point of this approach is that it makes the valuation of the riparian right much easier than using Oklahoma's traditional approaches to valuation of real property in inverse condemnation. This approach would also treat all riparians on a given stream system fairly, based upon their proportional ownership of riparian land and the physical limits of the stream system at issue.

185. Assume that the average annual flow for the stream system is 100 acre feet per year. Further assume that there is a total of fifty acres of riparian land on this stream system. Dividing the average annual flow by the total acreage renders a figure of two acre feet of water per year per acre. Suppose Riparian *A* owns ten acres of riparian land. If every riparian were to use the maximum amount of water available, Riparian *A* would receive twenty acre feet of water in one year.

186. Using the hypothetical facts in the previous footnote, assume the court values the twenty acre feet for one year at $1000.

187. For example, the value of the right for the present year may be $1000. The discounted value of the right for next year will be a lesser figure, perhaps $950. The court would keep discouting the value until a de minimus amount was reached.

The class action suggested for the determination of the taking and valuation of riparian rights in Oklahoma resembles the general adjudications presently occurring in prior appropriation states. If the outcome of *Franco* were a class action to determine all water rights on a stream system, the *Franco* court would have succeeding in forcing the State of Oklahoma to do what the court has desired in the area of water rights for a long, long time.[188]

V. Conclusion

The *Franco* decision has had a dramatic effect on the face of Oklahoma water law. This chapter has attempted to discuss the various issues involved in an argument for the taking of water rights, primarily riparian rights. Because the *Franco* litigation does not involve a takings claim, nor need its future mutations involve a takings claim, the chapter is completely speculative. Yet, by engaging in this speculation about the takings and valuations issues *Franco* possibly could raise, the chapter hopefully makes those who must think about, administer, and operate within the present parameters of Oklahoma water law more insightful concerning the contours of *Franco* itself and the choices *Franco* offers to those who will mold Oklahoma water law of the future.

188. *See* Gates v. Settler's Milling, Canal & Reservoir Co., 91 P. 856 (Okla. 1907); Gay v. Hicks, 124 P. 1007 (Okla. 1912); Owens v. Snider, 153 P. 883 (Okla. 1915).

Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board: An Examination of Its Potential Impact upon Oklahoma Groundwater Law

J. Matthew Thompson

Table of Contents

I. Introduction

There are two distinct bodies of law which control the use of water in Oklahoma. One statutory scheme regulates groundwater;[1] the other manages surface water use.[2] Attempting to govern the two types of water under these distinct bodies of law has lead to uncertain and inconsistent legal claims among groundwater users and users of stream water. The Oklahoma Supreme Court has attempted to preserve the two statutory schemes by deciding disputes on a case-by-case basis. Consequently, there is a confusing body of case law governing the use and management of surface water and groundwater. In 1993, the Oklahoma Supreme Court decided *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board*,[3] in which the court held unconstitutional part of the statutory provisions relating to stream water use.[4] Implicitly, *Franco* questioned the constitutional validity of Oklahoma's groundwater scheme as well, thus exacerbating the unpredictability of water rights in Oklahoma.

This discussion begins with a brief overview of basic hydrology principles and concepts. Next, the early development of groundwater law in Oklahoma will be explored. This will be followed by an analysis of the 1972 Oklahoma Ground Water Law. Finally, *Franco* and its effect on the current state of both groundwater law and stream water law in Oklahoma will be examined. The analysis will illustrate the inherent problems associated with attempting to manage water under two distinct bodies of law.

II. Hydrology

1. 82 OKLA. STAT. §§ 1020.1-1020.22 (1991 & Supp. 1994).
2. 82 OKLA. STAT. §§ 105.1-.33 (1991 & Supp. 1994).
3. 58 OKLA. B.J. 1406 (May 19, 1987), *withdrawn and substituted*, 855 P.2d 568 (Okla. 1990), *reh'g denied, opinion readopted and reissued*, 1993 Okla. LEXIS 51.
4. *Franco*, 855 P.2d at 577.

II. Hydrology

Early common law pertaining to underground water found its roots in the nineteenth-century courts of England[5] and the United States.[6] Yet, early judicial decisions from both of these jurisdictions lacked consistency, due to a general lack of understanding of hydrogeology and hydraulics.[7] In the United States, the courts in many jurisdictions believed that the early Anglo-American common law decisions reflected rules of property.[8] Consequently, many judges were reluctant to adapt their judicial decisions to a growing scientific knowledge of groundwater.[9] Yet, today, a basic knowledge of hydrology informs both judges and legislators in their decisions concerning groundwater.[10] Before discussing the statutory development of groundwater law in Oklahoma, it is necessary to provide a cursory hydrological discussion of groundwater.

Both the laws of physics and local geological conditions govern the occurrence and movement of groundwater.[11] Generally, groundwater can be found either in an underground stream or stored in the pores, or interstices, of rock formations.[12] This latter type of water is known as "percolating water."[13] "Porosity" refers to the amount of open space within rock and is defined as the percentage of the rock's total volume occupied by pore space.[14] Generally, the greater the porosity, the more water the rock can store.[15] "Permeability" refers to the ease with which water can move through a porous rock.[16] Permeability varies from one rock formation to another. The speed at which water moves through a formation is largely a function of gravity and the permeability of the rock.[17] Yet, while gravity may tend to pull groundwater downhill, "molecular attraction" tends to hold the water on the surface of each rock particle.[18] Thus, the water movement is slowed by this countervailing force.

Groundwater stored in permeable rock formations is surrounded by impermeable rock, thus preventing the water from escaping.[19] The underground rock strata may be divided into the zone of aeration,[20] which is closest to the surface, and the zone of saturation.[21] Water in the zone of aeration helps hydrate root systems.[22] However, water cannot be easily pumped from this zone because of molecular attraction.[23] Beneath the zone of aeration is the saturation zone, where water fills the rock's pores.[24] The boundary between the aeration zone and saturation zone is the water table.[25] Finally, beneath the zone of saturation lies bedrock which, because of its low porosity, confines the water in the saturated zone.[26]

Most modern economic, political, and legal attention vis-à-vis groundwater revolves around the use and replenishment of "aquifers." An aquifer is a water-bearing reservoir capable of yielding water in significant

5. Acton v. Blundell, 12 Mees. & W. 324, 152 Eng. Rep. 1223 (Ex. Cham. 1843).
6. Greenleaf v. Francis, 35 Mass. (18 Pick.) 117 (1836).
7. EARL FINBAR MURPHY & C. WILLIAM O'NEILL, *Geology and Hydrology, in* WATERS AND WATER RIGHTS 3 (Robert E. Beck ed., 1991).
8. *Id.*
9. *Id.*
10. *Id.*
11. DAVID H. GETCHES, WATER LAW IN A NUTSHELL 236 (2d ed. 1990).
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. FLETCHER G. DRISCOLL, GROUNDWATER AND WELLS 26 (Fletcher G. Driscoll ed., 2d ed. 1986).
17. MURPHY & O'NEILL, *supra* note 7, at 9.
18. DRISCOLL, *supra* 16, at 60.
19. GETCHES, *supra* note 11, at 237.
20. The "aeration zone" is also referred to as the "soil zone" or the "unsaturated zone." MURPHY & O'NEILL, *supra* note 7, at 11.
21. *Id.*
22. *Id.*
23. *Id.*
24. MURPHY & O'NEILL, *supra* note 7, at 7.
25. *Id.*
26. GETCHES, *supra* note 11, at 238.

quantities.[27] There are two types of aquifers: confined and unconfined.[28] In confined aquifers, also referred to as artesian aquifers, tremendous pressure is produced by impermeable rock formations which squeeze the water from both beneath and above the aquifer.[29] If this pressure is great enough, water may be extracted at the surface without pumping.[30] Note, however, that so long as there is sufficient pressure to raise the water level in the aquifer above the water table, the aquifer will be artesian.[31] For example, part of the aquifer may rise above the point where a surface well or spring is located.[32] Thus, gravity creates sufficient pressure to cause the water in the aquifer to rise to the surface.[33]

Unconfined aquifers lack the natural internal pressure necessary to force the water to the surface.[34] Thus, pumping is necessary to withdraw the water. An unconfined aquifer may also be "perched." A perched aquifer is underlain by an impervious stratum which prevents the water from percolating downward.[35] The impermeable rock is perched above another aquifer in the zone of aeration.[36]

Groundwater is part of the earth's "hydrologic cycle."[37] The components of the cycle include liquid water, water vapor, and water confined in glaciers.[38] The following provides a basic overview of the hydrologic cycle:

> The hydrologic cycle is the term given to the endless circulation of water in the atmosphere. Assume the cycle begins with the oceans, lakes and ponds. Heat from the sun causes moisture to evaporate and rise into the atmosphere. As the water vapor rises it cools and a portion eventually condenses into clouds. The clouds release their moisture as precipitation under proper atmospheric conditions. When this precipitation falls to the ground, it either runs off to rivers and streams, is collected in ponds and lakes, or seeps into the earth under the pull of gravity. Water in the rivers, streams, oceans, lakes, and ponds evaporates and begins the cycle again.[39]

Because water moves continuously through the hydrologic cycle, it is sometimes difficult to distinguish between the saturated zone, zone of aeration, and surface water. All three zones are interconnected. Thus, an aquifer may be isolated, or it could be hydraulically interconnected to another aquifer to form a groundwater basin.[40] Also, an aquifer may be connected to a surface stream to form a tributary to the stream.[41] It is essential to recognize that groundwater does not exist in isolation from other types of water in the hydrologic cycle. The consequences of such a misperception are discussed below in section IV.

III. Early Groundwater Law In Oklahoma

The nascence of groundwater law in Oklahoma dates back to the first session of the territorial legislature, which adopted the original version of what is now title 60, section 60 of the Oklahoma Statutes.[42]

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27. DRISCOLL, *supra* note 16, at 19.
28. MURPHY & O'NEILL, *supra* note 7, at 8.
29. GETCHES, *supra* note 11, at 238.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. MURPHY & O'NEILL, *supra* note 7, at 8.
35. GETCHES, *supra* note 11, at 239.
36. *Id.*
37. MURPHY & O'NEILL, *supra* note 7, at 9.
38. *Id.*
39. ROBERT H. ANDERSON, *Oklahoma's 1973 Groundwater Law: A Short History*, 43 OKLA. L. REV. 1, 7-8 (1990).
40. GETCHES, *supra* note 11, at 240.
41. *Id.*
42. Joseph R. Rarick, *Oklahoma Water Law, Ground or Percolating in the Pre-1971 Period*, 24 OKLA. L. REV. 403, 403 (1971) [hereinafter Rarick, *Pre-1971 Period*]. The legislation was originally adopted by TERR. OKLA. STAT. § 4162 (1890). Today, the statute is found at 60 OKLA.

The statute declared, "The owner of land owns water standing . . . or flowing under its surface, but not forming a definite stream."[43] This statutory language reflected the English common law rule of "absolute ownership,"[44] which gave the landowner an unqualified right to use groundwater, even to the detriment of his neighbor.[45] Thus, if a landowner who withdraws groundwater on his land causes an adjoining landowner's well to go dry because of a decreased water level in the aquifer, the aggrieved landowner has no legal remedy. The injury suffered by the adjoining landowner is considered to be *damnum absque injuria*.[46] This statute and its interpretative case law exclusively governed the use of groundwater in Oklahoma prior to 1949.[47]

The Oklahoma Supreme Court first considered the language of this statute in *Canada v. City of Shawnee*.[48] In *Canada*, the City of Shawnee purchased seventy acres of land about eight miles from the city. The city dug twelve wells on the land and withdrew large amounts of water, which was then transported to the city and sold there to its citizens as part of the city's water supply. Subsequent to the drilling of the wells, several adjoining landowners' wells went dry. These landowners brought an action seeking to enjoin the city from pumping its wells.

While title 60, section 60 appears to adopt the absolute ownership rule, the supreme court rejected this interpretation in favor of the "reasonable use" rule.[49] The "reasonable use" rule restricts each landowner to a "reasonable exercise of his own rights and a reasonable use of his own property, in view of similar rights of others."[50] Thus, the landowner is required to use the water on the overlying tract of land in a reasonable fashion. However, the court seemed to equate the rule of reasonable use with the "correlative rights doctrine."[51] Such a comparison is misplaced, as the two doctrines differ markedly from each other.

The reasonable use rule, or American rule,[52] focuses on how and where a landowner uses groundwater.[53] The landowner may use the water for any reasonable purpose, although the use may interfere with the underground water of a neighboring landowner. Nevertheless, withdrawing groundwater for the purpose of sale or use away from the overlying land is considered unreasonable per se and is therefore prohibited.[54]

The correlative rights doctrine also demands that each landowner use groundwater in a reasonable fashion.[55] However, this doctrine does not prohibit a landowner from using or selling surplus groundwater off the land.[56] Also, where the reasonable use rule allows a landowner to take as much water as is reasonably necessary during a time of shortage, the correlative rights doctrine requires that the water be equally apportioned among the effected landowners.[57]

While the court appeared to adopt the reasonable use rule, it did not strictly adhere to the principles contained in the rule. Specifically, the city withdrew water from its land and then transported it away from the land in order to sell it to its citizens. The reasonable use rule prohibits the pumping of water for export

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STAT. § 60 (1991) and reads: "The owner of the land owns water standing thereon, or flowing over or under its surface but not forming a definite stream. The use of groundwater shall be governed by the Oklahoma Groundwater Law." *Id.*

43. TERR. OKLA. STAT. § 4162 (1890).

44. The English courts first enunciated this rule in Acton v. Blundell, 12 Mees & W. 324, 152 Eng. Rep. 1223 (Ex. Cham. 1843).

45. ANDERSON, *supra* note 39, at 2.

46. CLYDE O. MARTZ, *The Law of Underground Waters*, 11 OKLA. L. REV. 26, 29 (1958). Read literally, *damnum absque injuria* means "harm without injury." BLACK'S LAW DICTIONARY 273 (6th ed. 1991).

47. In 1949, Oklahoma adopted the Oklahoma Ground Water Law which is discussed in Section IV, *infra*.

48. 64 P.2d 694 (Okla. 1936).

49. *Id.* at 696.

50. *Id.*

51. *Id.* The court stated, "At an early day, however, the courts expressed dissatisfaction with the common-law or English rule, and began applying what they called, variously, the rule of 'reasonable use' or rule of 'correlative rights' or the 'American rule.'" *Id.*

52. ANDERSON, *supra* note 39, at 2.

53. *Id.*

54. *Canada*, 64 P.2d at 697.

55. Rarick, *Pre-1971 Period*, *supra* note 42, at 410.

56. ANDERSON, *supra* note 39, at 3.

57. Rarick, *Pre-1971 Period*, *supra* note 42, at 410.

off of the land; such use is per se unreasonable. Yet, the court condoned the actions of the City of Shawnee under the rubric of the reasonable use rule.

The Oklahoma Supreme Court again addressed Oklahoma's rule concerning groundwater use in *Bowles v. City of Enid*.[58] The principal issue in *Bowles* was whether Oklahoma's adoption of the 1949 Oklahoma Ground Water Law, discussed *infra* Section IV, repealed the authority of municipalities to acquire groundwater rights by eminent domain.[59] In *Bowles*, the City of Enid located a water well site nineteen miles from the city. It laid pipeline to the site so that it could transport water back to its citizens, thus augmenting the municipal water supply. When dispute arose between the owner of the well-site land and the city, the city invoked the power of eminent domain to acquire the land upon which the water well had been drilled.

Holding that the adoption of the Oklahoma Ground Water Law did not preclude a city's use of eminent domain, the court devoted a significant part of its opinion to a discussion of *Canada* and what the *Canada* opinion held. While the language of *Bowles* shows confusion between the correlative rights rule and the reasonable use rule,[60] sholarly opinion has consistently held that the court did, in fact, adopt the reasonable use rule for groundwater in *Canada*[61] and that *Bowles* merely affirmed this adoption.

One final issue regarding the early development of groundwater law concerned the measure of damages for injury to a landowner's supply of groundwater. The court initially addressed this issue in *City of Stillwater v. Cundiff*.[62] In *Cundiff*, the City of Stillwater drilled six wells adjacent to the plaintiff's land in order to withdraw water to sale to its citizens. The plaintiff asserted that these wells had depleted his groundwater supply. Holding that the plaintiff had been injured, the court stated in the second paragraph of the syllabus, "The proper measure of damages for permanent injury to real property is the difference in the market value of the property immediately before and immediately after the injury, which difference in value is attributable to said injury."[63]

Subsequently, in *City of Enid v. Crow*,[64] the Oklahoma Supreme Court again considered the measure of damages for injury to a landowner's groundwater supply. In *Crow*, the City of Enid drilled a well adjacent to the plaintiff's land in order to transport the water to its municipal supply system for sale to its citizens. Finding that the city violated the reasonable use rule, the court set the measure of damages as the difference in value of the plaintiff's land before and after the groundwater was depleted.[65]

Note that when the court decided *Crow*, Oklahoma had adopted the 1949 Oklahoma Ground Water Law, discussed *infra* Section IV. However, the newly promulgated law provided no guidance for the court, as the provisions failed to address the issue of damages for a plaintiff whose use was interfered with by another user.[66] Thus, the court deferred to common law for the appropriate measure of damages.

IV. The Oklahoma Ground Water Law

In 1949, the Oklahoma legislature passed the state's first Oklahoma Ground Water Law (the Law).[67] The policy underlying the Law focused on conserving the state's groundwater resources.[68] The statutory

58. 245 P.2d 730 (Okla. 1952).

59. *Id.* at 734.

60. For example, at one point in the opinion the court states, "We adopted the rule as expressed by a majority of the courts that each owner or appropriator of the underground water must so use it as not to destroy correlative rights vested in other owners or users thereof. *Bowles*, 245 P.2d at 413. Still later in the opinion the court comments that, "The principle of correlative rights in rivers and streams has been uniformly applied and we perceive no reason why the rule cannot be equally applied to ground water. Public policy and a due regard for the general welfare argue strongly in support of the rule. *Id.* at 414.

61. Rarick, *Pre-1971 Period*, *supra* note 42, at 415; MARTZ, *supra* note 46, at 30.

62. 87 P.2d 947 (Okla. 1939).

63. *Id.* at 947.

64. 316 P.2d 834 (Okla. 1957).

65. *Id.* at 839.

66. 82 OKLA. STAT. §§ 1001-1019 (1951).

67. 1949 Sess. Laws of Okla. ch. 11, at 641-46. It was originally codified in 82 OKLA. STAT. §§ 1001-1019 (1951).

68. 82 OKLA. STAT. §§ 1003 (1951).

scheme defined groundwater as "water under the surface of the earth regardless of its geologic structure in which it is standing or moving; it does not include water flowing in underground streams with ascertainable beds and banks."[69]

Because the Law adopted a prior appropriation scheme, priority of right to use groundwater depended upon priority in time.[70] Those who were using groundwater before the effective date of the Law based their claim for the water on the date when they first put the water to beneficial use.[71] All others established priority by filing an application with the Oklahoma Planning and Resources Board (the Board).[72]

The Law provided for adjudicative suits to determine existing rights of use of groundwater from a particular basin.[73] In these suits, the Board was required to enter a decree establishing "the area, safe yield and annual recharge of the ground water basin" as well as the priority and amount of each claim.[74] If the Board had not adjudicated a particular basin, an applicant still needed to file a proper application with the Board.[75] If the Board found the application to be satisfactory, it filed the application and notified the applicant of the filing.[76] The applicant then received an appropriation for the amount requested and had two years to put the water to beneficial use.[77]

However, if there had been an adjudication of existing rights in a groundwater basin, the remaining groundwater subject to appropriation, if any, could be taken only after obtaining a license form the Board.[78] The license required the holder to put the specified amount of water to a beneficial use within two years from the time the license was granted.[79] If the license holder used less than the amount of water permitted by the license after two years, then the license was effective only for that amount used within the two-year window.[80]

In general , the Law was designed to limit the withdrawal of groundwater from any particular basin to the "safe annual yield" as measured by the basin's average annual recharge.[81] Groundwater would be allocated to overlying landowners and lessees based on a priority of appropriation.[82] However, the Board failed to administer the act according to the statutory provisions. Rather, for those basins which had not been adjudicated, the Board as a matter of unwritten practice limited any applicant's withdrawal of groundwater to two "acre feet"[83] per acre of land overlying the basin.[84] Yet the Law did not prescribe this power to the

69. *Id.* § 1002. This definition of groundwater is consistent with 60 OKLA. STAT. § 60 (1951), which reads, "The owner of land owns water standing . . . or flowing under its surface, but not forming a definite stream." Both definitions include the same types of groundwater.

70. 82 OKLA. STAT. § 1005 (1951).

71. *Id.*

72. *Id.*

73. 82 OKLA. STAT. §§ 1008-1012 (1961). These adjudications contrast sharply with adjudications of stream water use. Under the original statutory framework governing stream water use, only four adjudications were ever completed. *See* 82 OKLA. STAT. §§ 1-35 (1951) (containing provisions governing stream water use). Professor Rarick suggests that the very few number of adjudications reflect the fact that only parties with the tremendous resources of a city could afford a hydrographic survey and the subsequent adjudication. Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface in the Pre-1963 Period*, 22 OKLA. L. REV. 1, 38 (1969).

74. 82 OKLA. STAT. § 1010 (1951).

75. *Id.* § 1006.

76. *Id.*

77. *Id.*

78. 82 OKLA. STAT. § 1013 (1951).

79. *Id.*

80. *Id.*

81. Rarick, *Pre-1971 Period*, *supra* note 42, at 420.

82. *Id.* at 421.

83. One acre foot of water is that amount of water necessary to cover one acre of land with one foot of water. An acre foot of water is equivalent to 325,850 gallons of water. Oklahoma Water Resources Bd. v. Texas County, 711 P.2d 38, 62 (Okla. 1984).

84. Rarick, *Pre-1971 Period*, *supra* note 42, at 421. Most of the parties seeking permits during this time intended to use the groundwater for irrigation purposes. It was the consensus at the Board that two acre-feet per acre of land was a sufficient amount of water to fulfill the applicants' needs. Telephone Interview with Dean A. Couch, General Council, Oklahoma Water Resources Board.

Board.[85] Consequently, the Board transformed the Law from a system of prior appropriation to one of allocation based on the amount of overlying acreage.[86]

The Law was amended in 1961, 1965, and 1967. For purposes of this discussion, the 1967 amendments proved to be the most relevant. Specifically, the 1967 amendments made fundamental changes to the definition of groundwater in the Law. Prior to the amendments, groundwater was defined as "water under the surface of the earth regardless of the geologic structure in which it is standing or moving; *it does not include water flowing in underground streams with ascertainable beds and banks.*"[87] However, under the 1967 amendments, the italicized language was omitted.[88]

The impact of this change is enormous and can be illustrated by comparing the amended provision with title 60, section 60 of the Oklahoma Statutes, which was also amended in 1963.[89] In its amended form, this latter statutory provision provides:

> The owner of the land owns water standing thereon, or flowing over or under its surface but not forming a definite stream. The use of ground water shall be governed by the Oklahoma Ground Water Law. *Water running in a definite stream, formed by nature over or under the surface, may be used by him* for domestic purposes as defined in Section 2(a) of this Act, ...[90]

The comparison of these two statutes illustrates an intractable conflict between what constitutes stream or surface water and what constitutes groundwater. Specifically, under the amended definition of groundwater in title 82, section 1002, large amounts of water once subject to appropriation as stream water now constituted groundwater available only to overlying landowners.[91] For example, water flowing in the alluvium which once constituted stream water under title 60, section 60, now belonged to the overlying landowner as groundwater.[92] Aside from the constitutional implications of such a change, the alteration in language created a manifest conflict between title 82, section 1002, and title 60, section 60. While the definition of groundwater under title 82, section 1002 encompassed alluvial water, alluvial water was also available for public appropriation as stream water under title 60, section 60. The implications of this conflict are explored below.

In 1972, the Oklahoma legislature recodified the Oklahoma Ground Water Law.[93] This new Law repealed the original 1949 Oklahoma Ground Water Law as well as the subsequent amendments discussed above.[94] There were two significant aspects about the new 1972 Law.

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85. *Id.*

86. *Id.*

87. 82 OKLA. STAT. § 1002 (1961) (emphasis added).

88. *Id.* Professor Rarick suggests that the reason for the deletion in the statutory language stemmed from concerns of the Board personnel and the agricultural interests. The Board personnel sought administrative convenience and did not want to be faced with the task of categorizing water either as groundwater which was "flowing in a definite stream with ascertainable beds and banks", or as stream water. The agricultural interests wanted to enhance their status as landowners by subjecting water in underground streams to groundwater law instead of surface stream water law. Thus, after the statute was amended, only the landowner or lessee could withdraw groundwater in underground streams. JOSEPH F. RARICK, *Oklahoma Water Law, Stream and Surface Under the 1963 Amendments*, 23 OKLA. L. REV. 19, 35-36 (1970) [hereinafter Rarick, *1963 Amendments*].

89. 60 OKLA. STAT. § 60 (Supp. 1969). As Professor Rarick notes, the Oklahoma Legislature amended this provision to curtail the riparian right from the privilege of taking a reasonable amount of water to a more limited privilege of taking stream water for domestic uses only. Thus, the Legislature added the following language to make this distinction: ". . . may be used by him for domestic purposes as defined in Section 2(a) of this Act, ..." Rarick, *1963 Amendments*, *supra* note 88, at 26.

90. 60 OKLA. STAT. § 60 (1971) (emphasis added).

91. Rarick, *Pre-1971 Period*, *supra* note 42, at 424.

92. *Id.*

93. 82 OKLA. STAT. §§ 1020.1-.20 (1972) (effective July 1, 1973). Today, the Oklahoma Groundwater Law is codified in 82 OKLA. STAT. §§ 1020.1-.22 (1991 & Supp. 1994).

94. 82 OKLA. STAT. §§ 1020.1-.20 (1972).

First, under the new scheme, groundwater is now allocated to an overlying landowner based on a maximum annual yield of groundwater from the basin.[95] The maximum annual yield is measured in acre feet for each acre of land overlying the basin and calculated on a basin depletion rate of twenty years.[96] Consequently, the new system is based on a policy of utilization and depletion, as opposed to the previous 1949 groundwater policy of conservation.[97] The Board is to determine the maximum annual yield of particular groundwater basins based on hydrologic surveys.[98] Any landowner who intends to use groundwater must apply to the Board for a permit.[99] If a hydrologic survey has been completed on the basin in question, a regular permit may be issued.[100] If a survey has not been completed, the Board may issue a temporary permit until the survey is performed or completed.[101] While at first glance this allocation system appears to deviate from the prior appropriation scheme under Oklahoma's previous groundwater law, this "new" system merely codifies the manner in which the Board had apportioned groundwater since 1949.[102]

The second important aspect of the new statutory scheme concerns the Law's definition of groundwater. While the 1972 Law repealed the 1949 Law and its subsequent amendments, the 1972 Law in essence adopted the 1967 amended definition of groundwater. Under the new Law, section 1020.1 states: "'Ground Water' means fresh water under the surface of the earth regardless of the geologic structure in which it is standing or moving outside the cut bank of any definite stream."[103] Once again, this definition encompasses alluvial water which, prior to 1967, constituted stream water subject to appropriation under title 60, section 60. Consequently, the 1972 Law preserves the 1967 definition of groundwater, which is irreconcilable with that definition found in title 60, section 60.

The Oklahoma Supreme Court passed on the constitutionality of the 1972 Law in *Kline v. Oklahoma Water Resources Board.*[104] *Kline* involved a suit by various landowners (Appellants) challenging a Board's determination establishing a one-acre-foot maximum annual yield for each acre of land overlying the groundwater basin comprised by the alluvium and terrace deposits of the Beaver-North Canadian River in Blaine, Major, Dewey, Harper, and Woodward Counties in northwestern Oklahoma. The Board's determination was based on data and information compiled by the United States Geological Survey. At the district court level, Appellants were joined by Western Farmers Electric Cooperative (Western), who challenged the constitutionality of the 1972 Law. Western argued that the Law deprived the parties of vested property rights and abrogated prior water rights without due process of law by limiting the amount of water that could be taken from the basin. That is, Western believed that the 1972 Law took away the landowners' vested right to use groundwater in any reasonable manner. The trial court affirmed both the decision of the Board and the constitutionality of the 1972 Law.

The Oklahoma Supreme Court began its analysis by focusing on the stated policy goals of the statutory scheme.[105] The court noted that the legislature adopted the current groundwater scheme with the intent to utilize the groundwater of the state by establishing reasonable regulations to allocate the water based on reasonable use.[106] In the context of the current law, the definition of "reasonable use" is not synonymous

95. 82 OKLA. STAT. § 1020.5 (Supp. 1994).
96. *Id.* § 1020.11.
97. 82 OKLA. STAT. § 1020.2 (1991).
98. 82 OKLA. STAT. § 1020.5 (Supp. 1994).
99. *Id.* § 1020.7.
100. *Id.* § 1020.11.
101. *Id.*
102. *See supra* text accompanying note 81.
103. 82 OKLA. STAT. § 1020.1 (Supp. 1994).
104. 759 P.2d 210 (Okla. 1988).
105. *Id.* at 212.
106. *Id.*; *see also* 82 OKLA. STAT. § 1020.2 (1991). As explained earlier in this discussion, this utilization policy deviated from the stated policy objective of conservation under the 1949 Law.

with that definition adopted in previous case law[107] or at common law.[108] Rather, the phrase must be understood in its ordinary sense so that groundwater will be used beneficially and without waste.[109]

Moreover, the court explicitly endorsed the legislature's ability to regulate and restrict the use and enjoyment by landowners of natural resources in an effort to ensure that such resources are used efficiently and with due regard to the rights of others.[110] This type of regulation fails to constitute (1) a taking of property without just compensation, (2) a taking of property without due process of law, or (3) a violation of the equal protection clause under the Fourteenth Amendment.[111] Accordingly, the Oklahoma Supreme Court dismissed Western's claims and upheld the constitutionality of the 1972 Law.[112]

While *Kline* speaks to the constitutionality of the 1972 Law, there are two important issues relating to the Law left unresolved by the supreme court. The first of these issues concerns managing the conflicting definitions of groundwater in title 60, section 60, and title 82, section 1020.1. As mentioned previously, under title 60, section 60, water running in alluvium or terrace deposits constitutes stream water subject to public appropriation. Yet, title 82, section 1020.1 provides that this particular water belongs to overlying landowners as groundwater. With these two definitions as a backdrop, remember also that groundwater is but one component of the hydrologic cycle.[113] Consequently, groundwater may, in many instances, "feed" the flow of a particular stream. Pumping of water by a landowner from the alluvium or terrace deposits could decrease the stream flow for use by downstream appropriators and/or riparian users.

One possible way to reconcile the two statutory definitions would be to regulate groundwater pumping in order to protect stream flow, thus recognizing the stream water user's right as superior. Another possible resolution would be to modify the definition of groundwater in section 1020.1 and exclude hydrologically connected stream water so that this water would be regulated under the stream water law. Yet this too would create conflict between the riparian stream user and the landowner who affects the flow of the stream by withdrawing large amounts of groundwater. The proper solution is elusive. Moreover, any attempt to reconcile the rights of stream and groundwater users vis-à-vis alluvial water highlights the problem of attempting to divide water rights within a system which is inherently unitary.

A second issue left unresolved by *Kline* is whether the Oklahoma legislature "took" the alluvial water away from stream users in violation of the state constitution. Article 2, section 24 of the Oklahoma Constitution states, in part: "Private property shall not be taken or damaged for public use without just compensation." As used in this provision, the term "private property" includes "easements, personal property, and every valuable interest which can be enjoyed and recognized as property."[114] Moreover, a "'vested right' is the power to take certain actions or possess certain things lawfully, and is substantially a property right. It may be created either by common law, by statute, or by contract. Once created, it becomes absolute and is protected from legislative invasion."[115]

One could argue that current riparian users of stream water have a private property right to the water in their particular stream. By including alluvial water as groundwater in section 1020.1, the legislature infringed upon this property right by divesting stream users of potentially significant amounts of water — without compensation.

Kline did not directly address this issue. In *Kline*, the court held that the legislature could lawfully regulate the use and enjoyment of natural resources by the citizens of the state. However, the issue of whether "switching" alluvial water from stream water to groundwater constitutes valid legislative regulation of the state's natural resources remains unresolved.

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107. *See, e.g.*, Canada v. City of Shawnee, 64 P.2d 694 (Okla. 1936).
108. *Kline* 759 P.2d at 212.
109. *Id.*
110. *Id.* (citing Anderson-Prichard Oil Corp. v. Corp. Comm'n., 241 P.2d 363, *appeal dismissed*, 342 U.S. 938 (1952)).
111. *Kline*, 759 P.2d at 212.
112. *Id.* at 212-13.
113. *See* discussion *supra* part II.
114. Graham v. City of Duncan, 354 P.2d 458, 461 (Okla. 1960).
115. Oklahoma Water Resources Bd. v. Central Okla. Master Conservancy Dist., 464 P.2d 748, 755 (Okla. 1969).

One point worthy of speculation is the fact that *Kline* involved a Board determination establishing a maximum annual yield of fresh groundwater from *alluvium and terrace deposits.* By implication, it could be argued that the court found no constitutional infirmities with the definition of groundwater in section 1020.1 because the court upheld the entire 1972 scheme. However, this particular issue was not before the court, so any inferential analysis regarding the constitutionality of the definition is suspect at best. The point is that this issue has not been addressed.

The above discussion describes the state of Oklahoma's groundwater law at the time of *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd.*[116] With *Franco*, a whole new set of issues would be visited by the Oklahoma Supreme Court regarding the general nature of water law in Oklahoma.

V. Franco: A Unitary Approach to Groundwater?

Franco concerned an application by the City of Ada to the Board for an increase in its existing appropriation of stream water from Byrd's Mill Spring. One of the issues before the Oklahoma Supreme Court was whether groundwater rights should be considered in the determination of the appropriation of stream water. In the initial decision,[117] Justice Kauger answered in the affirmative, holding that an applicant's present groundwater rights must be considered by the Board in its determination of any present and future stream water needs for the person seeking an appropriation.[118] Nevertheless, the court's opinion was ambiguous in two respects.

First, Justice Kauger did not define what she meant by "present groundwater rights." It's entirely conceivable that she did not consider the implications of what actually represented a person's "present groundwater rights." Nevertheless, one possible interpretation is that the applicant's present groundwater rights must be considered whether or not those rights are connected to the particular stream from which the applicant is seeking an appropriation. If this is true, and if those rights are, in fact, not connected with the stream, would it matter how far away the groundwater rights are
vis-à-vis the stream and/or the anticipated area of usage? That is, at some point would the court refuse to consider the existing groundwater rights of an applicant simply because it would cost too much to transport that water to the area where the applicant intended to use the stream water? Also, would it matter how the water was going to be used, so that, with some types of uses, the court would not require the applicant to import water to the area of usage?

Alternatively, Justice Kauger could have been referring to those groundwater rights, if any, which are associated with the particular stream at issue. Thus, any existing groundwater rights outside of the particular basin would not be considered by the court. Either interpretation is possible because of the ambiguity in the opinion.

Second, the court appeared to mischaracterize the relationship between groundwater law and the law governing stream water in Oklahoma. Specifically, Justice Kauger stated that the OWRB is required by statute to "consider the applicant's present or future need for water from which it may be implied that an examination of the applicant's available water sources, including any ground water rights, must be considered, *and that a unitary rationale regulates both stream and ground water.*"[119] By implication, this latter language ignores the fact that two separate bodies of law with distinct policy considerations govern groundwater and stream water in Oklahoma.

The ramifications of this apparent misunderstanding by the court seem negligible because this opinion was withdrawn and substituted in 1990.[120] In the substituted opinion, Justice Opala, writing for the

116. 58 OKLA. B.J. 1406 (May 19, 1987), *withdrawn and substituted*, 855 P.2d 568 (Okla. 1990), *reh'g denied, opinion readopted and reissued*, 1993 Okla. LEXIS 51.

117. 58 OKLA. B.J. 1406 (May 19, 1987).

118. *Id.* at 1409.

119. *Id.* at 1408 (emphasis added).

120. 855 P.2d 568 (Okla. 1990).

majority, ruled that the Board *may*, in its discretion, consider the availability of groundwater sources when determining an applicant's need to appropriate stream water.[121] The court's vacillation in position from the previous decision stemmed from the fact that the Oklahoma legislature amended the applicable statute between the writing of the two opinions.[122] The italicized words in the following passage reflect the language which was added to the statute:

> A. After the hearing on the application the Board shall determine from the evidence presented whether:
>
> . . . .
>
> 2. The applicant has a present or future need for the water and the use to which applicant intends to put the water is a beneficial use. *In making this determination, the Board shall consider the availability of all stream water sources and such other relevant matters as the Board deems appropriate, and may consider the availability of groundwater as an alternative source . . .* [123]

Once again, this statutory language, as well as Justice Opala's opinion fails to indicate whether the applicant's groundwater rights must be connected to the stream at issue. Also, Justice Opala never explicitly rejected Justice Kauger's conclusions concerning the unitary rationale governing the two bodies of water law in Oklahoma. Thus, it could be argued that the court still labored under this misperception when it drafted its substitute opinion.

Whether or not the court actually adhered to this "unitary rationale" theory, the concept reflects modern hydrology principles, which recgnize that much groundwater and surface water is related.[124] Because of this interconnection between groundwater and stream water, promulgating independent bodies of law for each source of water can lead to conflict over the use of hydrologically linked water. Oklahoma serves as a perfect example. Suppose that a landowner constructs a well in order to withdraw groundwater from the alluvium for irrigation purposes on his land. Consequently, the natural flow of a nearby river which is fed by the underground stream[125] is reduced or even depleted, thus harming a lower riparian on the river. *Franco* espouses the principle that the riparian right is superior to any prior appropriator's claim to the use of stream water. Arguably, *Franco* could be expanded to recognize the superiority of the riparian's right to use stream water vis-à-vis the landowner's proprietary right to withdraw groundwater which affects the riparian's use of the stream water. Thus, under *Franco*, the landowner in the above hypothetical would have to yield to the demands of the riparian and curtail the pumping of groundwater.

However, using the same hypothetical, the landowner could assert that his proprietary right is superior to the riparian's right based on *Kline*. In *Kline*, the court upheld the constitutionality of Oklahoma's 1972 Law allowing owners of land overlying groundwater supplies to use the water in a reasonable fashion. Thus, *Kline* and *Franco* appear to grant conflicting superior rights to riparians and landowners concerning alluvial waters.

Moreover, the two decisions are inconsistent on another issue as well. In *Franco*, the court held that the 1963 stream water law was unconstitutional because it deprived riparians of their vested property right to any reasonable future use of stream water.[126] Yet, *Kline* upheld the right of a landowner under the 1972 Law to withdraw groundwater from the alluvium. As noted in Section IV, there is some question as to the constitutionality of the 1972 law because of its incorporation of the 1967 amended definition of groundwater which included alluvial water. Defining groundwater in this way deprived riparians of their vested right to a potentially significant amount of stream water without any compensation. *Franco* held that the

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121. *Franco*, 855 P.2d at 579.

122. 1988 Okla. Sess. Laws ch. 203, § 3.

123. 82 OKLA. STAT. § 105.12 (1991).

124. *See* discussion *supra* part II.

125. A stream fed by groundwater flow is called an "effluent stream." Conversely, a surface stream which feeds groundwater supply is known as an "influent stream." Peter N. Davis, *Wells and Streams: Relationship at Law*, 37 MO. L. REV. 189, 196 (1972).

126. *Franco*, 855 P.2d at 577.

abrogation of such a vested right is unconstitutional. Thus, *Franco* renders uncertain the constitutionality of *Kline* and the 1972 Groundwater Law. Moreover, *Franco* highlights the inherent conflict between the two bodies of law governing stream water and groundwater use in Oklahoma.

VI. Conclusion

The above discussion serves only to illustrate some of the issues relating to the use of groundwater and stream water in Oklahoma after *Franco*. Resolution of these issues is difficult given the current state of the law governing the two types of water. Current law is fraught with constitutional uncertainty as well as unmanageable inconsistency. These weaknesses stem from the fact that the Oklahoma legislature and the courts are attempting to regulate the use of the state's water under a dual systems of laws. Such a system ignores modern hydrological tenets that most groundwater and stream water is connected and cannot be separated either physically or legally. Perhaps recognition of the fact that water is not easily pigeonholed into categories is a first step toward establishing a unitary and predictable regime governing the use of water in Oklahoma.

Is *Franco* Moot When It Comes to Tribal and Interstate Claims to Oklahoma Water?

Michelle Lynn Gibbens

Table of Contents

[W]e only know the worth of water when the well runs dry.

— Benjamin Franklin[1]

I. Introduction: History of Oklahoma Indian Country

Oklahoma is home to many different Indian tribes.[2] Most of these tribes were involuntarily resettled

1. Lee Herold Storey, *Leasing Indian Water Off The Reservation: A Use Consistent With The Reservation's Purpose*, 76 CAL. L. REV. 179 (1988); *see* JOHN BARTLETT, FAMILIAR QUOTATIONS 347 (150th anniversary ed. 1980).

2. These tribes include, but are not limited to the following: the Apache, Arapaho, Caddos, Cherokee, Cheyenne, Chickasaws, Choctaw, Comanche, Creek, Delawares, Iowa, Kaw, Kickapoo, Kiowa, Osage, Otoe, Ottawa, Pawnee, Peoria, Ponca, Potawatomi, Quapaws, Sac and Fox,

into the State of Oklahoma under the federal government's nineteenth century removal policy.[3] As a response to numerous pressures and conflicts with the settlers and local governments with regards to eastern tribal lands, the federal government adopted a policy to induce or compel tribes to exchange their eastern lands for new land in the West.[4] The first tribes to move to Oklahoma, pursuant to a series of treaties, were the Choctaws, Chickasaws, Creeks, Cherokees, and Seminoles, otherwise known as the Five Civilized Tribes.[5] Other tribes were resettled to the north and on the parts of the Five Civilized Tribes' lands that the government reacquired from them.[6] Many of the removal treaties of the 1830s promised that the lands thereby set aside would never be included within the boundaries of any state or organized territory without the consent of the tribes.[7] For example, the preamble of the treaty with the Cherokees, the Treaty of New Echota,[8] states that the Cherokees executed the treaty to secure

> a permanent home for themselves . . . without the territorial limits of the State sovereignties, and where they can establish and enjoy a government of their choice and perpetuate such a state of society as may be consonant with their view, habits and condition; and as may tend to their individual comfort and their advancement in civilization.[9]

Article 5 of the treaty states:

> The United States hereby covenant and agree that the lands ceded to the Cherokee nation . . . shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country.[10]

This language proposed that the United States conveyed a fee simple property interest in the land, and it acknowledged the Cherokee Nation's power to pass all the laws it deemed necessary to regulate the property ceded to it by the United States.[11]

Seminole, Seneca, Shawnee, Tonkawa, Wichita, Wyandotte, and others. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 770 n.1 (Rennard Strickland et al. eds., 1982) [hereinafter HANDBOOK]; *see also* Browning Pipestem, *The Journey from Ex Parte Crow Dog to Littlechief: A Survey of Tribal Civil and Criminal Jurisdiction in Western Oklahoma*, 6 AM. INDIAN L. REV. 1, 3-4 (1978).

3. HANDBOOK, *supra* note 2, at 771.

4. *Id.*

5. *Id.* The Five Civilized tribes were moved under a series of treaties, many of which were forced upon them. *Id.* at 771 n.6; *see, e.g.* Treaty with the Cherokees, Dec. 29, 1835, 7 Stat. 478; Treaty with the Seminoles, May 9, 1832, 7 Stat. 368; Treaty with the Choctaws, Sept. 27, 1830, 7 Stat. 333 (Treaty of Dancing Rabbit Creek).

6. HANDBOOK, *supra* note 2, at 771.

7. *Id.*; *see, e.g.* Treaty with the Cherokees, Dec. 29, 1935, art. 5, 7 Stat. 478, 481; Treaty with the Ottoways, Aug. 30, 1831, art. 9, 7 Stat. 359, 361; Treaty with the Shawnees, Aug. 8, 1831, art. 10, 7 Stat. 355, 357; Treaty with the Choctaws, Sept. 27, 1830, art. 4, 7 Stat. 333 (Treaty of Dancing Rabbit Creek).

8. Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478. While this treaty only applies to the Cherokee Nation, the other Five Civilized Tribes have similar treaties. *See, e.g.*, Treaty with the Creeks, Feb. 14, 1833, 7 Stat. 417; Treaty with the Choctaws, Sept. 27, 1830, 7 Stat. 333; Treaty with the Chickasaws, Jan. 17, 1837, 11 Stat. 573; Treaty with the Seminoles, May 9, 1832, 7 Stat. 423; *see also* Choctaw Nation v. Oklahoma, 397 U.S. 620, 625, (1970) (as guarantee that Choctaws would not again be forced to move, the United States promised to convey the land to the Choctaw Nation in fee simple "to inure to them while they shall exist as a nation and live on it"). Note that the land granted to the Choctaws encompassed what is today approximately the southern third of the State of Oklahoma, while to the north the Cherokees received title to a tract of land in the eastern part of the remainder of the State with a perpetual outlet to and other rights in land farther west. *Id.* at 626. Moreover, although by later treaties other Indian tribes were settled on parts of the land originally included in these grants, and the Chickasaw Nation was granted an undivided one-fourth interest in the remainder of the land, simple title to a vast tract of land continued to be held by the Choctaws for well over half a century. *Id.* at 626-27; *see also* Treaty of Jan. 17, 1837, 7 Stat. 573; Treaty of June 22, 1855, 11 Stat. 611.

9. Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478; *see* David A. Mullon, *Indian Water Rights In Eastern Oklahoma*, *in* CLE INTERNATIONAL OKLAHOMA WATER LAW 5 (1994) [hereinafter *Eastern Oklahoma*].

10. Dec. 29, 1835, 7 Stat. 478, art. 5; *see Eastern Oklahoma*, *supra* note 9, at 6.

11. *See, e.g. Eastern Oklahoma*, *supra* note 9, at 6; Michael M. Gibson, *Indian Claims In The Beds Of Oklahoma Watercourses*, 4 AM.

The term "Indian Territory" was used in connection with several of the 1830s proposals to establish an organized territorial tribal government.[12] While the territorial tribal government was never established, the name "Indian Territory" became the common term for the lands of the Five Civilized Tribes and others settled among them.[13] The Five Civilized Tribes established comprehensive governments in Indian Territory and exercised self governments relatively free of federal interference.[14]

Unfortunately for the Five Civilized Tribes, the Civil War ultimately brought about the final cession; the Five Tribes were punished for siding with the South.[15] In 1866, the Five Civilized Tribes were forced to agree to new treaties that ceded much of their land, which was at one time the entire area of Oklahoma (excepting the Panhandle), and provided for eventual allotment of tribal lands.[16] Many tribes were removed to the western Indian Territory lands yielded by the Five Tribes in 1866.[17] Moreover, in 1889 unassigned lands in central Indian Territory were opened to white settlement.[18]

In 1890, the Oklahoma Organic Act reduced Indian Territory to the eastern portion, which consists of the lands of the Five Tribes and Quapaw Agency Tribes, created Oklahoma Territory in the western portion of Indian Territory, and established a territorial government.[19] The Organic Act expressly preserved tribal authority and federal Indian jurisdiction in both Oklahoma and Indian Territories.[20] The Oklahoma Indian tribes status was similar to that of tribes in other organized territories.[21]

During the 1890s most of the tribal lands in the Oklahoma Territory were allotted pursuant to the General Allotment Act.[22] The Dawes Act was established n 1893 to allot the lands of the Five Civilized Tribes, which were expressly excepted from the General Allotment Act.[23] In 1898, Congress passed the Curtis Act[24] which forced the allotment of the Five Civilized Tribes' lands and authorized non-Indian ownership.[25] In 1906, Congress passed the Five Civilized Tribes Act[26] which directed that all unallotted lands of the Five Tribes would pass to the United States in trust for the respective tribes and further

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INDIAN L. REV. 83 (1976) [hereinafter *Oklahoma Watercourses*].

12. HANDBOOK, *supra* note 2, at 772.

13. *Id.*

14. *Id.* at 772 & n.19.

15. *Id.* at 770; *see Oklahoma Watercourses, supra* note 11.

16. HANDBOOK, *supra* note 2, at 773.

17. *Id.*

18. *Id.*; *see* Appropriations Act of Mar. 2, 1889, ch. 412, § 13, 25 Stat. 980, 1005.

19. *See* Oklahoma Territory Organic Act, May 2, 1890, §§ 1-28, 26 Stat. 81. Congress' failure to include eastern Indian Territory in the new territorial government was consistent with treaty guarantees that the lands of the Five Civilized Tribes would never by subject to a territorial or state government. *See* Treaty with the Creeks and Seminoles, Aug. 7, 1856, art. 4, 11 Stat. 699, 700; Treaty with the Cherokees, Dec. 29, 1835, art. 5, 7 Stat. 478, 481; Treaty with the Creeks, Mar. 24, 1832, art. 14, 7 Stat. 366, 368; Treaty with the Choctaws, Sept. 27, 1930, art. 4, 7 Stat. 333. Section 1 of the Organic Act provided that the lands of the Five Tribes and the Quapaw Agency Tribes could be included within the boundaries of the new Oklahoma Territory whenever any tribe consented as such. *See* HANDBOOK, *supra* note 2, at 773 & n.35.

20. Oklahoma Territory Organic Act §§ 1, 12, 26 Stat. at 81, 88 (Oklahoma Territory); *id.* §§ 29-31, 26 Stat. at 93 (Indian Territory).

21. HANDBOOK, *supra* note 2, at 773; *see, e.g.* Pickett v. United States, 216 U.S. 456 (1910); Thomas v. Gay, 169 U.S. 264 (1898); Maust v. Warden of United States Penitentiary, 283 F. 912 (8th Cir. 1922); Brown v. United States, 146 F. 975 (8th Cir. 1906). This is relevant because it suggests a distinction between the tribes in Oklahoma Territory and the tribes in Indian Territory. This distinction may result in different treatment and effects on the tribes, Indians, and allottees as a result of the holding in Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 855 P.2d 568 (Okla. 1990).

22. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354, 381) (1988 & Supp. IV 1992)); *see* HANDBOOK, *supra* note 2, at 774 & ch. 2, § C. Under the General Allotment Act, the allottee receives an equitable and present usable estate in land while the federal government retains legal title; legal title does not pass to the allottee until a fee patent has been issued. *See* Angela M. Risenhoover, *Reservation Disestablishment: The Undecided Issue In Oklahoma Tax Commission v. Sac And Fox Nation*, 29 TULSA L.J. 781-98 (1994) [hereinafter *Reservation Disestablishment*].

23. Dawes Act, ch. 209, § 16, 27 Stat. 612 (1893); *see* 25 U.S.C. § 339. The exception extended to the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes. *Id.*

24. Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495. As a distinction, the General Allotment Act provided for "trust" allotments, and the Curtis Act provided for "restricted" allotments. *Reservation Disestablishment, supra* note 22, at 783; *see Ex parte* Nowabbi, 61 P.2d 1139, 1151 (Okla. Crim. App. 1936).

25. HANDBOOK, *supra* note 2, at 774; *Reservation Disestablishment, supra* note 22, at 783.

26. Apr. 26, 1906, 34 Stat. 137.

provided that the tribal governments "are hereby continued in full force and effect."[27] Two months later, the Oklahoma Enabling Act passed providing for the admission of Indian Territory and Oklahoma Territory as the state of Oklahoma.[28] Under the Enabling Act, the federal government's exclusive authority over the Indians and their lands was expressly reserved. The new State of Oklahoma was compelled to disclaim "all right and title" to Indian lands.[29] Statehood was granted in 1907.[30]

Today, Oklahoma's water law system is becoming a major state concern. While the Oklahoma Supreme Court's decision in *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board*[31] settled Oklahoma's system of water allocation, there is still much uncertainty in Oklahoma water law. One major area of uncertainty involves the reserved water rights of the Indian tribes, Indians, and allottees. Three basic principles have been set out: (1) the rights vest on the date the reservation was created; (2) the quantity of water allocated is sufficient water to fulfill the purposes of the reservation; and (3) the rights are not lost through nonuse but may be asserted at any time.[32] While these principles seem relatively straightforward, past litigation has shown otherwise. The assertion of Indian reserved rights may seriously impair a state's water law system and the many municipalities, private landowners, and others who rely on the state's system. It is uncertain what impact the *Franco* decision will have on Indian reserved rights. This chapter attempts to define some of the issues that might evolve from the Oklahoma Supreme Court's decision in *Franco* and their effect upon Indian reserved rights. In addition, this chapter defines issues relating to tribal/state water compacts and interstate water compacts.

II. Regulatory Jurisdiction on the Reservations

A. In General

The Supreme Court applied the reserved rights doctrine to both Indian reservations and federal reserved lands other than Indian reservations.[33] The most important difference between Indian reservations and other federal reservations relates to limitations on state jurisdiction over Indian reservations, as contrasted with the state's substantial (sometimes primary) jurisdiction over other federally owned lands.[34] States have much power over federal lands; absent consent, or cession, a state retains jurisdiction over federal lands within its territory, unless there is a specific federal law that conflicts with, or is intended to override, state laws.[35] On the other hand, the establishment of an Indian reservation has the effect of preempting state jurisdiction within the reservation over Indians, Indian tribes, and Indian property.[36]

Indian country status, as it relates to tribal, federal, and state jurisdiction, is important in determining tribal rights. The current statutory definition of "Indian country" is found in 18 U.S.C. § 1151:

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27. *Eastern Oklahoma*, *supra* note 9, at 10; *see* 34 Stat. at 148.

28. Oklahoma Enabling Act, June 16, 1906, 35 Stat. 267; *see* HANDBOOK, *supra* note 2, at 774.

29. 34 Stat. at 267-68, 270. *See generally Eastern Oklahoma*, *supra* note 9, at 11.

30. 35 Stat. 2160. Since statehood, the status of Oklahoma Tribes has been similar to that of tribes in other states. HANDBOOK, *supra* note 2, at 774 & n.49. The special laws enacted since statehood have primarily dealt with the property rights of individual members of the Five Civilized Tribes and the Osage Tribe. *Id.* at 774 & n.50.

31. 855 P.2d 568 (Okla. 1990). The 1990 opinion was reissued in 1993.

32. Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers*, 30 TULSA L.J. 61, 63 (1994) [hereinafter *Primer on Indian Water Rights*].

33. *See* Winters v. United States, 207 U.S. 564 (1908); Arizona v. California, 373 U.S. 546, 601 (1963); United States v. District Court for Eagle County, 401 U.S. 520 (1971); Cappaert v. United States, 426 U.S. 128 (1976); United States v. New Mexico, 438 U.S. 696 (1978); *see also* HANDBOOK, *supra* note 2, at 581.

34. HANDBOOK, *supra* note 2, at 582.

35. *Id.*

36. *Id.*

> [T]he term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[37]

While this definition is in the criminal code, the Supreme Court has applied the definition to civil jurisdiction, which includes water codes.[38] In *United States v. Pelican*,[39] the Supreme Court applied the test of whether the land in question "had been validly set apart for the use of the Indians as such, under the superintendence of the Government."[40] In Oklahoma, there has been much litigation over whether a particular tract of land constitutes "Indian country", even though the statutory definition seems clear.[41] In *State v. Klindt*,[42] the court expressly overruled itself, and held that an allotment in eastern Oklahoma was Indian country. Following the litigation over what constitutes "Indian country", the current law seems to clearly establish that there is Indian country in Oklahoma regardless of the existence of a "formal reservation," or a "trust" allotment, or a "restricted" allotment.[43]

Tribes in Oklahoma retain powers of self-government except to the extent that their powers have been limited by treaties, agreements, or congressional legislation.[44] While the quantity of land held by the Oklahoma tribes has been reduced by the allotment process, the tribes' inherent powers of self-government over Indian country are undiminished.[45] Neither the General Allotment Act nor most of the special allotment and cession agreements and statutes of the individual tribes extinguish or limit tribal powers of self government.[46]

For example, in *Indian Country, U.S.A. v. Oklahoma Tax Commission*, the Tenth Circuit concluded that while the federal legislation described above seriously undermined the Creek Nation's authority, "[they were] not persuaded that Congress intended or acted to completely abolish the Creek Nation jurisdiction over tribal lands, to divest the federal government of its authority, or to permit the assertion of jurisdiction by the State of Oklahoma."[47] Similarly, in *Chickasaw Nation v. Oklahoma Tax Commission*, the Tenth Circuit reaffirmed preemption of state regulation when application of state law would interfere with reservation self-government or would impair rights granted or reserved by federal law.[48] In *Cheyenne-Arapaho Tribes*

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37. 18 U.S.C. § 1151.

38. *See* Decoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 478-79 (1976).

39. 232 U.S. 442 (1914).

40. *Id.* at 449; *see* United States v. John, 437 U.S. 634, 649 (1978); United States v. McGowan, 302 U.S. 535, 539 (1938).

41. *Reservation Disestablishment, supra* note 22, at 782.

42. 782 P.2d 401, 404 (Okla. Crim. App. 1989) (overruling *Ex parte* Nowabbi, 61 P.2d 1139 (Okla. Crim. App. 1936)) *see* Oklahoma Tax Comm'n v. Citizen Band Potawatomi, 498 U.S. 505 (1991); Oklahoma Tax Comm'n v. Sac & Fox Nation, 113 S. Ct. 1985, 1990 (1993).

43. *Reservation Disestablishment, supra* note 22, at 785 & n.40.

44. HANDBOOK, *supra* note 2, at 779.

45. *Id.*

46. *Id.* at 780; *see, e.g.*, DeCoteau v. District County Court, 420 U.S. 425 (1975) (holding that allotment, by itself, does not diminish tribal jurisdiction); Oklahoma Tax Comm'n v. Sac & Fox Nation, 113 S. Ct. 1985 (1993); United States v. Grand River Dam Auth., 363 U.S. 229 (1960); Cheyenne-Arapaho Tribes v. Oklahoma, 618 F.2d 665 (10th Cir. 1980) (holding that states have no authority over Indians in Indian country unless it is expressly conferred by Congress); Indian Country, U.S.A. v. Oklahoma Tax Comm'n, 829 F.2d 967 (10th Cir. 1987); Cherokee Nation v. Oklahoma, 461 F.2d 675 (10th Cir. 1972); Chickasaw Nation v. Oklahoma Tax Comm'n, 31 F.3d 964 (10th Cir. 1994).

47. 829 F.2d 967, 978 (10th Cir. 1987); *see also* Cherokee Nation v. Oklahoma, 461 F.2d 675 (10th Cir. 1972); Oklahoma Tax Comm'n v. Sac & Fox Nation, 113 S. Ct. 1985 (1993); Chickasaw Nation v. Oklahoma Tax Comm'n, 31 F.2d 964 (10th Cir. 1994); United States v. Grand River Dam Auth., 363 U.S. 229 (1960).

48. 31 F.2d 964, 967 (10th Cir. 1994); *see also* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973); Cheyenne-Arapaho T ıbes of Okla. v. State of Oklahoma, 618 F.2d 665, 667-68 (1980) (holding that lands held in trust by United States for tribes are "Indian country," and thus allotment lands and trust lands remained "Indian Country" though reservation had been disestablished).

of Oklahoma v. State of Oklahoma, the Tenth Circuit held that lands held in trust by the United States for tribes are "Indian Country" within the statutory definition.[49] Thus, allotment lands and trust lands remained "Indian Country" even though the reservation had been disestablished.[50] In *Marchie Tiger v. Western Investment Company*, the Supreme Court stated that "in passing the enabling act for the admission of the state of Oklahoma, where these lands are, Congress was careful to preserve the authority of the government of the United States over the Indians, their lands and property, which it had prior to the passage of the act."[51] Unless expressly limited by Congress, regulatory jurisdiction over Indians resides exclusively with the federal government and the tribes.[52]

On the other hand, tribal authority over non-Indians and non-Indian lands can be limited. While tribes retain all governmental powers that have not been ceded by treaty, divested by Congress, or lost under the judicial doctrine of implied divestiture, the Court in *Montana v. United States*[53] held that tribes are presumed to have lost regulatory jurisdiction over non-Indians on non-Indian fee land within Indian country. However, there are qualifications to this presumption. First, this presumption applies only to non-Indian activity on the non-Indian fee land; non-Indian activity on Indian land remains subject to tribal regulation.[54] Second, tribes retain inherent governmental authority to regulate the activities of non-Indians who enter into consensual business relationships with the tribe.[55] Finally, Indian tribes retain governmental powers to regulate non-Indian conduct on fee land which will have a substantial effect on the tribe.[56] The Supreme Court recognized tribal regulatory powers over non-Indian conduct "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[57] In interpreting *Montana*, several courts have upheld tribal regulation by applying one of the exceptions.[58] However, even though administration of water systems would seem to invariably affect the tribes, courts have allowed state regulation over non-Indian use of excess water.[59]

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49. 618 F.2d 665, 667-68 (10th Cir. 1980). Further, states have no authority over Indians in Indian country unless it is expressly conferred by Congress. *Id.*

50. *Id.*

51. 221 U.S. 286, 309 (1911); *see* 34 Stat. at 267, ch. 3335; *see also Eastern Oklahoma, supra* note 9, at 13-14.

52. HANDBOOK, *supra* note 2, at 604; *see* United States v. Wheeler, 435 U.S. 313 (1978) (holding that tribal powers are based on inherent sovereignty). Note that Congress has expressly subjected the Five Tribes' allotments to specified Oklahoma laws in a number of areas. *See* HANDBOOK, *supra* note 2, at 787 & n.160-64. Moreover, since the founding of our nation, federal law has recognized tribes as "distinct, independent political communities" retaining inherent sovereign rights. Judith V. Royster, *Mineral Development In Indian Country: The Evolution Of Tribal Control Over Mineral Resources*, 29 TULSA L.J. 541, 603 (1994) [hereinafter *Tribal Mineral Resources*]; *see* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832). Particularly, tribes retain control over internal tribal matters, "to make their own laws and be ruled by them." *Tribal Mineral Resources, supra*, at 603; *see* Williams v. Lee, 358 U.S. 217, 220 (1959). Hence, tribes have inherent, and virtually plenary, sovereign power to regulate Indian lands and conduct within the reservation boundaries. *Tribal Mineral Resources, supra*, at 603; *see* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983); Brendale v. Yakima Indian Nation, 492 U.S. 408, 444 (1989).

53. 450 U.S. 544, 565-66 (1981); *see Tribal Mineral Resources, supra* note 52, at 604.

54. Montana v. United States, 450 U.S. at 557; *see Tribal Mineral Resources, supra* note 52, at 604 & n.9.

55. Montana v. United States, 450 U.S. at 565; *see Tribal Mineral Resources, supra* note 52, at 605. The Supreme Court recognized tribal regulatory powers of "taxation, licensing, or other means" over those non-Indians who enter into "commercial dealing[s], contracts, leases, or other arrangements" in Indian country. *Id.*

56. Montana v. United States, 450 U.S. at 566.

57. *Id.*

58. *See* Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1981) (upholding tribal health and safety regulations to a non-Indian operating a store on fee lands, and holding that the store owner's conduct threatened the health and welfare of the tribe); Knight v. Shoshone & Arapaho Tribes, 670 F.2d 900 (10th Cir. 1981) (upholding tribal zoning ordinance over non-Indian developers, and holding that the activities of the developers directly affect tribal and allotted lands); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (upholding tribal regulation of use of fee lands in closed area but not in open area; tribes retain sovereign authority to regulate activities with their territory, and this power may extend to non-Indian activities on fee lands within reservations when those activities affect or threaten important tribal interests); Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana v. Namen, 665 F.2d 951 (1981) (holding that tribes had authority to regulate the federal common-law riparian rights of non-Indians who owned reservation land, to which tribes had beneficial title because non-Indians had potential for significantly affecting economy, welfare, and health of tribes).

59. *See* United States v. Anderson, 736 F.2d 1358, 1365 (9th Cir. 1984) (holding that state regulation of non-Indian water rights on Spokane Reservation would not adversely impact tribe); *see also In re* General Adjudication of All Rights to Use Water in the Big Horn River System (*Big Horn I*), 753 P.2d 76, 114-15 (Wyo. 1988) (authorizing State Engineer to enforce state appropriation water rights on Wind River Reservation);

B. Regulatory Authority over Water Use and Water Rights

1. Who Has Jurisdiction: Federal, State, or Tribal

The federal government has regulatory authority over the resources of federal reserved lands.[60] Generally state jurisdiction continues, unless a federal law conflicts with, or is intended to override, state laws.[61] The federal government has the constitutional authority to preempt state water laws in order to carry out federal purposes and programs.[62] Indians and Indian tribes are more dependent on federal law for protection and utilization of their water rights; thus, the scope of federal preemption is broader for Indian reserved water rights than for non-Indian federal reserved rights.[63] Since the establishment of an Indian reservation in and of itself has the effect of preempting state jurisdiction within the reservation over Indians, tribes, and Indian property, state water laws do not govern the use of reserved water by Indians and Indian tribes on Indian lands with respect to any of the purposes of a reservation.[64] In fact, regulatory jurisdiction over Indian reserved water rights, including those of allottees and lessees, resides exclusively with the federal government and the tribes, unless water rights that have vested under state law are acquired for the Indians' use and benefit.[65]

In *Colville Confederated Tribes v. Walton (Walton I)*,[66] the Ninth Circuit held that the state has no power to regulate water located entirely within the reservation boundaries. Thus, permits issued by the state to use this water were of no force and effect.[67] This proposition was later supported by the Ninth Circuit in *Colville Confederated Tribes v. Walton (Walton II)*,[68] holding that reserved water rights for Indians are federal water rights and are not dependent upon state law or procedure, although it is appropriate to look at state law for guidance. On the other hand, in *United States v. Anderson*,[69] the court held that the state had the authority to regulate the use of excess waters by non-Indians on nontribal lands. The *Anderson* court applied the *Montana* holding in finding that the non-Indians' conduct did not threaten or have such a "direct effect on the political integrity, the economic security, or the health or welfare of the Tribe" as

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In re General Adjudication of All Rights to Use Water in the Big Horn River System (*Big Horn III*), 835 P.3d 273, 282-83 (Wyo. 1992). *But see* Colville Confederated Tribes v. Walton, 647 F.2d 42, 51 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981) (holding that state had no authority to regulate water in a creek system in Indian country and no authority to issue state appropriation permits in the creek).

60. Aaron H. Hostyk, *Who Controls Water? The Emerging Balance Among Federal, State, And Indian Jurisdictional Claims And Its Impact On Energy Development In The Upper Colorado And Upper Missouri River Basins*, 18 TULSA L.J. 1, 8 (1982); *see* Kleppe V. New Mexico, 426 U.S. 529 (1976).

61. HANDBOOK, *supra* note 2, at 582.

62. WATERS AND WATER RIGHTS 274 (Robert E. Beck ed. 1991) [hereinafter WATER RIGHTS]; *see* U.S. CONST. art. VI, cl. 2.

63. HANDBOOK, *supra* note 2, at 583-84.

64. HANDBOOK, *supra* note 2, at 583; *see* United States v. McIntire, 101 F.2d 650, 654 (9th Cir. 1939). Indian water rights must be defined by reference to federal law, unless water rights vesting under state law are acquired for the Indians' use and benefit. HANDBOOK, *supra* note 2, at 583. The Supreme Court held that Congress impliedly reserved water in sufficient quantities to fulfill the "primary purpose" of the reservation but not for secondary or lesser purposes. *See* United States v. New Mexico, 438 U.S. 696, 702 (1978); Cappaert v. United States, 426 U.S. 128, 139 (1976). While federal law controls over the primary purpose of the reservation, state law presides over any secondary purposes. *New Mexico*, 438 U.S. at 702; *Cappaert*, 426 U.S. at 139. However, the Ninth Circuit held that the *New Mexico* and the *Cappaert* holdings, which were not based on Indian reservations but instead on non-Indian federal reservations, do not preclude a reservation from having multiple "primary purposes." United States v. Adair, 723 F.2d 1394, 1409 (9th Cir. 1983).

65. HANDBOOK, *supra* note 2, at 583, 604. The appropriate inquiries in ascertaining Indian reserved water rights is not whether a particular use is primary or secondary but whether it is completely outside the scope of a reservation's purposes. *Id.* at 584. If particular water uses are found outside the scope of a reservation's purposes water can probably be appropriated from state or tribal authorities. *Id.* However, the extent of state authority over this appropriated water is uncertain. *Id.*

66. 647 F.2d 42, 51 (9th Cir. 1981).

67. *Id.*

68. 752 F.2d 397, 400 (9th Cir. 1985); *see also* United States v. Adair, 723 F.2d 1394, 1411 n.19 (9th Cir. 1983); Colorado v. New Mexico, 459 U.S. 176, 184 (1982) (look to state law for *guidance* of prior appropriation principle); Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976) (volume and scope of reserved rights remain federal questions) (quoting United States v. District Court fc Eagle County, 401 U.S. 520, 526 (1971).

69. 736 F.2d 1358, 1365 (9th Cir. 1984).

to confer tribal jurisdiction.[70] The holding in *Anderson* and *Montana* might indicate a trend in the courts to authorize state regulation over non-Indians' use of excess waters. However, the court distinguished *Walton I* from *Anderson*. In *Walton I*, the creek was small and non-navigable and located entirely within the reservation. Appropriations from the creek in *Walton I* would adversely affect tribal agriculture and fisheries.[71] In *Anderson*, the stream flowed mostly outside the Spokane Reservation, thus creating a stronger state interest.[72] The courts, which held that the state was authorized to regulate non-Indian use of water in Indian country, stressed that state regulation only applied to excess water and the state could not regulate Indian reserved rights.[73]

In *In re Waters of Long Valley Creek Stream System*,[74] the Supreme Court of California held that the State Water Resources Control Board is fully empowered to make determinations as to the scope, nature, and priority of the unexercised federally-held riparian rights as the Board deems reasonably necessary to promote the state's interest in fostering the most reasonable and beneficial use of its water resources. Yet the *Long Valley* court held that while granting the Board the authority to determine the nature and scope of water rights, it did not intend to authorize the Board to place limitations on or extinguish future riparian rights that would raise serious constitutional questions.[75] In *In re Water of Hallett Creek Stream System*[76], the Supreme Court of California held that, in the context of non-Indian lands, that federally-reserved lands are entitled to riparian rights, over and above the reserved rights, under state law. The *Hallett* court applied the *Long Valley* holding to a non-Indian federal reservation when it held that the United States must apply to the Board whenever it proposes to exercise its state riparian water rights on reserved lands, so that the Board may evaluate the proposed use in the context of other uses and determine whether riparian use should be permitted in light of the state's interest in promoting the most efficient and beneficial use of the state's water.[77] By analogy, Indian tribes and allottees should also be permitted to exercise their state riparian rights, separate from their reserved water rights, just as a private landowner riparian could exercise his state riparian rights under *Hallett*. While a water resources board should not be able to govern the reserved rights of the Indians under state law, the board will most likely be the governing body to any additional state water rights that the tribes or allottees might be able to obtain in addition to their *Winters* reserved rights.[78] Further, the Wyoming Supreme Court authorizes the state engineer to monitor all water rights on the Wind River Reservation.[79] However, the state engineer is required to uphold the constitution, must apply federal law, and must not deprive the tribes of water without a suit for the administration of a court's decree.[80]

In summary, Indian reserved rights are governed by federal or tribal law, not state law, unless there is express approval otherwise. State permits and regulation do not apply to the use and allocation of reserved waters of the Indian tribes and allottees. However, there is the suggestion that Indians may also have state riparian rights in addition to their reserved rights. These additional riparian rights should be

70. *Id.*; *see also* Montana v. United States, 450 U.S. at 566.

71. *Walton I*, 647 F.2d at 52; *Anderson*, 736 F.2d at 1365-66.

72. *Anderson*, 736 F.2d at 1366.

73. *Id.* at 1365; *Big Horn I*, 753 P.2d at 115.

74. 599 P.2d 656 (1979). In so doing, the *Long Valley* court held that riparian rights are limited by the concept of reasonable and beneficial use and must not be exercised in a manner inconsistent with constitutional policy provisions governing the interpretations of water rights in the state. *Id.* at 663.

75. *Id.* at 662-63.

76. 749 P.2d 324, 327-30 (Cal. 1988).

77. *Id.* at 337-38. However, the *Hallett* court imposed the same constitutional limitations found in *Long Valley*. *Id.*

78. However, the McCarran Amendment, discussed *infra*, allows the United States to waive its sovereign immunity and the sovereign immunity of the Indian tribes for a state general adjudication. *See* 42 U.S.C. § 666.

79. *In re* General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76, 114-15 (Wyo. 1988), *aff'd by equally divided court*, Wyoming v. United States, 109 S. Ct. 2994 (1989) (*Big Horn I*) (holding that federal law has not preempted state oversight of reserved water rights); *see In re* General Adjudication of All Rights to Use Water in the Big Horn River System, 835 P.2d 273, 282-83 (Wyo. 1992) (*Big Horn III*).

80. *Big Horn I*, 753 P.2d at 115.

governed by state law because they are based upon a state law right. The state water resources board should have authority over the Indians, allottees, and federal reservations as far as the state riparian rights are concerned. However, the state water resources board should not have authority as far as the Indians' reserved rights are concerned.

2. Oklahoma Jurisdiction

The authority of western states to regulate the use and allocation of water resources was granted by Congress in the Desert Land Act of 1877.[81] However, Oklahoma was not a Desert Land Act state.[82] As explained previously, unlike most tribes in the West, the Five Civilized Tribes did not acquire mere reservations in a territory which was to become a future state; instead, the Five Tribes received lands that were designated "Indian Territory" where the tribal governments could operate without interference or competition by non-Indians or state governments.[83] Recall article 5 of the Treaty of New Echota (for the Cherokees) in which "the United States hereby covenant[ed] and agree[d] that the lands ceded to the Cherokee nation . . . shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory."[84] Moreover, the Treaty stated that the Cherokees had the secured right "to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country."[85] The United States, in granting a fee simple to the Indians in their property, gave the Cherokees the power to regulate their property and people.

In *Choctaw Nation v. Oklahoma*,[86] the Supreme Court analyzed the treaties and patents granted to the Choctaw, Cherokee, and Chickasaw Nations to determine who had title to the bed and banks of the Arkansas River and whether the Tribes were entitled to recover royalties derived from state granted leases. The Cherokee Nation claimed that it had been the absolute fee owner of certain land below the water of the Arkansas River since 1835. The Choctaws and Chickasaws intervened to establish their claims to the riverbed. The State of Oklahoma argued that the Indians never received title to the land. The State argued that the title remained in the United States and thus, based on the equal footing doctrine, passed to the State upon admission to the Union as an incident of statehood.[87] The Supreme Court, in remembering that "no part of the land granted to [the tribes] shall ever be embraced in any Territory or State[,]" concluded that the United States intended to and did convey title to the bed of the Arkansas River within the State of Oklahoma to the tribes.[88] Since those lands had never been allotted, title to the riverbed remained in the tribes.[89] The Court held that the Indians were promised virtually complete sovereignty over their new lands, and the United States seems to have had no present interest in retaining title to the riverbed at all; "it had all it was concerned with in its navigational easement via the constitutional power of commerce."[90] Justice Douglas, in his concurring opinion, stated that "the title held

81. Mar. 3, 1877, 19 Stat. 377 (codified at 43 U.S.C. §§ 321 *et. seq.*). In California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 162 (1935), the Court interpreted the Desert Land Act of 1877 to give the job of regulating water rights and water use to the laws of designated state and federal territories. *Id.*

82. *Id.* at 156; *see* 43 U.S.C. § 323.

83. *Eastern Oklahoma, supra* note 9, at 5.

84. Dec. 29, 1935, 7 Stat. 478, art. 5. *See supra* note 8-11 and accompanying text.

85. Dec. 29, 1935, 7 Stat. 478, art. 5.

86. 397 U.S. 620 (1970).

87. Choctaw Nation v. Oklahoma, 397 U.S. at 627-28. The State of Montana posed a similar argument in Winters v. United States, 207 U.S. 564 (1908). The *Winters* court held that the reservation of the waters on the reservation for irrigation purposes was not repealed by the admission of Montana into the Union on an equal footing with the original states. *Id.*

88. Choctaw Nation v. United States, 397 U.S. at 635.

89. *Id. See generally Eastern Oklahoma, supra* note 9, at 6.

90. Choctaw Nation v. United States, 397 U.S. at 635; *see also* Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922) (holding similarly with respect to ownership of riverbed under non-navigable reach of Arkansas River carved out of Cherokee lands for the Osage).

by these tribes was not the usual aboriginal Indian title of use and occupancy but a fee simple,[91] terminable if and when these Indian nations ceased to exist or abandoned the territory — conditions not yet occurring."[92] It is reasonable to infer that the United States did not have a plan to hold the river bed in trust for a future state.[93]

As one commentator has stated, would it be reasonable to infer that while title to the riverbed was intended to pass to the tribes, that the right and power to use and regulate 100% of the water was not?[94] The treaties and case law suggest that whatever property rights and regulatory powers the federal government had over lands within Indian Territory, excepting the navigational easement, were ceded to the tribes. Therefore, it is reasonable to conclude that the tribes did retain the right to regulate their water rights, use, and allocation.

III. Water Rights in Oklahoma: Who Owns the Water

A. In General

There is an implication that water law in the United States is characterized by three basic doctrines: (1) the riparian doctrine, (2) the prior appropriation doctrine, and (3) the reserved rights doctrine.[95] Arguments have arisen as to who owns the water: the federal government, the tribes, or the states. If Congress exercises its plenary authority under the Constitution, the Supremacy Clause gives the federal government control of the water.[96] With the exception of federal reserved water rights,[97] Congress gave the day-to-day actual governmental control of the rights to use the waters to the individual states.[98]

In the Southwest there is no more critical problem than that of water scarcity.[99] As the southwestern population grows, conflicting claims to this scarce resource increases. Many of these claims involve waters on Indian reservations. Indians and Indian tribes have well established rights to large amounts of water, which are for the most part unquantified.[100] These tribal rights have developed from two main sources.[101] First, water rights stemmed through historical use predating the creation of the reservation.[102] Second, most common to the plains and desert tribes, water rights were created from the agreements or treaties that established the reservation.[103] The water rights are based on the concept that the

91. *Cf.* United States v. Creek Nation, 295 U.S. 103 (1935).

92. Choctaw Nation v. United States, 397 U.S. at 638-39.

93. *Id.* at 638.

94. *Eastern Oklahoma, supra* note 9, at 7.

95. Storey, *supra* note 1, at 185.

96. WATER RIGHTS, *supra* note 62, at 174.

97. A reserved right is similar to a right owned by the federal government. WATER RIGHTS, *supra* note 62, at 174 at n.20. The priority date attaches not from the moment of federal ownership of lands, but rather from the date of the reservation, preexisting vested rights may have seniority over the federal right. *Id.*

98. *Id.* at 174-75; *see* California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935); *see also* Aaron H. Hostyk, *Who Controls The Water? The Emerging Balance Among Federal, State, and Indian Jurisdictional Claims and Its Impact On Energy Development in the Upper Colorado and Upper Missouri River Basins*, 18 TULSA L.J. 1 (1982).

99. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 804 (1976).

100. HANDBOOK, *supra* note 2, at 575. Generally, these Indian claims to use water have not actually been exercised. Reid P. Chambers & John E. Echohawk, *Implementing The Winters Doctrine Of Indian Reserved Water Rights: Producing Indian Water And Economic Development Without Injuring Non-Indian Water Users?*, 27 GONZ. L. REV. 447 (1991/92). While non-Indians irrigate about 46 million acres in the United States, Indians irrigate only around 500,000 to 600,000 acres. *Id.* However, legally, Indians generally have superior water rights. *Id.*

101. *See* Thomas W. Clayton, *The Policy Choices Tribes Face When Deciding Whether To Enact a Water Code*, 17 AM. INDIAN L. REV. 523, 524 (1992) [hereinafter *Water Code*].

102. *Id. See generally* United States v. Winans, 198 U.S. 371 (1905) (holding that treaties reserve Indian rights not granted to the United States); William H. Veeder, *Indian Prior and Paramount Rights of the Use of Water*, 16 ROCKY MTN. MIN. L. INST. 631 (1971).

103. *Water Code, supra* note 101, at 524; *see* Winters v. United States, 207 U.S. 564 (1908).

establishment of Indian reservations meant not only that the land was reserved but also that the right to sufficient water to fulfill the purposes of the reservation was reserved.[104]

B. Winters Doctrine

Indian reserved rights are grounded in federal treaties, statutes, agreements, and executive orders.[105] The nature of the conveyance is significant for the nature and scope of rights. In some conveyances the Indian rights are expressed as reservations of preexisting uses,[106] while in other conveyances the Indian rights are expressed as grants of new uses from the federal government to the Indians.[107]

The law of reserved Indian water rights was first established in 1908 by the Supreme Court's decision in *Winters v. United States*,[108] in which the United States in its capacity as trustee brought suit to protect the Fort Belknap Reservation in Montana against upstream diversions of water from the Milk River. The *Winters* Court held that when the United States reserved land out of the public domain for the use and benefit of an Indian tribe, it implicitly reserved from streams flowing through the reservation the right to use a sufficient quantity of water to fulfill the purposes of the reservation.[109] Moreover, in response to the allegation that Montana's admission to the Union repealed the reservation of water, the Court stated: "[T]he power of the Government to reserve the waters and exempt them from appropriation under state laws is not denied, and could not be . . . . That the government did reserve them we have decided, and for a use that would necessarily continue through the years."[110] The *Winters*' decision was predicated on federal law, which was consistent with the Supreme Court's prior decision that state laws generally were not applicable within Indian reservations and in any event could not be applied in a manner that interfered with or frustrated federal Indian policies.[111] Only unappropriated waters at the creation of a reservation are subject to *Winters* rights.[112]

Winters had little impact on the allocation of western water law in the years following, but the Supreme Court suddenly changed this in 1963 with its decision in *Arizona v. California*.[113] In *Arizona*, the Court resurrected the *Winters* doctrine and, in fact, expanded the reserved rights concept beyond the boundaries of Indian reservations.[114] The *Arizona* Court defined the nature and extent of reserved Indian

104. HANDBOOK, *supra* note 2, at 575 & n.3.

105. WATER RIGHTS, *supra* note 62, at 217. Because Indian reserved water rights are federal rights under the Supremacy Clause of the Constitution, state laws cannot affect Indian reserved rights without federal approval. *Id.*

106. *See* United States v. Winans, 198 U.S. 371 (1905); *see also* WATER RIGHTS, *supra* note 62, at 217.

107. *See* United States v. Winters, 207 U.S. 564 (1908).

108. 207 U.S. 564 (1908).

109. *Winters*, 207 U.S. at 576. The Court held that it was irrelevant that no express reservation of water was made, since all ambiguities in the agreement such as silence concerning water rights, were to be interpreted in favor of the tribes. *Id.* at 576-77; *see* Judith v. Royster, *Overview Of Native American Water Rights, in* SOVEREIGNTY SYMPOSIUM VII, at 1, 5 (Tulsa, Okla. June 8, 1994) (originally prepared for *Water Wars: The Return of the Riparian A Renewed Focus on Water Rights, in* UNIVERSITY OF TULSA COLLEGE OF LAW CLE (Mar. 18, 1994)) [hereinafter *Native American Water Rights*]; *see also* HANDBOOK, *supra* note 2, at 221-22.

110. *Winters* 207 U.S. at 577 (citing United States v. Rio Grand Ditch & Irrigation Co., 174 U.S. 690, 702 (1899); United States v. Winans, 198 U.S. 371 (1905)).

111. *See* United States v. Winans, 198 U.S. 371, 381 (1905); United States v. Rickert, 188 U.S. 432 (1903); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832). Because they are federal rights under the Supremacy Clause of the Constitution, state laws cannot affect Indian reserved rights without federal approval. WATER RIGHTS, *supra* note 62, at 217.

112. *Native American Water Rights, supra* note 109, at 11.

113. 373 U.S. 546 (1963).

114. *Id.* at 546, 600; *see* WATER RIGHTS, *supra* note 62, at 211. Interestingly, one of the five reservations at issue in *Arizona* was not riparian to the river. In fact, the reservation was approximately two miles from the river. The *Arizona* Court did not address the fact the reservation was not contiguous to the river, yet still applied the PIA standard to it. This distinction may be supported by a proposal that tribes should have *Winters* rights in the water near reservations when off-reservation water is the only reasonable means of supply. *See* HANDBOOK, *supra* note 2, at 585 & n.51; *Native American Water Rights, supra* note 109, at 12; *Primer on Indian Water Rights, supra* note 32, at 67-68. *But see* Harry B. Sondheim & John R. Alexander, *Federal Indian Water Rights: A Retrogression to Quasi-Riparianism?*, 34 S. CAL. L. REV. 17 (1960) (stating that although *Winters* might be expanded to include reservations whose boundaries are adjacent to water, the rationale certainly should not be expanded to allow an implied retention of water for reservations non-contiguous to the water supply). Thus, it appears that water rights may be satisfied from any available surface water. *Primer on Indian Water Rights, supra* note 32, at 67-68. While the PIA standard appears to apply

water rights for western reservation tribes. The *Arizona* Court legitimized the quantification theory of "practicably irrigable acreage" (PIA).[115] The Court held that the federal government "intended to deal fairly with the Indians by reserving water for them without which their lands would have been useless."[116] The fact that fulfilling the purposes of the reservation might result in economic hardship or might leave non-Indian interests without a water supply at all does not justify an "equitable apportionment"[117] or reduction of Indian water by the judiciary.[118]

Another issue involving tribal water rights is the allocation of groundwater. In *Cappaert v. United States,*[119] the Supreme Court affirmed an order enjoining the pumping of groundwater by a private landowner on his own land where the federal reserved water rights were being depleted. The *Cappaert* Court ruled that reserved rights may be protected against off-reservation groundwater, as well as surface water, diversions.[120] However, the Wyoming Supreme Court, subject to much criticism, stated that no court had ever found a reserved right to groundwater, thus rejecting *Cappaert* on the grounds that *Cappaert* treated the water below the ground as surface water.[121]

C. *Oklahoma Cases*

Winters and its progeny[122] are important to the water rights of Oklahoma's tribes when examining the source of a tribe's reserved rights and the allocation of the water. The courts, in deciding the following cases, have had to determine what Congress intended in its treaties and statutes to reserve for the tribes when it established their homelands.[123]

In general, when a territory is admitted into statehood the state acquires portions of the public land.[124] Included in the public lands are navigable rivers, which are subject to the navigation servitude of the federal government.[125] As a general rule, the beds of nonnavigable watercourses are owned by the adjoining riparian owners to the middle of the watercourse.[126] This is subject to exceptions which include the Indians.[127]

In *Brewer-Elliott Oil & Gas Co. v. United States,*[128] the federal government, as trustee for the Osages, sued for an injunction against further exploration and drilling and to quiet title to the part of the Arkansas River bed. This claim was based on the fact that, as owner of the entire mineral estate (which was located in the Osage Reservation), the Osages owned the mineral estate to the middle of the Arkansas River. The state, on the other hand, argued that it owned the river bed in fee. The Eighth Circuit held that "whether the river was navigable or nonnavigable, the United States, as the owner of the territory through which

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to the tribes who have an agricultural purpose, even those tribes not contiguous to the river, it is questionable whether a non-agricultural tribe could obtain the same rights.

115. Arizona v. California, 373 U.S. 546, 600 (1963). PIA will be discussed below.

116. *Id.* at 600.

117. The doctrine of equitable apportionment is a method of resolving water disputes between states. This doctrine does not apply to Indian reservations because an Indian reservation is not a "state" even though they have the power to manage their own affairs. *Id.* at 597.

118. *Id.* at 597; *see* HANDBOOK, *supra* note 2, at 587.

119. 426 U.S. 128 (1976).

120. *Id.* at 143.

121. *Big Horn I*, 753 P.2d 76, 99-100 (Wyo. 1988).

122. *See* Winters v. United States, 207 U.S. 564 (1908); Arizona v. California, 373 U.S. 546, 600 (1963) (legitimized practicably irrigable acreage (PIA) quantification theory, at least for reservations whose purpose was to create an agrarian-based tribal economy); *Big Horn I*, 753 P.2d 76 (Wyo. 1988), *aff'd*, 492 U.S. 406 (1989) (refined PIA); Cappaert v. United States, 426 U.S. 128, 139 (1976) (Congress impliedly reserves water in sufficient quantities to fulfill "primary purpose" of reservation but not for secondary or lesser purposes); United States v. New Mexico, 438 U.S. 696, 702 (1978) ("primary purpose" test); United States v. Adair, 723 F.2d 1394, 1409 (9th Cir. 1983) (reservation not precluded from having "multiple purposes").

123. *Id.*

124. *Oklahoma Watercourses, supra* note 11, at 84.

125. *Id.*

126. *Id.*

127. *Id.*

128. 260 U.S. 77 (1922).

the Arkansas flowed before statehood, had the right to dispose of the river bed, and had done so to the Osages."[129] On appeal, the Supreme Court affirmed the lower courts.[130]

In *Choctaw Nation v. Oklahoma*,[131] the Court held that Congress intended to convey to the tribes the bed and banks of the Arkansas River; and since those lands had never been allotted, title to the riverbed remained in the Choctaw, Cherokee, and Chickasaw Nations. In *Cherokee Nation v. Oklahoma*,[132] the Tenth Circuit examined the effects of different acts and treaties involving the Indians' entitlement to the lands, including the Dawes Act, the General Allotment Act, the Five Tribes Act, the Oklahoma Enabling Act, and other allotment acts, and determined their impact on the Cherokee Nation.[133] The Tenth Circuit rejected the state of Oklahoma's argument that these acts divested the Cherokees of title to the Arkansas riverbed.[134] This argument was at issue in an earlier case, *United States v. Grand River Dam Authority*,[135] where the Court held that a 1906 Act, which granted light and power companies the right to construct a dam across a nonnavigable stream in Cherokee territory, did not effect a transfer of the Cherokees' water rights. The respondents argued that if any rights in the water of the Grand River remained in the United States after the grant to Indians in 1838, rights over them were later given to Oklahoma. The Court disagreed, holding that the 1906 Act was no more than a regulatory measure of the United States over the Indians; it did not purport to grant title to waters and appurtenant lands to the State of Oklahoma.[136]

D. Effects of Franco on Reserved Rights

In *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board*,[137] the Supreme Court of Oklahoma did not abolish prior appropriation; however, it did seem to give prior appropriators a lesser right than riparians. As a result, the effects of *Franco* on the *Winters* doctrine are unclear because, to date, *Winters* rights have only been recognized in appropriation states. The nature and extent of *Winters* reserved rights have only been defined for western reservation tribes found in appropriation states. On the other hand, *Winters* rights have not been rejected in purely riparian states; rather, no cases have addressed the issue.[138]

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129. *Id.* at 80. *See generally Oklahoma Watercourses*, *supra* note 11, at 84.

130. *Brewer-Elliott*, 260 U.S. at 80.

131. 397 U.S. 620 (1970).

132. 461 F.2d 675 (10th Cir. 1972), *on remand* after Supreme Court's decision in Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

133. *See also Eastern Oklahoma*, *supra* note 9, at 11.

134. 461 F.2d at 678; *see* Chickasaw Nation v. Oklahoma Tax Comm'n, 31 F.3d 964 (10th Cir. 1994).

135. 363 U.S. 229, 234-35 (1960).

136. *Id.* However, in 1938 two adjudications took place regarding Spavinaw Creek, a tributary of Grand River. These are called the City of Tulsa v. Grand-Hydro adjudication and In the Matter of the Application (as amended) and Supplemented, but the City of Tulsa, a Municipal Corporation, for Appropriation of the Waters of Spavinaw Creek. *See* JOSEPH R. RARICK, THE RIGHT TO USE WATER IN OKLAHOMA 37-50 (2d ed. 1984). These adjudications granted the Grand River Dam Authority the water in question. This may seem to conflict with United States v. Grand River Dam Authority, which occurred 20 years later. While potential conflict may exist, a determination of this is beyond the purpose of this chapter.

137. 855 P.2d 568 (Okla. 1990).

138. *See Native American Water Rights*, *supra* note 109, at 6; *see also* WATER RIGHTS, *supra* note 62, at 216. However, in California, which recognizes both riparian and appropriated rights, state riparian rights may also be asserted on reserved lands in addition to the reserved water rights. *Id.*; *see In re* Water of Hallett Creek Stream Sys., 749 P.2d 324, 332 (1988). However, *Hallett* did not discuss or apply the *Winters* doctrine because tribal rights were not at issue.

An action was brought by the Seminole Tribe in Florida that might have addressed the issue, yet it was settled by the enactment of the Florida Indian (Seminole) Land Claims Settlement Act of 1987, which incorporated the Seminole Water Rights Compact as federal law. *Native American Water Rights*, *supra* note 109, at 28; *see* 25 U.S.C. §§ 1772-1772g. The Compact is reprinted in *Seminole Indian Land Claims Settlement Act of 1987: Hearing on S. 1684 Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 1st Sess. 83-122 (1987) [hereinafter *Senate Hearing*]. *See generally*, *Native American Water Rights*, *supra* note 109, at 28 (citing Jim Shore & Jerry C. Straus, *The Seminole Water Rights Compact and the Seminole Indian Land Claims Settlement Act of 1987*, 6 J. LAND USE & ENVT'L L. 1 (1990)); Barbara S. Monahan, Comment, *Florida's Seminole Indian Land Claims Agreement: Vehicle for an Innovative Water Rights Compact*, 15 AM. INDIAN L. REV. 341 (1991)). The Compact recognized Seminole rights to a percentage of the water available from specified sources instead of quantifying their water rights. *Native American Water Rights*, *supra* note 109, at 28; *see Seminole Water Rights Compact*, *supra*, at 25-27, *reprinted in Senate Hearing*, *supra*, at 111-13.

The definition of "reserved rights" supports an application of the *Winters* doctrine to a riparian or dual-system state. In *Idaho Department of Water Resources v. United States*, the Idaho Supreme Court defined "reserved rights" as those rights reserved, either expressly or impliedly, by the United States and are exempt from appropriation.[139] Generally, these rights consist of those rights reserved by treaty with the Indians.[140] Reserved rights also include those obtained by the United States prior to granting statehood to a territory by the riparian doctrine or for the purpose of maintaining navigable stream flows and other rights created by the United States when it held land as a territory.[141] Arguably, if riparian rights are within the definition of reserved rights, then the *Winters* doctrine should apply to riparian systems. In *Arizona v. California*,[142] the Supreme Court upheld *Winters* rights in a dual system state. The Court did not expressly address the fact that several of the reservations were located in a dual-system state. This may imply a willingness to apply the *Winters* doctrine in riparian and dual-system states.[143]

There are three main issues in discussing the effects of *Franco* on reserved rights. First, Indian reserved rights may be exempt from *Franco* because these rights are exempt from the jurisdiction of Oklahoma. Generally, Indian reserved water rights are determined under federal law, not state law.[144] Thus, *Franco*, which is based on Oklahoma state law, should not be applicable to the Indians, allottees, or reservations. Second, if *Franco* creates riparian rights in Oklahoma, then the tribes, Indians, and allottees may also have state riparian rights in addition to their reserved rights. *Franco* may have an effect on the determinations of these additional riparian rights. Third, reserved rights are probably not subject to the ordinary rules for sharing and shortages as private riparian water holders. The additional riparian rights over the reserved rights will probably be subject to the pro rata sharing typically required in times of water shortages under basic riparian principles.

The first proposition is that the Indian reserved water rights are not subject to state law and not subject to the *Franco* decision. If this is true, Indian reserved rights should not be subject to state law riparian principles. The tribes, reservations, and allottees should have greater priority over private landowner riparians because they were granted the land and the reserved water rights much earlier than the private landowners. Further, they were granted the land and reserved rights from the federal government through treaties or other means with the intent that they would be allotted sufficient water to fulfill the purposes of the reservations. Possibly the best method to allocate the Indians' reserved waters in a riparian state would be first to ensure sufficient water to fulfill the federally reserved purposes of the reservations.[145] Then the burden of shortage should be allocated among the remaining riparians, or at least among those riparians whose use began subsequent to the establishment of the reservation.[146] Implicit in this idea is that along with the government's intent to reserve lands is the federal intent to

139. 832 P.2d 289, 293 & n.3 (Idaho 1992).

140. Idaho Dep't of Water Resources v. United States, 832 P.2d 289, 293 n.3 (Idaho 1992); *see* Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983); *In re* Rights to Use Water in Big Horn River, 753 P.2d 76 (Wyo. 1988); State *ex rel.* Reynolds v. Lewis, 545 P.2d 1014 (N.M. 1976).

141. *Id.* at 293 n.4; *see* United States v. Rio Grand Dam & Irrigation Co., 174 U.S. 690 (1899); United States v. Winans, 198 U.S. 371 (1905).

142. 373 U.S. 546 (1963).

143. *See Primer on Indian Water Rights, supra* note 32, at 102.

144. In Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), the Court ruled that Indian reserved rights were subject to state jurisdiction based on the McCarran Amendment, *infra*. However, in Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983), the Court clarified that the McCarran Amendment is jurisdictional only; it does not change the federal substantive law of reserved rights. On the other hand, in *Big Horn III*, the Supreme Court of Wyoming held that tribes were not authorized to change their right to divest future water from agricultural purposes to maintain instream flow for fishery purposes without regard to state law. *Big Horn III*, 835 P.2d at 278. The *Big Horn III* court analyzed its decision based on primary purposes of the reservation. The *Big Horn III* court held that water is impliedly reserved only to meet the primary purpose(s) for which the reservation is made and that Congress must have intended for water to be acquired under state law for any secondary purposes. *Id.* at 278 (citing United States v. New Mexico, 438 U.S. 696 (1978)). The *Big Horn III* court held that changing their use of reserved water was in fact finding a secondary purpose which is controlled by state law. *Big Horn III*, 835 P.2d at 279.

145. WATER RIGHTS, *supra* note 62, at 216.

146. WATER RIGHTS, *supra* note 62, at 216; *see* Hanks, *Peace West of the 98th Meridian — Solution to Federal-State Conflicts over Western Waters*, 23 RUTGERS L. REV. 33, 39-40 (1968).

reserve sufficient water to achieve the purposes of the reserved lands.[147] The scope and nature of the Indians' reserved water rights also depends on the intent of the federal government.[148] The Montana Supreme Court held that intent should be construed as being entitled to enough water to fulfill the federal goal of Indian self-sufficiency.[149] The Supreme Court of California held that the reserved rights doctrine provides that, when the United States reserves land from the public domain for federal purposes, it implicitly reserves sufficient water to accomplish the purposes of the reservation.[150] Because the federal government's intent was to reserve sufficient water to the Indians and tribes, they should have the right to sufficient water to fulfill the primary purpose of the reservation. If this is so, the affects of *Franco* will be minimal because the Indians, tribes, and allottees are entitled to sufficient water to fulfill the reservation's purposes despite any attempts of *Franco* to diminish or deny the water rights.[151]

By analogy, the decision in *Badgley v. City of New York*,[152] could be applied to strengthen the argument that *Franco* does not affect Indian reserved rights. The Second Circuit held that a state cannot grant to private parties any privately owned property interest in riparian rights greater than the state's own property interest in them.[153] The Second Circuit held that as a result of an interstate compact, the State of Pennsylvania never held a right to an undiminished flow of the water source at issue.[154] Moreover, the Second Circuit held that the rights of the citizens are no greater than those of the state and thus cannot interfere with the rights granted to the City under the terms of the Compact.[155] While *Badgley* is an interstate compact case, it may relate to the issue of the affect of *Franco* on Indian reserved rights. Generally, reserved rights were reserved by the United States at an earlier priority date than other appropriators, and thus they are not subject to further state appropriation. It can be implied that a state no longer has the right to an undiminished flow to the reserved water rights. Since the citizens of the state cannot enjoy a greater interest than the state's interest in the water, the citizens cannot enjoy an undiminished right to the water either. Applying *Badgley*, neither the state nor its citizens can interfere with the terms and the intent of the federal government when it granted the tribes and reservations their reserved water rights. The state's rights and citizens' right to the water have a lesser priority than the water rights reserved by the federal government. Based on the *Badgley* decision, the state cannot interfere with the Indians' reserved rights. Thus, *Franco*, which is based on state law, cannot interfere or affect the Indians' reserved rights.

Federal Indian reserved water rights are similar to riparian rights.[156] Indian rights are reserved when they attach to waters which are contiguous to the land set aside for Indian reservations.[157] On the other hand, Indian reserved water rights differ significantly from both riparian and appropriative rights and have been suggested to be "quasi-riparianism."[158] Indian reserved rights are not based on appropriation and actual beneficial use nor are they lost by nonuse.[159] Sufficient water is reserved to fulfill the purposes

147. WATER RIGHTS, *supra* note 62, at 217.

148. *Id.* at 219. Because Indians were pressured into signing treaties that they did not really understand, courts usually broadly construe intent in favor of the Indians. *Id.*

149. *Id.* at 220; *see* Montana v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 712 P.2d 754, 767-68 (Mont. 1985).

150. *In re* Water of Hallett Creek Stream Sys., 749 P.2d 324, 327 (Cal. 1988).

151. However, one needs to beware of a distinction between the actual rights to water versus paper rights to water. Indians, tribes, and allottees may not always get the quantity that it seems they should be entitled.

152. 606 F.2d 358 (2d Cir. 1979), *cert. denied*, 447 U.S. 906 (1980).

153. *Id.* at 365-66.

154. *Id.*

155. *Id.* at 367.

156. Sondheim & Alexander, *Federal Indian Water Rights: A Retrogression To Quasi-Riparianism?*, 34 S. CAL. L. REV. 1, 2 (1960) [hereinafter *Quasi-Riparianism*].

157. *Id.*

158. HANDBOOK, *supra* note 2, at 578; *see also Quasi-Riparianism, supra* note 155, at 2.

159. *Id. See, e.g.*, United States v. Hibner, 27 F.2d 909, 911 (D.Idaho 1928) (holding that Indians' reserved water rights held not abandoned or forfeited by failure to reside on land and use water).

for which a reservation was established.[160] The creation of reserved water rights is usually the date on which a reservation was established, or perhaps even earlier, which is generally earlier than the creation of most non-Indian water rights.[161] Unlike riparian rights, Indian reserved rights are not ratably reduced in times of shortage.[162] For these reasons and because Indians are not subject to state law, Indian reserved water rights are generally prior and paramount to rights derived under state law.[163]

This proposition was impliedly supported in California, a dual-system state. In *Arizona v. California*,[164] the Court resurrected *Winters* and awarded water rights in the Colorado River to the five reservations asserting claims to water. The Court held that the reserved rights of the five Indian reservation were found superior to unused riparian rights under California law. The Court held that the water rights of the reservations had been reserved by the United States for the Indians, and the right to the water became effective as of the time the Indian reservations were created.[165] These water rights had vested at the time of the creation of the reservation and are present perfected rights, subject to priority over any subsequent claims.[166]

The second proposition under *Franco* is the implication that the Indians and reservations may be able to assert state law riparian rights in addition to their reserved rights. While no case has applied the *Winters* doctrine in a riparian jurisdiction, California, which recognizes both riparian and appropriation laws, allowed non-Indian federally reserved lands to execute its state riparian rights. This proposition was addressed by the California Supreme Court in *In re Water of Hallett Creek Stream System*[167] where it held, in the context of non-Indian lands, that federally-reserved lands are entitled to state riparian rights in addition to reserved rights. The *Hallett* court held that the riparian rights of the United States on its reserved national forest lands in California are as fully immune from defeasance as riparian rights of private owners.[168] Applying the *Hallett* reasoning, Indians with lands riparian to the water may be able to assert their riparian rights in addition to their reserved rights for any secondary purposes or uses.[169] In this instance, the Indians' reserved rights would be prior and paramount to private landowners' water rights. However, any additional state rights asserted under the riparian doctrine implemented by *Franco* would be subject to the ordinary riparian rules for all other private landowner riparians.

The third issue under *Franco* is to determine water allocation in times of water shortages. Unlike riparian rights, Indian reserved rights are not ratably reduced in times of shortages.[170] In *Arizona*, the five Indian reservations were given a vesting date in the water based on the date of the reservation; thus, the reservations acquired a reserved right in the unappropriated water which is prior and superior to the rights of future appropriators.[171] In fact, the reservations' reserved rights were also found superior to

160. HANDBOOK, *supra* note 2, at 578.

161. *Id.*

162. *Id.*

163. *Id.* This analysis applies only to the water rights reserved for the primary purposes of the reservation. In United States v. New Mexico, 438 U.S. 696 (1978), the Court distinguished between primary and secondary purposes of a non-Indian federal reservation. The Court held that water is reserved only for the primary purposes of the reservations and that water for secondary purposes must be obtained under state law. *Id.* at 702. However, there is speculation as to whether *New Mexico* applies to Indian water rights.

164. 373 U.S. 546 (1963). The water rights were awarded based on the practicably irrigable acreage (PIA) of the reservation. *Id.* at 600-01. Quantification, including PIA, will be discussed *infra*.

165. Arizona v. California, 373 U.S. at 600.

166. *Id.*

167. 749 P.2d 324 (Cal. 1988).

168. *Id.* at 336-37.

169. *See* Kent McNeil, *First Nation Riparian Rights And Hydraulic Development In Ontario*, *in* SOVEREIGNTY SYMPOSIUM VII (Tulsa, Okla. June 6-9, 1994). McNeil's paper gives the law in Ontario on Indian reserves and their riparian rights. McNeil suggests that as riparian rights arise from lawful possession of land, the First Nation Indians have riparian rights in relation to any reserve lands which encompass or are adjacent to the waterbodies. *Id.* at 1. These rights are in addition to any other water rights which the Indians may have based on their aboriginal rights and treaties. *Id.* at 2. The Indians have the same riparian rights respecting their reserve lands as other lawful possessors of land that are enforceable against anyone who infringes upon them. *Id.* at 4; *see also Native American Water Rights*, *supra* note 109, at 29.

170. HANDBOOK, *supra* note 2, at 578.

171. *Id.* at 576.

unused riparian rights under California law.[172] While California gives the Indian reservations priority over prior appropriators and unused riparian rights, it does not address whether tribal rights are given priority over current riparian rights. Impliedly, the purposes of the reserved rights should have greater priority over both current and future riparian rights, even in times of shortages. The water should first be used to fulfill the purposes of the reservation, and then the shortage should be allocated among the remaining riparians. Any additional state rights asserted by the reservations under state law, however, should be subject to pro rata distribution along with all other riparians.

IV. McCarran Amendment: Adjudication of Water Rights

A. In General

Although tribal rights to water are federal rights, they may be adjudicated in state court. In 1952, Congress enacted the McCarran Amendment, waiving its sovereign immunity defense and consenting to be joined in state suits determining the water rights of all users on particular streams.[173] In *United States v. District Court for Eagle County*,[174] a suit not involving Indian reserved rights, the Supreme Court held that the McCarran Amendment constituted consent to join the federal government in a state general adjudication suit that included the determination of all appropriated rights, federally reserved rights, and riparian rights. Subsequently, in *Colorado River Water Conservation District v. United States*,[175] also known as the *Akin* case, the Supreme Court extended the ambit of the McCarran Amendment to include Indian reserved water rights.[176] The Supreme Court held that concurrent jurisdiction existed, and both the federal court and the state court had jurisdiction, because the McCarran Amendment's waiver of sovereign immunity applied to Indian water rights held in trust by the United States.[177] The *Akin* Court held that no distinction existed between Indian and non-Indian federal reserved rights for the purposes of the McCarran Amendment.[178]

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172. *Id.* at 591.

173. 43 U.S.C. § 666. The McCarran Amendment provides in pertinent part:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto be reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances.

Id.

174. 401 U.S. 520, 524 (1971); *see also* United States v. District Court for Water Div. No. 5, 401 U.S. 527 (1971).

175. 424 U.S. 800, *reh'g. denied* 426 U.S. 912 (1976) [hereinafter *Akin*].

176. *Id. But see* Stephen M. Feldman, *The Supreme Court's New Sovereign Immunity Doctrine And The McCarran Amendment: Toward Ending State Adjudication Of Indian Water Rights*, 18 HARVARD ENV'T L. REV. 433 (1994). Feldman's article argues that McCarran Amendment does not apply to Indian reserved rights based on decision in United States v. Nordic Village, Inc., 112 S. Ct. 1011 (1992).

177. *Akin*, 424 U.S. at 811; *see* HANDBOOK, *supra* note 2, at 601. The *Akin* court ruled that, given its policy about piecemeal adjudications of water rights and the fact that no meaningful progress had been made in the federal court proceeding, the federal court should abstain in favor of the state court proceeding. *Akin*, 424 U.S. at 817-20. The *Akin* decision also held that the McCarran Amendment confers subject matter jurisdiction on state courts when there are no federal statutory or state constitutional bars to its exercise. *Id.* at 809-10.

Several courts tried to limit *Akin* by holding that states who had disclaimed jurisdiction over Indian lands were prevented the assertion of state jurisdiction over Indian water cases. However, in Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545 (1983), the Court rejected these arguments, citing the possibility of "duplicative and wasteful" concurrent proceedings and "the serious potential for spawning an unseemly and destructive race to see which forum can resolve these issues first, which is contrary to the McCarran Amendment." *Id.* at 567; *see* WATER RIGHTS, *supra* note 62, at 254.

In United States v. Adair, 723 F.2d 1394, 1404-06 (9th Cir. 1983), the Ninth Circuit, in support of the contention of concurrent jurisdiction, upheld the trial court's refusal to abstain in favor of state court adjudication because at the time the federal suit was filed, no state proceedings had commenced. *Id.* The *Adair* court noted that the federal proceeding was limited to establishing the priority among water rights and was to be coordinated with the state quantification proceeding. *Id.* at 1405-06.

178. *Akin*, 424 U.S. at 810. An argument has been made that the McCarran Amendment should not apply to Indian reserved water rights

Nonetheless, in *Arizona v. San Carlos Apache Tribe*,[179] the Court noted that the McCarran Amendment is a procedural statute only and does not purport to change:

> the substantive law by which Indian rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.[180]

This right to review should alleviate the concern that states cannot, or will not, fairly adjudicate Indians' reserved water rights.[181]

In Oklahoma, the application of the McCarran Amendment can vary, depending on which tribe is at issue. As discussed previously, eastern tribes (the Five Civilized Tribes) acquired their land separate from the General Allotment Act, thus holding their land in fee. On the other hand, the western tribes have their land held in trust by the United States. The McCarran Act waives sovereign immunity for the adjudication of water rights where the United States is the owner of or is in the process of acquiring water rights, and the United States is a necessary party to such suit.[182] The *Akin* court held that the state court had jurisdiction to adjudicate Indian water rights because the McCarran Amendment's waiver of sovereign immunity applies to Indian water rights held "in trust" by the United States. There is a question as to whether the *Akin* holding, and thus the McCarran Amendment, applies to the eastern Indians because their land is not held "in trust" by the United States.[183] However, most likely this distinction will not exempt the eastern tribes from the McCarran Amendment.

A brief discussion of what is "Indian country" and a discussion of what it means to be held "in trust" versus "not held in trust" is necessary. "Indian country" includes formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.[184] Numerous cases confirm the principle that the Indian country classification is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian land.[185] In *Indian Country U.S.A. v. Oklahoma Tax Commission*,[186] the Tenth Circuit found that the land in issue, which was on

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at all. *See* Feldman, *supra* note 175, at 433. This argument is based on the decision in United States v. Nordic Village, Inc., 117 L. Ed. 2d 181 (1992), where the Supreme Court held that effective waivers of the United States' sovereign immunity must be unequivocally expressed and are not generally to be liberally construed. *Id.* at 187. Applying the *Nordic* holding, the McCarran Amendment must be interpreted to preserve sovereign immunity regarding Indian water rights because it does not expressly waive Indian sovereign immunity. Feldman, *supra* note 175, at 467, 488. In fact, the McCarran Amendment nowhere mentions Indian water rights. The McCarran Amendment may not waive the sovereign immunity of the Indians at all. However, this contention has not been adjudicated in the wake of the *Nordic* decision. If the *Nordic* decision excludes Indians from the grasp of the McCarran Amendment, then the Indian tribes would not be subject to state adjudication of water rights. Federal law controls on the reservation and any determination of water rights in a state general adjudication could be preempted by federal law if the adjudication and/or *Franco* adversely affects the Indian's reserved rights to water. Therefore, *Franco* would hold no weight with respect to the tribes because *Franco* is based on state law.

179. 463 U.S. 545 (1983).

180. *Id.* at 571; *see Akin*, 424 U.S. at 817.

181. Moreover, there are arguments that a federal court is more likely than a state court to be familiar with federal water law and with Indian water law. Elizabeth McCallister, *Water Rights: The McCarran Amendment and Indian Tribes' Reserved Water Rights*, 4 AM. INDIAN L. REV. 303 (1976); *see Akin*, 424 U.S. at 820-27 (Justices Stewart's and Steven's dissent).

182. 43 U.S.C. § 666.

183. This chapter does not purport to determine the answer to this question. Instead, this chapter will focus on the effects the *Franco* decision will have on the Eastern and Western tribes, taking into consideration whether the McCarran Amendment applies or does not apply.

184. *Reservation Disestablishment*, *supra* note 22, at 785 & n.40; *see* 18 U.S.C. § 1151; Oklahoma Tax Comm'n v. Sac & Fox Nation, 113 S. Ct. 1985 (1993); Indian Country, U.S.A. v. Oklahoma Tax Comm'n, 829 F.2d 967 (10th Cir. 1994).

185. *See* Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1984); DeCoteau v. District County Court, 420 U.S. 425, 427-28 & n.2 (1975); Kennerly v. District Court, 400 U.S. 423 (1971); Cheyenne Arapaho Tribes of Oklahoma v. Oklahoma, 618 F.2d 665 (10th Cir. 1980); HANDBOOK , *surpa* note 2, at 27-46; FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 5-8 (1942 ed.).

186. *Indian Country, U.S.A.*, 829 F.2d at 973.

the Creek Nation land, did retain its status as Indian country, over which Congress intended primary jurisdiction to rest in the federal and tribal governments. The Tenth Circuit noted that the federal government's role as guardian and protector of Creek lands was recognized by the Supreme Court long after Oklahoma became a state.[187] The Tenth Circuit reasoned that it would be anomalous to adopt the position that the treaties conferring upon the Creek Nation a title stronger than the right of occupance have left the tribal land base with less protection simply because fee title is not formally held in trust by the United States.[188] Regardless of who holds fee title, the United States has assumed certain obligations to protect and preserve Creek Nation lands.[189] It is clear that trust obligations assumed by the United States with respect to Indian lands are not inconsistent with fee title in the tribe.[190]

This seems to imply that, even though fee title of Indian land is not held in trust by the United States, the United States, as protector and guardian, holds an interest in the land as if fee title were held in trust by the United States. If so, there is a strong argument that the McCarran Amendment would apply to both eastern and western tribes even if *Akin* and the statute only refers to the United States as trustee or owner of the land because of the United States' role as protector and guardian of the land.

B. McCarran Amendment Applies to All Oklahoma Tribes

If the McCarran Amendment applies to both eastern and western[191] tribes in Oklahoma, then these tribes may be subject to a state law general adjudication to determine who has rights to the water. The states may have the authority to determine the extent of the reserved water rights of the Oklahoma Indians, tribes, and allottees.

Since *Franco* holds that in Oklahoma the riparian system dominates over the prior appropriation system, it is unclear how tribal water rights and federal water rights will be determined. There are several suggestions to consider when determining the extent of the Indians' reserved rights. First, the Indians may share equal priority with other riparians in the state because priority dates are irrelevant as far as riparians are concerned. On the other hand, the Indians may have greater priority over other riparians because *Winters* and *Arizona* provide that the Indian tribes have a right to a sufficient quantity of water to fulfill the purposes of the reservation. The latter suggestion is probably the proper treatment of Indian reserved rights. The United States impliedly reserved sufficient water for the Indians, and it is doubtful that they will diminish this right in favor of private landowners. A final suggestion is that the Indians do have a greater priority than prior appropriators because the Indians have a vested right in the water with a priority date not later than the date of creation of the reservation.

C. Eastern Oklahoma Tribes Exempt from McCarran Amendment

There is an argument that the eastern tribes are not affected by the McCarran Amendment. Since the Five Civilized Tribes (the Tribes) were ceded land in what is known as "Indian Territory" and did not acquire mere reservations on the public domain in a territory destined to become a future state, they received land where tribal governments could operate without interference or competition by non-Indians and territorial or state governments. The lands were ceded to the Tribes and, as stated in the treaty, the Tribes received the power to pass "all such laws as they may deem necessary for the government and protection of the

187. *Id.* at 975; *see* United States v. Creek Nation, 292 U.S. 103, 109 (1935).

188. *Indian Country, U.S.A.*, 829 F.2d at 975-76.

189. *Id.* at 976 & n.4; *see, e.g.*, United States v. Hayes, 20 F.2d 873, 875 (8th Cir. 1927) (United States, as guardian and trustee of Creek tribal property, brought suit on tribe's behalf); United States v. Creek Nation, 295 U.S. 103 (1935) (holding that guardianship of United States extends to Creek Nation's property and affairs).

190. Indian Country, U.S.A. v. Oklahoma Tax Comm'n, 829 F.2d at 973, 976 n.4.

191. The lands of the Western Oklahoma tribes, which exclude the Five Civilized Tribes, are held in trust by the United States. Thus, the McCarran Amendment applies to waive their sovereign immunity in state water rights adjudications. *See* Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976); Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983); Department of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306 (Wash. 1993); Idaho Dep't of Water Resources v. United States, 832 P.2d 289 (Idaho 1992).

persons and property within their own country."[192] Moreover, the Tribes were excepted from the General Allotment Act.[193] Nothing in subsequent allotments expressly conveyed the reserved rights away from the Tribes. In *Indian Country, U.S.A. v. Oklahoma Tax Commission*,[194] the Tenth Circuit held that Congress did not intend or act to completely abolish tribal jurisdiction over tribal lands, to divest federal government of its authority, or to permit assertion of jurisdiction by Oklahoma. In addition, the Tenth Circuit rejected the disestablishment argument.[195] The Supreme Court, in remembering that "no part of the land granted to [the tribes] shall ever be embraced in any Territory or State[,]" concluded that the United States intended to and did convey title to the bed of the Arkansas River to the tribes.[196] Title to the riverbed remained with tribes becasue those lands were never allotted.[197] Further, in *United States v. Grand River Dam Authority*,[198] the Supreme Court held that the Cherokees' water rights did not transfer to the State upon statehood.

Because the United States gave the Indians the power to pass laws deemed necessary and covenanted that the lands ceded shall not be included within the territorial limits or jurisdiction of any State or Territory without their consent, it would be hard to justify subjecting these Tribes to a state adjudication.[199] The United States gave these tribes ownership in fee of their land, including the power to regulate the use and allocation of the water. Is it conceivable that Congress meant to go back on their promise to the Tribes and force them into the jurisdiction of the State?

If Congress keeps its promise, the McCarran Amendment should not apply to the Five Civilized Tribes of eastern Oklahoma. The lands of the Tribes are not held in trust by the United States. The land is held in fee by the Tribes. Since the McCarran Amendment is only directed towards the United States as "owner of" water rights,[200] arguably it should not apply to the Five Civilized Tribes. The Tribes would not be subject to a state general adjudication of water rights unless they consented as such. As a result, any determinations in a state general adjudication that affected the water rights of the Tribes would be moot because all interested parties would not be present. Moreover, the Tribes are subject to federal law, not state law. Any finding in the state adjudication could be preempted by the federal and tribal laws. If the Five Civilized Tribes are not covered under the McCarran Amendment, then *Franco* would be moot with respect to them. *Franco* is based on state law, which generally does not apply to the Indian tribes. Absent express consent, any water rights determined in a state adjudication under *Franco* would always be subject to possible preemption by the Five Civilized Tribes' assertion of their reserved rights.[201]

V. Allotments and Quantificaton of Water

A. Allotments

The General Allotment Act of 1887[202] resulted in the federal government transferring millions of acres to individual tribal members, and then much of the land was subsequently conveyed to non-Indians.[203] The

192. *See, e.g.*, Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478. *See supra* note 8-10 and accompanying text.

193. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 339).

194. 829 F.2d 967 (10th Cir. 1987).

195. Chickasaw Nation v. Oklahoma Tax Comm'n, 31 F.2d 964 (10th Cir. 1994).

196. Choctaw Nation v. Oklahoma, 397 U.S. 620, 635 (1970).

197. *Id.*

198. 363 U.S. 229 (1960).

199. *See supra* notes 8-11 and accompanying text.

200. The McCarran Amendment also applies to land in which the United States holds in trust for the Indians. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

201. *See* Cheyenne-Arapaho Tribes v. Oklahoma, 618 F.2d 665, 667-68 (10th Cir. 1980) (holding that states have no authority over Indians in Indian country unless it is expressly conferred by Congress). *See generally* WATER RIGHTS, *supra* note 62, at 217. If the McCarran Amendment and *Franco* do not apply to the Five Civilized Tribes then whose water law will apply? There is no uniform federal water law system to implement. Thus, these tribes appear to be left with no water law system. It is unclear what the implications of this are. One solution has been suggested that the tribes enacting their own individual water codes. *See generally Water Code*, *supra* note 101.

202. 25 U.S.C. § 331.

203. WATER RIGHTS, *supra* note 62, at 237.

Supreme Court recognized that the Indian allottees obtained a ratable portion of tribal reserved rights, or *Winters* rights, based on the amount of irrigable acres allotted.[204] The priority date for these allottees is the date the reservation was created and allottees' rights are not lost through nonuse.[205] The same rights also apply to Indian fee lands which never passed from Indian ownership.[206] The recent debate is whether non-Indian successors to Indian allottees may also succeed to a portion of the reservation water right including its early priority date.[207] The Ninth Circuit held that allottees who acquire a share of a tribe's reserved water rights may convey their water rights to non-Indian purchasers of land.[208] The non-Indian purchasers acquire water rights equal to the amount the allottee was actually using just before the conveyance, plus any additional quantities the non-Indian purchaser begins to use within a reasonable time after the conveyance, and they also obtain the reservation priority date.[209] However, the Ninth Circuit recognized that the tribal water rights not associated with the irrigatability of the allottees' land does not pass to the allottees or the non-Indian successors, and under this circumstance these water rights enjoy a higher priority than those which are transferable to the allottee.[210] Non-Indians who acquire lands by homesteading, in contrast, do not obtain *Winters* rights.[211]

B. Purposes of the Reservations

Water rights are reserved to carry out the government's purpose in creating the reservation.[212] In *United States v. New Mexico*, a non-Indian case, the Court made a distinction between primary and secondary purposes.[213] The Court held that water is impliedly reserved only for the primary purposes of federal reservations, but not for secondary purposes.[214] Yet the Ninth Circuit held that having multiple primary purposes is not precluded.[215]

The Ninth Circuit held that the general purpose of Indian reservations was to provide the tribes with homelands.[216] The Ninth Circuit held that the primary purposes of this reservation were both agriculture and fisheries preservation.[217] On the other hand, the Wyoming Supreme Court, in rejecting the homeland concept, held that the sole purpose of the reservation was agricultural.[218] The court

204. *Id.*; *see* United States v. Powers, 305 U.S. 527, 532-33 (1939); *see also* United States v. Ahtanum Irrigation Dist., 23 F.2d 321, 342 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957); *Walton I*, 647 F.2d 42, 50 (9th Cir. 1981); Skeem v. United States, 273 F. 93, 96 (9th Cir. 1921); United States v. Hibner, 27 F.2d 909, 912 (D. Idaho. 1928).

205. *Walton I*, 647 F.2d at 51; *Walton II*, 752 F.2d at 404.

206. *Big Horn I*, 753 P.2d at 112.

207. Non-Indians can acquire reservation lands by: (1) purchasing allotments from allottees who received fee patents to their land, or (2) they may homestead "surplus" reservation lands opened to settlement after the reservations were allotted. *Native American Water Rights, supra* note 109, at 19; *see* HANDBOOK, *supra* note 2, at 138.

208. *Walton I*, 647 F.2d at 51; United States v. Hibner, 27 F.2d 909, 912 (D.Idaho 1928) (holding that purchaser of Indians' land acquires same water rights for acreage irrigated when title passed, and added with reasonable diligence thereafter; they acquire same character of water rights, with equal priority); United States v. Ahtanum Irrigation Dist., 236 F.2d 321, 342 (9th Cir. 1956); *see Eastern Oklahoma, supra* note 9, at 8; *Native American Water Rights, supra* note 109, at 20.

209. *Eastern Oklahoma, supra* note 9, at 8; *see Walton I*, 647 F.2d 42 (9th Cir. 1981); *Walton II*, 752 F.2d 397 (9th Cir. 1985); United States v. Adair, 723 F.2d 1394 (9th Cir. 1983); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984); *see also Big Horn I*, 753 P.2d 76, 113-14 (1988).

210. *Eastern Oklahoma, supra* note 9, at 8-9; *see* United States v. Adair, 723 F.2d at 1418.

211. *Anderson*, 736 F.2d at 1362-63.

212. Winters v. United States, 207 U.S. 564, 576 (1908).

213. 438 U.S. 696, 700 (1978); *see* Cappaert v. United States, 426 U.S. 128, 141 (1976); *see also Native American Water Rights, supra* note 109, at 7.

214. *New Mexico*, 438 U.S. at 702; *Cappaert*, 426 U.S. at 139.

215. United States v. Adair, 723 F.2d 1394, 1409 (9th Cir. 1983).

216. *Walton I*, 647 F.2d 42, 47, 49 (9th Cir. 1981).

217. *Id.* at 47-48.

218. *Big Horn I*, 753 P.2d 76, 96-99 (Wyo. 1988), *aff'd by equally divided court*, Wyoming v. United States, 492 U.S. 406 (1989); *see Native American Water Rights, supra* note 109, at 9.

refused to recognize a new fisheries purpose for the tribes because they were not historically dependent upon fisheries for their livelihood.[219]

There are cases on allottees' water rights on western Indian reservations in which courts have found the primary purpose of the reservation is to provide the tribe with an agrarian-based economy.[220] The rights in these cases were transferable to allottees and the non-Indian successors. Moreover, these rights were primarily related to irrigation. In eastern Oklahoma, due to the greater amount of available water, the water rights associated with irrigation are fairly small compared to water rights granted to the tribes.[221] Thus, the western tribes allotment cases, dealing primarily with irrigation, are of little importance in understanding the current state of water rights of the eastern Oklahoma tribes.[222]

Indians and tribes might need water for purposes other than those in which their rights were originally reserved. The Special Master in *Arizona v. California*[223] addressed this issue after stating that the measure of the Indians' right to the use of water was to be determined by their irrigable acreage.[224] The Special Master also explained that "this does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agriculture and related uses."[225] The Ninth Circuit ruled that the tribes may determine how to use their water rights.[226] Other courts have held that *Winters* rights are federal rights defined and controlled by federal law, not state law.[227] In contrast, the Wyoming Supreme Court ruled that tribes have no "unfettered right" to use their water rights based on practicably irrigable acreage for any use other than the original agricultural use.[228] The *Big Horn III* court held that tribes, like any other appropriator, had to comply with state water law to change use of their reserved future project water from agricultural purposes to any other beneficial use, such as instream flow.[229]

C. Quantification of Reserved Rights

The quantification of reserved rights was promulgated in *Arizona v. California*,[230] which defined that nature and extent of reserved *Winters* right for western reservation tribes. The *Arizona* court held that Indian tribes were entitled to a quantity of water equal to practicable irrigable acreage (PIA), which allows sufficient water to irrigate each acre of the reservation that was irrigable, regardless of whether such land was actually cultivated.[231] In 1988, the Wyoming Supreme Court addressed the PIA standard

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219. *Big Horn I*, 753 P.2d at 98.

220. *See Walton II*, 752 F.2d 397, 400 (9th Cir. 1985). Water reserved for other purposes, such as to maintain fisheries, does not pass to the allottees, and thus remains with the tribes. *Id.*

221. *Eastern Oklahoma, supra* note 9, at 9.

222. *Id.*

223. 373 U.S. 546 (1963).

224. HANDBOOK, *supra* note 2, at 592 & n.108.

225. *Id.*

226. *Walton I*, 647 F.2d at 48-49. However, the Ninth Circuit held that tribes may not change the use of instream flow to consumptive purposes because the right to instream flow is more in the nature of a right to prevent others from decreasing the stream below a certain level. *Adair*, 723 F.2d at 1410-11; *see* Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979). As long as other water users are no worse off than they would have been if the rights had been exercised for their original use at their original place, Indians and tribes presumably are allowed to change the nature and place of use of their reserved water rights to further the purposes of their reservations and to advance their economic self-sufficiency. HANDBOOK, *supra* note 2, at 592-93. *See generally* Storey, *supra* note 1.

227. *Native American Water Rights, supra* note 109, at 14-15; *see Adair*, 723 F.2d at 1410-11 & n.19; *Big Horn III*, 835 P.2d at 288.

228. *Big Horn III*, 835 P.2d at 278.

229. *Id.*

230. 373 U.S. 546 (1963).

231. *Id.* The Court expressly rejected the suggested approach of the tribes' reasonably foreseeable needs because it would introduce too much uncertainty. *See Native American Water Rights, supra* note 109, at 9; *see also* Eric Eisenstadt, *Fish Out Of Water: Setting A Single Standard For Allocation Of Treaty Resources*, 17 AM. INDIAN L. REV. 209 (1992); *Water Code, supra* note 101.

in *In re General Adjudication of All Rights to Use Water in the Big Horn System*[232] and awarded water rights based on PIA.

Not all reserved rights are measured by PIA. Rights to water based on purposes other than agricultural are quantified differently. For example, the Ninth Circuit held that, because the preservation of fisheries was one purpose of the Colville Reservation, the Colville Tribes had a right to the quantity of water to maintain the fisheries.[233] Moreover, the Ninth Circuit allowed for multiple purposes, including agriculture, hunting, and fishing; thus, water rights of Indians may be implied when water is necessary to fulfill the very purposes for which the federal reservation was created.[234] It has been held that irrigation rights to water that are based on a priority date of time immemorial are measured by past use, not by PIA.[235] Also, when preexisting tribal uses, such as hunting and fishing, are confirmed by treaty, statute, or executive order, the proper priority date is "time immemorial."[236] Other courts apply a needs-based standard for uses other than irrigation which are not measured by the PIA standard.[237]

In a non-Indian context, the quantity reserved extends only to that amount of water necessary to fulfill the purpose of the reservation.[238] In *United States v. New Mexico*[239], the Court held that non-Indian federal reservations carried an implied right to water necessary to fulfill the primary purposes of the reservation. The Court noted, however, that the federal government could seek water for secondary purposes under state law.[240] This was supported by the California Supreme Court when it held, in the context of non-Indian lands, that federally reserved lands are entitled to state riparian rights in addition to reserved rights.[241] The *Hallett* court held that the United States' riparian rights, which can be exercised separately and in addition to the reserved rights, are as fully immune from defeasance as riparian rights of private owners.[242] The *Hallett* court held that the United States could acquire water for secondary purposes in the same manner as any other public or private entity, by the assertion of their state riparian rights.[243] It is important to distinguish between reserved rights and riparian rights in this instance; reserved rights are federal rights available for the purposes of the reservation, whereas riparian rights are sought under state law because the land is actually riparian to the water.

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232. 753 P.2d 76 (Wyo. 1988); *see* Robert H. Abrams, *The Big Horn Indian Water Rights Adjudication: A Battle For The Legal Imagination*, 43 OKLA. L. REV. 71 (1990). Upon certiorari, the Supreme Court affirmed without opinion. Wyoming v. United States, 109 S. Ct. 2994, *reh'g denied*, 110 S. Ct. 28 (1989); *see* WATER RIGHTS, *supra* note 62, at 227. The future of the PIA standard is questionable because at least four member of the Supreme Court seemed prepared to alter or limit the PIA standard. *Id.* at 228-30.

233. *Walton I*, 647 F.2d at 48.

234. United States v. Adair, 723 F.2d 1394, 1408-10 (9th Cir. 1984).

235. WATER RIGHTS, *supra* note 62, at 232; *see Native American Water Rights*, *supra* note 109, at 11-12.

236. WATER RIGHTS, *supra* note 62, at 223; *see* United States v. Winans, 198 U.S. 371 (1905); State *ex rel.* Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 712 P.2d 754, 764 (Mont. 1985).

237. *Adair*, 723 F.2d at 1408-09; *see* WATER RIGHTS, *supra* note 62, at 230.

238. Cappaert v. United States, 426 U.S. 128, 141 (1976); *see also In re* Water of Hallett Creek Stream Sys., 749 P.2d 324 (Cal. 1988); United States v. New Mexico, 438 U.S. 696 (1978).

239. 438 U.S. 696, 702 (1978).

240. *Id.* at 702.

241. *In re* Water of Hallett Creek Stream Sys., 749 P.2d 324 (Cal. 1988). It is important to note the distinction between reserved rights and state riparian rights. Reserved rights imply that reservations may enjoy the paramount right to the water, basing its analysis on the fundamental purpose of the reservation system, the practical need for water in the arid west, and the canons of construction for Indian treaties and agreements. Winters v. United States, 207 U.S. 564 (1908); *see Native American Water Rights*, *supra* note 109, at 4. The priority date of tribal water rights is the date of creation of the reservation. *Arizona*, 373 U.S. at 600. "Reserved" rights are unlike riparian rights, despite their similarities. Like riparian rights, reserved rights are appurtenant to the land; land ownership is the basis of the right. *See* WATER RIGHTS, *supra* note 62, at 200. Also like riparian rights, reserved rights are not lost by non-use. *Id.* However, unlike riparian rights, reserved rights can be used on non-riparian lands. The most distinguishing characteristic of reserved rights is that they are federal rights, impliedly reserving sufficient water to effectuate the purposes of the reservation. Also, riparian rights are enjoyed on the basis of "reasonable use" standard, not on a "purposes" standard. *Id.*

242. *Hallett*, 749 P.2d at 336-37.

243. *Id.* at 330. Riparian rights provide that "the owner of land that is riparian to a waterbody, has the right to have that waterbody c ntinue to stand or flow along his land, subject to the right of other riparian owners to make reasonable use of the waters." 7 WATER RIGHTS, *supra* note 62, at § 610; *see* HANDBOOK, *supra* note 2, at 577.

There are limitations on riparian rights in California. The *Hallett* court referred to its decision in *In re Waters of Long Valley Creek Stream System*[244] in its response to the contention that recognition of unexercised riparian rights in federal reserved lands will disrupt the settled rights of appropriators throughout the state and impair the Board's ability to plan and manage the allocation of the state's scarce water supply.[245] The *Long Valley* court stated that the State Water Resources Control Board (the Board) is authorized to:

> decide that an unexercised riparian claim loses its priority with respect to all rights currently being exercised. Moreover, to the extent that an unexercised riparian right may also create uncertainty with respect to permits of appropriation that the Board may grant after the statutory adjudication procedure is final, and may thereby continue to conflict with the public interest in reasonable and beneficial use of state waters, *the Board may also determine that the FUTURE riparian right shall have a lower priority than any uses of water it authorizes before the riparian in fact attempts to exercise his right.* In other words, while we interpret the Water Code as not authorizing the Board to extinguish altogether a future riparian right, *the Board may make determinations as to the scope, nature and priority of the right that it deems reasonably necessary to the promotion of the state's interest in fostering the most reasonable and beneficial use of its scarce water resources.*[246]

The Board is fully empowered to make determinations as to the scope, nature, and priority of the unexercised federally-held riparian rights as the Board deems "reasonably necessary to the promotion of the state's interest in fostering the most reasonable and beneficial use" of its water resources.[247] The Board's power stems from the fact that the unexercised riparian rights are exercised under state law. The state riparian rights are separate from federal reserved rights. While the United States' riparian rights may have theoretically "attached" when the land was reserved from the public domain, the Board may order such rights subordinated to appropriative rights currently being exercised, and it may determine that the future riparian rights shall have a lower priority than any uses of water it authorizes before the riparian attempts to exercise his right.[248] This may be interpreted to say that future riparian rights and unexercised riparian rights may be lost for nonuse to any prior appropriators. Thus, in California, prior appropriators have a greater priority than future riparian landowners. On the other hand, in *State of Montana v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*,[249] the court held that federal reserved rights, like Indian reserved rights, are immune from abandonment for nonuse.[250]

The *Long Valley* and *Hallett* reasoning should apply to uphold riparian rights on Indian lands, in addition to their reserved rights. Indian reservations and non-Indian federal reservations are similar because they were created by the federal government with a purpose in mind. The government impliedly intended to provide sufficient resources to fulfill this federal "purpose." Even though the *Long Valley* and *Hallett* cases related to non-Indian reservations, by analogy they should also apply to Indian reservations. The Indian reservation should receive sufficient water to fulfill the federal purpose of the reservation. In addition, the Indian tribes should be able to perfect their riparian rights under state law, in addition to their reserved *Winters* rights, if the reservations are riparian lands.[251]

D. How Does Franco Affect Quantification of Reserved Rights

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244. 599 P.2d 656 (1979).
245. *Hallett*, 749 P.2d at 336.
246. *Id.* at 336-37 (quoting *In re* Waters of Long Valley Creek Stream Sys., 599 P.2d 656, 659 (1979) (emphasis added)).
247. *Hallett*, 749 P.2d at 337; *see In re* Waters of Long Valley Creek Stream Sys., 599 P.2d 656 (1979).
248. *Hallett*, 749 P.2d at 337; *see In re* Waters of Long Valley Creek Stream Sys., 599 P.2d 656 (1979).
249. 712 P.2d 754 (Mont. 1985).
250. *Id.* at 768. The State recognizes the distinction between federal reserved rights and state-created appropriative rights. *Id.*
251. *Native American Water Rights*, *supra* note 109, at 31.

The Indians, allottees, and non-Indian purchasers are entitled to the amount of water to fulfill purposes of their reserved rights. *Franco* should not apply to these reserved rights. However, *Franco* should apply to the Indians, allottees, and non-Indian purchasers if they exercise their state riparian water rights. The *Franco* decision should govern riparian rights because they would be exercised under state law.

Also, *Franco* may apply when a new use is implemented by the Indians and tribes. If the new use requires a change in use of the reserved water rights, the new use might not be protected under the reserved rights doctrine. A general adjudication may be required to determine the quantity of the reserved water rights and the uses to which that quantity can be put.[252] On the other hand, the Oklahoma courts could hold similarly to the *Hallett* court and allow the Indian tribes to exercise its riparian rights under state law.[253] The Indians, tribes, and allottees might be able to assert their riparian rights, which are immune from defeasance in the same manner as private riparian landowners. These additional rights may be used for the new use or purposes. The Indians, tribes, and allottees should be able to simply use the water as a private riparian, subject to ordinary riparian principles. In times of shortages, the Indians, tribes, and allottees should be subject to pro rata sharing with other riparians, with regards to any state riparian water rights that have been asserted. However, as previously noted, the reserved rights of the reservation should not be subject to this pro rata sharing.

There are several unanswered questions that could be raised based on the preceding discussion. For example, there are issues of water transfers and water marketing. It might be possible for a tribe to sell or lease their reserved rights to a private landowner or to a municipality. If so, could the tribe then assert their state riparian rights to fulfill the purposes of the reservation and also get the economic benefit of the sale or lease of the reserved rights? There is also a question as to whether the purchaser would step into the shoes of the tribes asserting the same rights and being afforded the same federal protection as the tribes. However, the tribes' ability to sell their reserved rights may be restricted under the Nonintercourse Act, which provides that tribal property may not be alienated or encumbered without congressional authority.[254] This restriction probably extends to reserved water rights.[255] However, leasing the reserved rights might possibly be within congressional intent.[256] Congress has given general consent to on-reservation leases of Indian land, yet it is unclear whether congressional consent has been given for off-reservation transfers.[257] The Wyoming Supreme Court held that the Wind River Tribes could not market their water.[258] But the Department of the Interior has proposed draft rules that recognize a right to market water in the lower basin of the Colorado River.[259] These are just a few questions which could be raised.

If state riparian rights are asserted by the Indians, the unexercised riparian rights might be given a lower priority than appropriated rights by the Oklahoma Water Resources Board. However, this is unlikely because *Franco* prioritizes riparian rights, both current and perhaps future, over prior appropriators. In *Hallett*, the California Supreme Court held that unexercised riparian rights may be subject to a lesser priority than prior appropriators if the Water Board so determines. California gives these prior appropriators greater rights than the riparians in this instance. Oklahoma is distinctly different because of *Franco*. In Oklahoma, riparians have a vested right of reasonable use, whether

252. *See Big Horn I*, 753 P.2d 76 (Wyo. 1988) (ruling that tribes had to comply with state water law to change use of their reserved rights). *But see* Arizona v. California, 373 U.S. 546 (1963) (implied that waters reserved for Indian reservations may possibly be used for purposes other than the primary purposes); *Walton I*, 647 F.2d at 48-49 (ruling that tribes may determine how to use their water rights).

253. *Hallett*, 749 P.2d at 330.

254. *Primer on Indian Water Rights*, *supra* note 32, at 82.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Big Horn I*, 753 P.2d at 100.

259. *Primer on Indian Water Rights*, *supra* note 32, at 84.

current or future, to the water adjacent to their lands.[260] The implication of this distinction is that, while in *Hallett* unexercised riparian rights may have lesser priority than prior appropriators, Oklahoma gives riparians, both current and future, greater priority over the appropriators. The tribes and allottees should be able to simply assert their state riparian rights, whether currently exercised or unexercised, and put to use the quantity of water allowed under the riparian doctrine.

VI. Tribal and Interstate Compacts

A. Tribal/State Compacts

Interstate water compacts are increasing in popularity, including compacts between tribes and states and between two separate states. The quantification standards to fix the extent of *Winters* rights are judicially determined. Many of these judicial determinations are being replaced by settlement agreements between the tribes and the government.[261] These settlements give the Indian tribes the opportunity to actually put the water to productive use instead of merely having a "paper" right to use the water.[262] These settlements provide among the states and other existing users certainty of the quantity of water to which both the Indians and non-Indians are entitled.[263]

The main feature of these agreements deals with the quantification of water rights.[264] Negotiations may proceed on the theory of PIA or other quantification method, yet tribes generally agree to a certain amount of water, usually with promises or assistance in delivering the water to the reservation, in exchange for ceding their claims to potentially larger, but unspecified, amounts of water.[265] In practically all the settlements, the tribes usually have agreed to less water than they would be entitled to under their *Winters* rights.[266] Moreover, the settlement agreements may also clarify other issues, such as whether tribes may market water off reservation, whether irrigation water rights may be used for instream purposes, or whether tribal rights included groundwater.[267] Finally, the agreements may clarify the individual roles of the states, federal government, and tribes.[268]

There are several Indian water settlements already in effect today. For example, a congressionally approved Seminole Water Compact replaces the tribes' reserved rights with state rights, protects both existing water uses and reservation wetlands, provides for a dispute resolution process, and authorizes a tribal water code, while reserving water quality regulation of the state.[269] The Compact recognized Seminole rights to a percentage of the water available from specified sources.[270] Regulation of the use remained the exclusive province of the tribe; neither the state nor the water management district had any administrative control over the tribe's water use.[271]

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260. Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 855 P.2d 568, 577, 582 (Okla. 1990).

261. *Native American Water Rights*, *supra* note 109, at 11.

262. WATER RIGHTS, *supra* note 62, at 260.

263. *Id.*

264. *Id.* at 259-63.

265. *Native American Water Rights*, *supra* note 109, at 11; *see* LLOYD BURTON, AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF LAW 80-91 (1991); HANDBOOK, *supra* note 2, at 598-99.

266. *Native American Water Rights*, *supra* note 109, at 11; *see* BURTON, *supra* note 265, at 80-81. The Indian settlements have been criticized as ways which the federal government may compromise tribal claims or subject the tribes to state control. WATER RIGHTS, *supra* note 62, at 262-63. Others question the authority of the federal trustee to agree to settlements that deliver to the tribes less water than they would be entitled through court quantification. *Id.* at 263. Yet, because they promise a transformation of "paper" water rights into actual usable water, negotiated settlements will probably increase in popularity in the future. *Id.*

267. WATER RIGHTS, *supra* note 62, at 260.

268. *Id.*

269. *Id.* at 261-62 (examples of tribal-state compacts); *see also* Monahan, *supra* note 138.

270. *Native American Water Rights*, *supra* note 109, at 28.

271. *Id.* at 28-29.

It might be difficult to find a mutual agreement between the parties in the negotiation process. However, one commentator outlined the interest that must be satisfied to reach a binding settlement agreement:

> To be effective, it would seem than an agreement must be reached that is satisfactory to the tribe whose rights are in issue, the United States as trustee for the tribe and the state in which the reservation is located as de facto representative of its own interest and that of prior appropriators likely to be affected by the resolution of the issue. A Federal statute confirming the agreement is the surest way to make the accord legally binding on all of the parties.[272]

The agreements must be satisfactory to all parties at issue and should be binding if all parties were involved in the negotiations and had agreed upon the terms.[273] This is true even if the tribes' reserved water rights are diminished regardless of whether it there is a riparian prior appropriation system. The parties in the agreements should be entitled to the quantity of water provided for in the agreement regardless of the holding in *Franco*. In times of shortages, the parties to the agreement should be entitled to the quantity of water provided for in the agreement before the riparians and/or appropriators are entitled to the water. *Franco* will not affect the distribution of water under the agreement. *Franco* should only apply to the riparians and/or appropriators after the parties to the tribal/state compact have received the water provided for in the compact. Also, the settlement agreements between tribes and states will generally be enacted by federal statute. Because *Franco* is based on state law, it should not apply to the compacts that have been federally enacted.

B. Interstate Compacts[274]

The Constitution of the United States provides that "[n]o State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another state."[275] In 1911, Congress gave blanket consent to the states for compacts "for the purposes of conserving the forests and water supply of the States" entering into such compacts.[276] Today, interstate water compacts have become the most common method of apportioning interstate waters.[277]

Many interstate compacts state that nothing in the compact shall impair the right of a signatory state to regulate water use inside its border not inconsistent with its obligations under the compact.[278] The implication is that state laws continue to operate if they are consistent with the compact but not if they are inconsistent.[279] If a compact fails to express how it affects state law, the results are likely to be the

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272. J. SAX & R. ABRAMS, LEGAL CONTROL OF WATER RESOURCES 553 (1986).

273. Arguably, the United States cannot enter into a compact for the Five Civilized Tribes since they own their land in fee. The United States is not trustee nor the owner of the Five Civilized Tribes' reservations. Thus, only if the Five Civilized Tribes enter into the compact themselves, should it be enforceable upon them because the agreement must be satisfactory to all parties whose rights are at issue.

274. *See* WATER RIGHTS, *supra* note 62, at 549-74. *See generally* Jerome C. Muys, *Interstate Compacts and Regional Water Resources Planning and Management*, 6 NAT. RESOURCES LAW. 153 (1973) [hereinafter *Interstate Compacts*]; Jerome C. Muys, *Allocation and Management Of Interstate Water Resources: The Emergence of the Federal-Interstate Compact*, 6 DENV. J. INT'L L. & POL'Y 307 (1976); Marguerite Ann Chapman, *Where East Meets West in Water Law: The Formulation Of An Interstate Compact To Address The Diverse Problems Of The Red River Basin*, 38 OKLA. L. REV. 1 (1985).

275. U.S. CONST. art. I, § 10, cl. 3.

276. RARICK, *supra* note 136; Act of Mar. 1, 1911, § 1, 36 Stat. 961 (codified at 16 U.S.C. § 552).

277. WATER RIGHTS, *supra* note 62, at 549.

278. *Id.* at 561; *see, e.g.*, Arkansas River Basin Compact, Arkansas-Oklahoma, art. XI(B), 87 Stat. 569, 575 (1973); Arkansas River Basin Compact, Kansas-Oklahoma, art. XIII(B), 80 Stat. 1409, 1414 (1966); Canadian River Compact art. X(d), 66 Stat. 74, 78 (1952).

279. WATER RIGHTS, *supra* note 62, at 561-62; *see* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) (holding that to the extent compact provisions are based on equitable apportionment principles they will preempt contrary state laws); League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 507 F.2d 517 (9th Cir. 1974) (concluding that an interstate compact is form of federal law); Frontier Ditch Co. v. Southeastern Colorado Water Conservancy Dist., 761 P.2d 1117, 1123 (Colo. 1988) (holding that Arkansas River Compact "is . . . part of federal law, having been approved by an act of Congress on May 31, 1949, 63 Stat. 145 (1949), and is thus preemptive of any conflicting state law on the same subject"); State *ex rel.* Intake Water Co. v. Board of Natural Resources & Conservation, 645 P.2d 383, 387 (holding that

same.[280] State laws consistent with the compact should continue to operate, unless Congress intended to preempt or override state law.[281] However, state laws inconsistent with a compact will probably be superseded, even with the lack of an express compact provision.[282] Several states have held that a water compact is federal law for purposes of the Supremacy Clause of the Constitution, and thus it supersedes inconsistent state laws.[283]

Since an interstate compact is considered to be a law of each of the compacting states, actions thereunder may be challenged as any other state action.[284] The Supreme Court has concluded, and it is a well-established rule, that interstate compacts present a "federal question."[285] In *Illinois v. City of Milwaukee*,[286] the Supreme Court held that federal common law applies to compact questions. Moreover, the Court in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*[287] held that whether the waters of an interstate stream must be apportioned between two states is a question of 'federal common law,' upon which neither the statutes nor the decisions of either state can be conclusive. In *West Virginia ex rel. Dyer v. Sims*,[288] the Supreme Court said that the state court had the final power to construe the state constitution for exclusively state purposes but not "in the limited field where a compact brings in issue the rights of other States and the United States."[289] Compacts between states and approved by Congress[290] take precedence, under the Supremacy Clause of the Federal Constitution, over state law restricting state action with respect to such compacts.[291]

If a compact supersedes inconsistent state laws because it is federal law for purposes of the supremacy clause, it still does not settle how the compact affects vested water rights.[292] The supremacy clause does not allow federal taking of state-created private property rights without appropriate compensation.[293] In *Hinderlider*, the court held that when the apportionment of interstate waters is made by a compact between the states, the apportionment is binding upon the state's citizens and any water claimants.[294] This is so even in cases where water rights had been granted to the citizens by the state before the state entered into the compact.[295] Moreover, the compact is binding upon the citizens of the compacting state, whether or not individual citizens were parties to the negotiations.[296]

In *Badgley v. City of New York*,[297] the Second Circuit applied the *Hinderlider* rule to riparian rights asserted in a suit to recover damages for interference with water rights. Here, actions were brought by,

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Yellowstone River Compact has "the status of a treaty and state law is subordinate to it"), *cert. denied*, 459 U.S. 969 (1982).

280. WATER RIGHTS, *supra* note 62, at 561-62.

281. *Id.*

282. *Id.* at 562. The Supreme Court stated, "[C]ongressional consent transforms an interstate compact . . . into a law of the United States." *See* Texas v. New Mexico, 462 U.S. 554, 564 (1983); *see also* West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22 (1951) (holding that state legislation that conflicts with terms of interstate compact cannot prevent enforcement of compact).

283. WATER RIGHTS, *supra* note 62, at 562-63; *see* Frontier Ditch Co. v. Southeastern Colorado Water Conservancy Dist., 761 P.2d 1117, 1123 (Colo. 1988) (holding that the Arkansas River Compact is part of federal law); State *ex rel.* Intake Water Co. v. Board of Natural Resources & Conservation, 645 P.2d 383, 387 (1982) (holding that the Yellowstone River Compact has the status of a treaty and state law is subordinate to it); *see also* West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22 (1951) (holding that court had final power to construe state constitution exclusively for state purposes, but not in the limited field where a compact brings in issue the rights of other States and the United States).

284. *Interstate Compacts*, *supra* note 274, at 184.

285. *Id.*

286. 406 U.S. 91 (1972).

287. 304 U.S. 92, 110 (1938).

288. 341 U.S. 22 (1951).

289. *Id.* at 28.

290. There is general agreement that compacts allocating interstate waters require congressional consent. DAVID H. GETCHES, WATER LAW IN A NUTSHELL 408 (1990).

291. West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 33 (1950) (Justice Reed's concurrence).

292. WATER RIGHTS, *supra* note 62, at 563.

293. *Id.*

294. *Hinderlider*, 304 U.S. at 106.

295. *Id.*

296. *Id.* at 106-09.

297. 606 F.2d 358 (2d Cir. 1979), *cert. denied*, 447 U.S. 906 (1980).

or in the name of, riparian landowners situated in Pennsylvania who claimed that the value of their lands along the Delaware River and its West Branch was diminished by the City of New York's impoundment, diversion, and manipulation of the headwaters of the river for the City's public water supply purposes. In reversing the district court's decision in favor of the riparian owners, the Second Circuit held that a state cannot grant to private parties any privately owned property interest in riparian rights greater than the state's own property interest in them.[298] The riparians argued that the applicable decree and compact provisions could not be interpreted in such a way as to divest them of their riparian rights to the full natural flow of the river without just compensation. However, the Second Circuit stated "that Pennsylvania never had a right to an undiminished flow of the Delaware River."[299] The Second Circuit held that rights of riparians to collect damages for the city's acts relative to the waters of the Delaware River depended upon the scope of rights granted to the city under the terms of the decree and Delaware River Basin Compact.[300] Also, the Second Circuit held that the rights of the citizens are no greater than those of the state, and they may not exceed the state's rights to the extent that they interfere with the rights granted to the City under the terms of the Decree and Compact by placing an onerous price upon the exercise of those rights.[301] The *Badgley* court reasoned that to draw the conclusion that the individual interests of the riparian owners were not represented in the suit in which the decree was determined was to ignore the obvious fact that the riparian rights are not independent of the state's rights in the waters of the Delaware River, but rather are derivative therefrom and are subject to change by the laws of the state.[302]

When applying the foregoing cases that discussed interstate water apportionment compacts to Oklahoma's four water compacts,[303] the implications of *Franco* are deemed to be minimal. This is because *Hinderlider* and its progeny held that state law applies only to the water which has not been committed to other states by equitable apportionment, whether through apportionment compacts or by other means. In Oklahoma, it is only the water which has not been committed to other states by the four equitable apportionment compacts and which is not reserved for the Indians, tribes, and allottees that can be subject to state law. Ttherefore, only the water not involved in the compacts or reserved for the Indians might actually be subject to *Franco*. Potentially, this might be a very minimal amount.

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298. *Id.* at 365-66 (applying *Hinderlider*). The extent of Pennsylvania's rights in the River was determined by a decree authorizing the City of New York to divert water subject to a new formula. The decree further provides for certain excess releases depending upon the City's expected consumption of water.

299. *Id.* at 365. As the Supreme Court made clear in its opinion in *New Jersey v. New York*:

> A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best as they may be.

New Jersey v. New York, 283 U.S. 336, 342-43 (1931).

300. *Badgley*, 606 F.2d at 367; *see* Pub. L. No. 87-328, 75 Stat. 688 (1961) (compact determining allocation of water rights among four basin states was approved by Congress). The general purposes of the Compact are to

> promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the states; to encourage and provide for the planning, conservation, utilization, development, management and control of the water resources of the basin; and to provide for cooperative planning and action by the signatory parties with respect so such water resources.

Badgley v. City of New York, 606 F.2d 358, 360-63 (2d Cir. 1979).

301. *Badgley*, 606 F.2d at 367.

302. *Id.* at 365.

303. The four Oklahoma Water Compacts are codified as follows: 82 OKLA. STAT. § 526.1 *et seq.* (1951) (Canadian River Compact); 82 OKLA.STAT. § 1401 *et seq.* (Supp. 1965) (Arkansas River Basin Compact, Kansas-Oklahoma, 1965); 82 OKLA. STAT. § 1421 *et seq* (1971) (Arkansas River Basin Compact, Arkansas-Oklahoma, 1970); 82 OKLA. STAT. § 1431 *et seq.* (Supp. 1979) (Red River Compact, Arkansas-Louisiana-Oklahoma-Texas, 1978).

VII. Conclusion

The laws relating to both Indian law and water law as they pertain to the State of Oklahoma are both immense and unclear. Oklahoma has two separate groups of Indians: the eastern tribes and western tribes. Different laws may apply to each. While there has been much litigation involving the western Indians, there has been very little litigation involving the eastern tribes. Further, most of the litigation involving Indians' reserved water rights has taken place in prior appropriation states. This makes it difficult to determine the implications that *Franco* will have on the Indians in a state where the riparian doctrine may dominate. Portions of this chapter are speculative, based on the author's research, understanding, and application of both Indian law and water law. The author has neither attempted nor intended to make the final determination of how *Franco* affects the tribes of Oklahoma or tribal/state compacts and interstate compacts. Instead, the purpose of this chapter has been to raise the different questions on how *Franco* could affect the tribes and water apportionment compacts in the State of Oklahoma.

Promotion of Ecological and Conservation Values Under the Decision in *Franco*

Lisa McDonnell

Table of Contents

I. Introduction

Today states are faced with many policy and value choices concerning natural resources. When making these policy decisions, states must find a balance between, on the one hand, promoting industry and business, and, on the other hand, protecting the environment and conserving resources which are located within their borders. These are necessarily difficult questions. States have a great incentive to promote business and industry because to do so employs their citizens and brings money to the state. However, businesses often involve factories which might discharge wastes into water, or merely involve the consumption of water. Consequently, promotion of business and industry can often lead to depletion or pollution of existing water sources. At the same time, a reckless depletion of resources and wildlife and widespread pollution of land water serves no citizen well.

Arguably, the most important natural resource in the world is water. Without water humans and wildlife could not exist. Therefore, a consistent and protective water allocation policy is essential to any state. In the allocation of water rights, states should be concerned with the potential ownership and uses of this most precious resource. The allocation of water use permits necessarily entails a policy choice of what uses a state will allow and whether these choices are consistent with the environmental policy which the state has adopted.

Oklahoma's water policy has undergone many changes since the state entered the Union in 1907. While Oklahoma has changed from a riparian system[1] to an appropriation system[2] and back to a riparian system[3], the water policy has always remained the same in one sense — the water policy has never adopted an environmental or conservationist emphasis. The emphasis of Oklahoma water law has always been on the use of water for farms, industries, businesses, recreation, hydropower, or municipal and rural water district water supplies. While not all these uses are consumptive, all these uses value water for what water can do. Oklahoma has not valued water for itself, flowing in a stream as part of the natural ecosystem of which the stream is a part.

It is true that title 82, section 1084.1 of the Oklahoma Statutes provides:

> Whereas the pollution of waters of this state constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life, and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water, it is hereby declared to be the public policy of this state to conserve and utilize the waters of the state and to protect, maintain and improve the quality thereof for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses . . . .[4]

Moreover, the Oklahoma Water Resources Board, the administrative agency in charge of the allocation of water rights, also is the designated agency to work with the federal government to insure that the state of Oklahoma and its citizens comply with the federal Clean Water Act.[5] Consequently, the Oklahoma Water Resources Board is the agency which classifies the uses of waters of the state of Oklahoma and sets water quality standards to insure that the classifications are attained and maintained.[6]

In contrast to these three statutory provisions which have an ecological or conservationist flavor, title 82, section 1086.1, in setting out the criteria for the Comprehensive State Water Plan, states that "[t]he policy of the State of Oklahoma is to encourage the use of surplus and excess water to the extent that the use thereof is not required by people residing within the area where such water originates."[7] Section 1086.1 makes it clear that Oklahoma's water policy takes a distinctively consumptive orientation, even in light of language in Section 1084.1 to the effect that the policy of the state is to "conserve" water. For further evidence of Oklahoma's consumptive use policy one need only look to section 1086.1A(3), which states, "Water use within Oklahoma should be developed to the maximum extent feasible for the benefit of Oklahoma so that out-of-state downstream users will not acquire vested rights therein to the detriment of the citizens of this state."[8]

A consumptive use approach to water policy seems to be in direct conflict with a conservationist approach. If a state's policy is to have its citizens use all the water they possibly can, then a state is not concerned with ensuring that enough water is left to preserve the ecosystems which are present in that water. Certainly, the State of Oklahoma is concerned with planning a scheme by which to allocate water, and Oklahoma is certainly concerned with assuring that prior appropriators and riparians are protected in their rights to take water, but Oklahoma has not been terribly concerned with the amount of water left after water rights have been satisfied. Therefore, Oklahoma's water policy could be classified as concerned with conservation sufficient to assure all human users of water that they will be able to take their share,

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1. *See, e.g.*, Chicago R.I. & P. Co. v. Groves, 93 Pac. 755 (Okla. 1908).
2. 82 OKLA. STAT. §§ 105.1-.32 (1991).
3. Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board, 855 P.2d 568 (Okla. 1990), *readopted, reissued*, and *reh'g denied* (1993).
4. 82 OKLA. STAT. § 1084.1 (Supp. 1994). Section 1084.1 entered Oklahoma law in 1993. 1993 Okla. Laws ch. 145, § 317.
5. 82 OKLA. STAT. § 1085.29 (Supp. 1994).
6. *Id.* § 1085.30.
7. *Id.* § 1086.1. Oklahoma's Comprehensive State Water Plan is set forth in 82 OKLA. STAT. §§ 1086.1-.6 (1991 & Supp. 1994).
8. 82 OKLA. STAT. § 1086.1(A)(3) (Supp. 1994).

but not truly concerned with preserving water in streams and lakes beyond what is needed for human use.

The 1963 amendments to the Oklahoma water laws,[9] which attempted to establish once and for all that prior appropriation would be the governing water allocation system in Oklahoma, did not provide for consideration of depletion of water sources, nor did the amendments establish any priority or preference for permit applicants seeking to use water to enhance or preserve the environment.[10] Consequently, the Oklahoma Water Resources Board would not be required to give a preference to a water permit applicant who wanted to use water to establish a refuge for an endangered species of fish, over another applicant who wanted the water to enhance the recovery of oil.[11]

Like the 1963 amendments to the Oklahoma Water Law Code, the 1972 amendments to the Oklahoma Groundwater Code[12] also fail to further environmental policies. The 1972 amendments provide for the allocation of water based on the maximum annual yield of the basin.[13] The 1972 amendments replaced the original system of groundwater allocation established by the Oklahoma legislature in 1949. The 1949 scheme provided for the allocation of water permits based on the "safe yield" of the basin.[14] The determination of allocations based on a "safe yield" indicates that the Oklahoma legislature, at that time, did consider conservation of water an important consideration in granting water permits. In contrast, by making the basis of water allocation maximum annual yield, the Oklahoma legislature in 1972 abolished any conservation aspects of the Groundwater Code in favor of establishing a system which is based on use of the water.

Finally, in *Franco-American Charolaise v. Oklahoma Water Resources Board*[15], the Oklahoma Supreme Court has established a potential avenue for the policies of conservation of resources and preservation of environmental quality to carry the day. This chapter will discuss the various holdings of the *Franco* decision and the impact they could have on the promotion of environmental and ecological concerns in Oklahoma. It will now be up to the Oklahoma courts and the Oklahoma Water Resources Board in the future to bring these policies to the forefront when litigating disputes between riparian landowners, between riparians and appropriators, and when adjudicating water use appplications for permits to use water.

II. Riparian Rights

A. Natural Flow Theory

Riparian systems of water allocation originally were based upon a natural flow theory. The basic premise of the natural flow theory is that an owner of riparian land — land over which or by which water runs — has the right to have the stream flow in its natural channel without diminution or alteration.[16] The natural flow theory lends itself easily to furthering the preservation of wildlife and ecological

9. 60 OKLA. STAT. § 60 (Supp. 1963); 82 OKLA. STAT. §§ 1-A *et seq.* (Supp. 1963).

10. The 1963 amendments established a list of priorities presently set forth in 82 OKLA. STAT. § 105.2B(1)-(7) (1991). None of these categories specifically address concerns about pollution, depletion or ecological preservation. However, that is not to say that an environmental use would not be considered a beneficial use. *Compare* California Trout Inc. v. State Water Resources Control Bd., 153 Cal. Rptr. 672 (1979) (holding that appropriation of water sought for in stream flow in order to preserver fish and wildlife was properly rejected where no physical possession of the water is to occur) *with* Nebraska Game & Parks Comm'n v. The 25 Corp., 463 N.W.2d 591, 600 (Neb. 1990) (holding that appropriation permit granted to state Game and Parks Commission for in stream flow of water was properly granted).

11. Title 82 OKLA. STAT. § 25 (1961) contained a public interest standard that might have allowed the state water agency to protect environmental or conservationist concerns against consumptive uses. The 1963 amendments purposefully deleted the public interest standard on the ground that such standard gave too much discretion to administrators. *See generally*, Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface Under the 1963 Amendments*, 23 OKLA. L. REV. 19, 50 (1970).

12. 82 OKLA. STAT. §§ 1020.1-.22 (1991 & Supp. 1994).

13. 82 OKLA. STAT. § 1020.5 (1991).

14. 82 OKLA. STAT. § 1010 (1951).

15. 855 P.2d 568 (Okla. 1990) *readopted, reissued* and *reh'g denied* (1993).

16. Crawford Co. v. Hathaway, 93 N.W. 781, 790 (Neb. 1903); *see also* 1 WATERS AND WATER RIGHTS § 7.02(c), at 233 (Robert E. Beck ed., 1991).

values,[17] Presumably, if a stream continues to run at its normal level and at its normal quality, the ecosystems in that stream would continue evolving without interference from human-induced pollution or depletion.[18] A riparian landowner, under the natural flow doctrine, could prevail in a lawsuit against another person who was polluting the water, or taking a significant amount of water out of the natural channel.

B. Reasonable Use Doctrine

The natural flow theory eventually lost its luster as a means of administering a riparian system of water rights.[19] American courts realized that the natural flow theory did not allow for many consumptive use of water and envisioned water flowing freely as a waste of a valuable natural resource.[20] Because of the limitations of the natural flow theory, most American jurisdictions adopted the reasonable use doctrine of riparian water rights.[21] The reasonable use doctrine holds that riparians may use adjacent waters if the use does not interfere with the reasonable use of water by other riparians.[22] Oklahoma adopted the reasonable use theory of riparian rights.[23]

In 1963, however, the Oklahoma legislature changed the landscape of the Oklahoma water allocation system.[24] The legislature, in amending the pre-1963 water code, tried to reconcile the prior appropriation system and riparian system which had coexisted until then. Towards this aim, the legislature diminished riparian rights by limiting riparians to taking water for domestic use.[25] Further, the 1963 amendments placed riparians on an equal basis with non-riparians for future appropriations thereby eliminating any future right of reasonable use, aside from domestic uses, for the riparian.[26]

III. The Central Holdings of Franco and Their Importance to Oklahoma Environmentalists

A. The Central Holdings

The Oklahoma Supreme Court definitely intended to re-establish the existence of traditional riparian rights.[27] The court's decision in *Franco* purports to have a great number of "holdings". This section will only consider the holdings which are of importance to river and stream ecosystems and riparian rights. The relevant holdings include the following: (1) "the modified common law riparian right to the reasonable use of the stream" is the controlling law in Oklahoma;[28] and (2) the statutory right to appropriate water does not preempt or diminish the riparian common law right.[29]

Even in light of all the questions raised by the court's decision in *Franco*, it is evident from statements such as, "the heart of the riparian right is to assert a use at any time as long as it does not harm another

17. WATERS AND WATER RIGHTS, *supra* note 16, § 7.02(c), at 236-38. However, the editor does point out that any court seeking to enforce ecological values through the natural flow theory must face two problems, "(1) how to assure that particular riparians in fact protect those values, and (2) how to measure the minimum level or quantity of water to be protected." *Id.*

18. Of course, streams and their ecosystems could still suffer from natural causes such as drought.

19. WATERS AND WATER RIGHTS, *supra* note 16, § 7.02(c), at 239.

20. *Id.* §7.02(c), at 233.

21. *Id.* § 611, at 36.

22. *Id.* § 7.02(d), at 241.

23. *See* Chicago R.I. & P. Ry. Co. v. Groves, 93 Pac. 755 (Okla. 1908); Miller v. Marriott, 149 Pac. 1164 (Okla. 1915); Broady v. Furry, 21 P.2d 770 (Okla. 1933); Martin v. British American Oil Producing Co., 102 P.2d 124 (Okla. 1940); Baker v. Ellis, 292 P.2d 1037 (Okla. 1956).

24. 82 OKLA. STAT. § 105.2(A) (1991) begins with the classic prior appropriation statement: "Beneficial use shall be the basis, the measure, and the limit of the right to the use of water . . . ." *Id.*

25. Title 82, § 105.2(A) states: "Any person has the right to take water for domestic use from a stream to which he is riparian or take stream water for domestic use from wells on his premises." 82 OKLA. STAT. § 105.2(A); *see also* Rarick, *supra* note 11.

26. 82 OKLA. STAT. § 105.2(B) (1991); *see also* Rarick, *supra* note 11.

27. The court specifically stated that riparian landowners have a vested common law right to the reasonable use of the stream, including reasonable uses in the future. *Franco*, 855 P.2d at 576.

28. *Id.*

29. *Id.*

riparian who has a corresponding right"[30], that the court meant to restore riparian rights to their status before the 1963 amendments. Since the court overturned the 1963 amendments, a fair interpretation of the opinion indicates that the riparian right in Oklahoma is superior to the appropriative right.

1. Riparian Right to the Reasonable Use of the Stream is the Controlling Law of Oklahoma

Under the water allocation system as it existed after 1963 and prior to the *Franco* decision, if a person wanted to use water to establish a wildlife refuge, that person would have had to apply to the Oklahoma Water Resources Board for a permit.[31] That person would have to demonstrate a beneficial use of the water.[32] Further, if the person was a junior appropriator,then in times of water shortage that person would have had to stop using the water in order that the senior appropriators received their allocated amount.

After the decision in *Franco*, the same person who wants to use the water to establish a wildlife refuge could simply begin using the water, as long as that person is a riparian landowner. A riparian would not have to apply to the Oklahoma Water Resources Board for a permit because under *Franco* he could assert a reasonable use of the water.[33] Moreover, because the riparian can simply being using water, the riparian does not have to convince the Oklahoma Water Resources Board that a wildlife refuge is a "beneficial use of water as that term is used within the prior appropriation system. Under its prior appropriation system, Oklahoma has had no occasion to address whether environmental uses of water, like a wildlife refuge, is a beneficial use of water. Hence, the riparian avoids a difficult benefical use determination, which might be a significant obstacle if the riparian had to apply for a permit.

A nonriparian might have to resort to the Oklahoma Water Resources Board for a permit to use water. Riparian water rights systems generally require that the use of water be reasonable and that the water be used on riparian land.[34] After *Franco*, will the use of water on nonriparian land be governed by the prior appropriation system or by the riparian system? If by the riparian system, in *Smith v. Stanolind Oil Co.*,[35] the Oklahoma Supreme Court recognized that a riparian landowner may lease their riparian water rights to persons or entities not using the water on riparian lands.

Under the approach in *Smith*, a nonriparian may still be able to obtain water without going to the Oklahoma Water Resources Board, by leasing the riparian right from a riparian landowner. The availability of riparian rights by lease or other transfer could either help or hurt the environmentalist's cause. Because riparian rights in Oklahoma are transferable, landowners might take this opportunity to earn money by leasing their riparian rights to nonriparians who have a consumptive use for the water. Therefore, leasing to consumptive users could result in less water in streams, thereby possibly injuring the ecosystems living in those streams. On the other hand, environmentalists could take advantage of the availability of transfer of riparian rights. Public interest groups could acquire leases of riparian rights so that they could ensure that the water in those streams to which they have acquired rights stays of high quality and quantity. Any public interest group could enforce their leased riparian rights of quality and quantity by suing any other riparian — or appropriator — who interfered with their rights.[36]

Regardless of whether a person is riparian or has obtained riparian rights through lease from a riparian, the person claiming riparian rights must establish a reasonable use of the water. The court remanded the *Franco* case to the trial court in order for the trial court to determine whether the use of

30. *Id.* at 577.

31. 82 OKLA. STAT. § 105.2(B)(4) (1991).

32. *Id.* § 105.2(A).

33. Indeed, under *Franco*, the riparian absolutely does not want to apply for a permit because a secondary holding of *Franco* is that a person who applies for a prior appropriation permit voluntarily relinquishes riparian rights. *Franco*, 855 P.2d at 580.

34. DAVID H. GETCHES, WATER LAW IN A NUTSHELL 47 (2nd ed. 1990).

35. 172 P.2d 1002 (Okla. 1946).

36. There would be some question as to whether the lessee of riparian rights could assert a natural flow theory. Further, a questic . could arise as to whether a nonconsumptive use or an instream use could be protected under riparian rights. *See* WATERS AND WATER RIGHTS, *supra* note 16, § 7.03(a), at 258-59.

water for the "enhancement of the value of riparian land,[37] for recreation, for the preservation of wildlife, for fighting grass fires, and for lowering the body temperature of .... cattle .... is reasonable."[38] By remanding the case for the determination of this issue, the Oklahoma Supreme Court clearly did not rule that those uses were unreasonable per se.

It remains to be seen whether the uses listed by the *Franco* court will be held as reasonable in Oklahoma. However, by looking to the *Restatement (Second) of Torts* , which the *Franco* court cited as appropriate authority for determining reasonableness,[39] one can analyze with those factors whether environmental uses, such as the enhancement of the ecological or the aesthetic value of land, would be considered reasonable. The eleven factors listed by section 850A of the *Restatement* include size of the stream, custom, climate, season of the year, size of the diversion, place and method of diversion, type of use and its importance to society, needs of other riparians, location of the diversion on the stream, suitability of the use to the stream, and fairness of requiring the user causing the harm to bear the loss.[40] These factors to be considered mandate that any use be weighed against other riparians' needs. However, it seems that under the appropriate circumstances (location on the stream, other riparian needs, the flow of the stream) a riparian could claim an amount of water as necessary to enhance the value of the land.[41]

2. Riparian Water Rights Are Not Diminished by a Statutory Appropriative Right

Before the decision in *Franco*, a riparian could not have simply used the water in a stream running over his land to set up a wildlife reserve without applying to the OWRB for a permit. The existing water code provided that riparians could only use water for domestic purposes, limited to watering farm and domestic animals, household uses and gardens.[42] Establishment of a wildlife reserve would not fall under the category of domestic uses. After the *Franco* decision, however, a riparian could make such use of the water because riparian rights are no longer limited to statutory domestic purposes.[43]

B. Resurgence of the Natural Flow Doctrine After Franco

Before the Oklahoma legislature in 1963 decreed the prior appropriation system as the exclusive water rights system, Oklahoma followed the reasonable use doctrine of riparian rights in its dual system of water rights. Indeed, as the court in *Franco* indicates, the natural flow theory never had a firm basis in Oklahoma water law[44]. However, the opinion in *Franco* could be read to allow for the natural flow doctrine to be implemented in practice, if not in theory.

Three ways exist by which the natural flow doctrine could be implemented in practice in Oklahoma using the holding in *Franco*.

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37. As published in the *Oklahoma Bar Journal*, the *Franco* opinion has a comma after the phrase "value of the riparian land." Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board, 61 OKLA. B.J. 1114, 1118 (Apr. 24, 1990). As printed in the *West Pacific Reporter*, the *Franco* opinion does not have a comma after the phrase "value of the riparian land," but instead reads "value of the riparian land *for recreation*." *Franco*, 855 P.2d at 577 (emphasis added). The significance of the placement of the comma is that the presence or absence of the comma drastically alters the meaning of this crucial passage. Without the comma after the word "land," the trial court apparently considers the enhancement of value of riparian land for recreation, but not the enhancement of the value of the land in and of itself, when considering reasonable riparian uses of water. With the comma, the trial court, on remand, would consider the value of riparian land in and of itself as a reasonable riparian use, presumably economic or ecological or aesthetic value. If the *Franco* decision is to have a significant impact favorable to ecological and conservationist values of water, the *Franco* opinion needs to be read with the additional comma in place, as the opinion appeared in the *Oklahoma Bar Journal*.

38. *Franco*, 855 P.2d at 577.

39. *Id.* at 575 n.40; *see* RESTATEMENT (SECOND) OF TORTS § 850A (1979).

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

41. Once again, there is some question concerning whether a nonconsumptive in stream use will be deemed a "use." The RESTATEMENT (SECOND) OF TORTS § 850A lists factors dealing with diversion of water. It is unclear whether a riparian would actually have to divert water in order to claim a use.

42. 60 OKLA. STAT. § 60 (1991).

43. *Franco*, 855 P.2d at 576.

44. *Id.* at 573-75.

First, the court in *Franco* held that riparian landowners have a vested property right in the future reasonable use of water, which prospective use is not subject to divestment by prior appropriations,[45] The court further found that the OWRB, when granting permits for appropriation on a stream system, should "maintain the minimum flow necessary to allow for diversion" by riparians.[46] Since riparians have a vested property right in future use of water from a stream, the riparians could assert that their vested property rights guarantee them the right to a minimum or natural flow[47] in order to protect any future reasonable non-domestic use of water.[48]

The second way in which the natural flow doctrine could be implemented in practice by using the holding in *Franco* is by claiming enhancement of the value of land as a reasonable use. The Oklahoma Supreme Court in *Franco* directed the trial court, on remand, to determine whether stream flow for the enhancement of the value of riparian land is a reasonable use.[49] Therefore, the Supreme Court implied that stream flow for enhancement of the value of riparian land is not unreasonable per se. If the trial court finds that enhancement of value is a reasonable use on the particular circumstances involved in the *Franco* litigation, riparians could effectively claim a right to the natural flow.

For instance, a riparian environmentalist could claim that she wants a minimum flow of water to enhance the ecological and aesthetic value of her land. She could even argue that she wants a minimum flow of water to enhance the economic value of her land. The difference in the values here does not matter[50] because either way a minimum amount of water in a stream helps to preserve the ecosystems existing within that stream. If the court on remand in *Franco* determines that enhancement of value of land is a reasonable use then, riparians could assert a "use" of the water by asserting they should be guaranteed a minimum flow of water under *Franco*. The minimum flow language in *Franco* thereby incorporates a form or variation of the natural flow doctrine into Oklahoma water law.

What has just been said becomes even more tangible if an environmental organization — for example one dedicated to the preservation of riparian wetlands or certain species of flora or fauna — purchased riparian land with the investment-backed expectations of having a minimum or natural flow to the stream explicitly for the preservation of the stream ecosystem for its riparian land. Particularly with respect to future applicants for a prior appropriation on the same stream, the environmental organization would be in an excellent legal position under *Franco* to contest and defeat the future prior appropriation application.

This second method of implementing the natural flow doctrine through the *Franco* decision is closely tied to the first method. If one defines "value" as economic value of land, then riparians would argue that a natural flow of the stream must be maintained in order to protect their vested property right in future use of the water, which would thereby increase the economic value of their lands. Regardless of the vested rights argument, however, water flowing in its natural flow, rather than in an emaciated trickle, definitely increases the economic value of the land.

It remains to be seen whether the trial court will accept an argument that defines "use" as nonuse of the water, not because it interferes with a current use of water by another riparian, but because the environmentalist riparian wants to "use" the water by not using the water in order to increase the value of riparian land. Such an argument would seem to create economic waste because precious resources would not be put to their best economic use. However, as discussed above, such an argument could be used to promote ecological and environmental concerns which are not measured by normal economic values. In this sense, the *Franco* case might serve as the first Oklahoma case upon which an ecological or a conservationist view, as opposed to a developmental view, of water rights can be built.

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45. *Id.* at 582.

46. *Id.* at 578.

47. A minimum flow would not necessarily be equal to the natural flow of the stream. However, riparians could use the "minimum flow" language in the *Franco* opinion to assert a natural flow theory.

48. *Franco*, 855 P.2d at 584 (Lavender, J., concurring and dissenting opinion).

49. *Franco*, 855 P.2d at 577.

50. It would matter if the court on remand decides that the only "value" intended by the Supreme Court in *Franco* is economic value.

The third method of implementing the natural flow doctrine is by asserting the protection of wildlife, or arguably any other related ecological or environmental concern as a reasonable use. The court in *Franco* sent the issue of whether the use of the stream flow for the preservation of wildlife is a reasonable use back to the trial court.[51] In so doing, the court, as in the enhancement-of-land-value argument, implicitly stated that the preservation of wildlife is not an unreasonable use per se.

Presumably, to use a stream to preserve wildlife would mean keeping a certain amount of water in the stream so that fish, birds, and any other animals or insects which should happen to be part of the natural habitat of the stream might continue living in their normal state of affairs. The court itself uses the preservation of wildlife as an example of when the OWRB would need to maintain a minimum flow of water in a stream.[52]

C. A Riparian's Right To Water Quality

As already discussed, under the opinion in *Franco* riparians might further environmental interests by asserting through the reasonable use doctrine the right to a natural flow of water. However, to adequately protect environmental values, it is also necessary to insure that the quality of the water flowing through the streams is conducive to supporting wildlife and vegetation. Theoretically, if a riparian has a vested right to the future use of water running over or by riparian land, then the riparian has a right to demand that the quality of the water not be damaged.[53] Other states, using a riparian language, have recognized a riparian landowner's right to water quality.[54]

Because the riparian right is a vested right and may include such uses as preservation of wildlife and enhancement of value, a riparian who receives water of a diminished quality should be able to sue the offending riparian or appropriator for damages resulting from the decline in water quality. Traditionally, riparian landowners bring actions for pollution under the nuisance doctrine.[55] Under typical nuisance law, the test is "whether the defendant's activity is reasonable under all the circumstances."[56] It is easy to see that this reasonableness test is deferential to polluters and could cause a heavy burden for the person bringing the nuisance action.

The difficult burdens born by riparians alleging common law violations, such as nuisance, prompted the passage of the Clean Water Act.[57] The Clean Water Act also provides a remedy for aggrieved riparian landowners.[58] Section 505 of the Clean Water Act provides any citizen may sue on his own behalf any entity who is alleged to be violating an effluent standard or a state or federal order with respect to effluent standards.[59] Therefore, any riparian who was being damaged by a polluter who was in violation of an effluent permit or order under the Clean Water Act could sue under this section.[60] The advantage of such

51. *Franco*, 855 P.2d at 578.

52. *Id.* at 578 n.56. There seems to be some question as to whether preservation of wildlife could be a reasonable riparian use since uncaptured wildlife is the property of the state by statute. By contrast riparian water rights are private property rights and must be asserted for riparian lands. This issue of standing will be addressed later in this chapter.

There is also some question, as discussed later in the chapter, as to whether a riparian with a vested right in future use of water could act as a private attorney general for the benefit of the public trust. While that riparian might not be able to assert possession of wildlife, the riparian possibly could assert a public trust protection for the water so as to preserve the public interest in wildlife.

53. Indeed, a riparian asserting any type of natural flow doctrine has the right to the water free from pollution. *See* DAN A. TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 3.13, at 3-72 (1988). A riparian need not even have a vested right in future use to have a right to water quality.

54. *See, e.g.*, Hale v. Colorado River Mun. Water Dist., 818 S.W.2d 537 (Tex. Civ. App. 1991).

55. TARLOCK, *supra* note 53, § 3.13, at 3-72.

56. *Id.*

57. 33 U.S.C. §§ 1251-1387; *see* 5 WATERS AND WATER RIGHTS, *supra* note 16, § (b), at 157-60.

58. 33 U.S.C. § 1365. In fact, the act under § 1365 (c)(3)(g) defines citizen as, "a person or persons having an interest which is or may be adversely affected." *Id.* § 1365(c)(3)(g).

59. *Id.* § 1365(a)(1).

60. The citizen suit may also authorize an individual to sue for pollution from nonpoint sources (such as run-off from agricultural operations) because states, under 33 U.S.C. § 1329, are authorized to implement such standards for nonpoint sources as they deem fit. Therefore, if a nonpoint source polluter was in violation of any state order or standard, they would fall under the parties able to be sued under § 1365 of the Act.

a suit is that the burden of proof under the Clean Water Act provides for an easier burden of proof than that encountered at common law.[61]

Because of the vested rights language in *Franco*, riparians could sue to protect wildlife from damage.[62] The ability of riparians to sue for damage to wildlife would elevate riparians to the status of private attorney generals in that they could sue to protect the environment. Normally, the state protects the environment for the benefit of its citizens. Nevertheless, this is yet another way in which the *Franco* decision could be used to promote environmental and ecological quality in the state of Oklahoma.

D. Standing

In order to assert a right to reasonable riparian use which protects ecological or conservationist valuses via one of the previously-mentioned methods, the person making the claim would have to be a riparian. The three methods previously enumerated[63] are only available to riparian landowners. Public interest groups, such as the Sierra Club or the Oklahoma Wildlife Federation, would presumably have no standing to assert a right to natural flow unless such groups themselves owned or leased riparian lands or rights, or had members who owned or leased riparian lands or rights.

To the contrary, though, the OWRB could promote environmental policy. In adjudicating water appropriation permits, the OWRB has been directed by *Franco* to take into account the amount of water necessary in the stream to maintain the minimum flow.[64] Therefore, the OWRB may indirectly promote environmental policies by ensuring that in any given stream system enough water flows through the stream to maintain any natural habitats.

While the standing issue is a slight stumbling block to truly fostering environmental interests, it is important to remember that any adoption of a minimum flow or natural flow theory will advance environmental interests. For example, if a riparian merely asserts his right to a minimum flow of water, then the wildlife and aesthetic values are nonetheless preserved even if that was not the intent of the riparian landowner. Likewise, if a riparian landowner merely wants to increase the economic value of the land by ensuring that the stream running through the land does not run dry, environmental interests are nevertheless served even though the intent of the landowner was economic gain.

E. Potential Criminal Repercussions

The court in *Franco* established that a riparian who in the future applied for a water appropriation permit would voluntarily relinquish his riparian rights except for the domestic uses allowed by the statute.[65] A riparian would have no incentive to apply for a permit to appropriate water. Under a true appropriation system, an appropriator's use does not have to be reasonable, just beneficial. But under the dual system the *Franco* court established, riparians and prior appropriators will share surplus water in accordance with a relative reasonableness standard. Because conflicts between riparians and prior appropriators will be governed by the relative reasonableness standard, and because riparians in traditional riparian systems have their water uses evaluated by a reasonableness standard, riparians should simply avoid the prior appropriation, beneficial use aspect of Oklahoma's dual system altogether.

The *Franco* decision creates a risk to any riparian landowner who simply begins to use water for something other than a domestic use. Under the present statutory scheme in Oklahoma, the unauthorized use of water is a misdemeanor, with every day the violation continues being a separate misdemeanor.[66]

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61. *See, e.g.*, Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49 (1987).

62. As discussed above, it is questionable whether riparian landowners could assert a right to wildlife which is actually owned by the state. Therefore, it is unlikely that a court would award damages to a riparian based upon the fact that wildlife, making its habitat in the stream or on the riparian's land, was injured by pollution.

63. The three methods are as follows: (1) requiring minimum flow for enhancement of value of land; (2) requiring minimum flow as a reasonable use; and (3) requiring minimum flow for protection of wildlife as reasonable use.

64. *Franco*, 855 P.2d at 578.

65. *Id.* at 577.

66. 82 OKLA. STAT. § 102.20 (1991).

The OWRB has the authority by statute to file criminal complaints and to enjoin the use of water.[67] Therefore, a riparian who did not apply and receive a permit to appropriate water could be subject to criminal sanctions. For example, the environmentalist who uses water to establish a wildlife reserve could suffer criminal prosecution for doing so. On the other hand, if the reasonable use riparian rule is the controlling law of water rights in Oklahoma, as the court in *Franco* stated that it is, a riparian presumably could not be charged with a misdemeanor because the riparian use of water would be a lawful use of water despite the statute.

The conflict between *Franco* and the statute making unauthorized use of water a misdemeanor causes quite a dilemma for the riparian landowner who wishes to use water for something other than a domestic use. On the one hand, if that riparian seeks a permit for appropriation, under *Franco* the riparian forever loses riparian rights.[68] However, if the riparian uses water without the appropriation permit, depending on how the OWRB responds to the *Franco* decision, the riparian may be facing criminal prosecution.

IV. The Public Trust Doctrine

A. General Background

The essence of the public trust doctrine is that the public has an interest in the natural resources of a state which is paramount to any individual interests of its citizens, and that the state owns the natural resources as trustee for the people.[69] Water is one of the natural resources to which the public trust doctrine has been applied.[70]

The public trust doctrine is most developed in *National Audubon Society v. Superior Court of Alpine County*.[71] In that case, the California Supreme Court held that the public trust doctrine forbids parties from acquiring a vested right to use water in a way that is injurious to the public good.[72] This doctrine applies to appropriative rights as well as riparian rights.[73] In California the scope of the public trust in water extends all the way to nonnavigable tributaries which drain into navigable tributaries.[74]

B. Implications of Franco on the Public Trust Doctrine

Justice Lavender argued, in his concurring and dissenting opinion, that the majority opinion confused public rights in streams with private property rights.[75] The majority opinion in *Franco* holds that riparians have a vested future right to a reasonable use of a stream.[76] The majority opinion also gives riparian landowners a right to sue for damages if a minimum flow has not been maintained. Three problems occur for the public trust doctrine as a result of the possible combined effect to these two holdings.

First, the state itself, not private parties, should hold the future interest of the waterways in trust for the benefit of the public good.[77] As discussed earlier, riparian landowners could assert a reasonable use to a minimum flow under the *Franco* decision, and assertion of the minimum flow could promote

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67. *Id.*

68. *Franco*, 855 P.2d at 577.

69. Hannig, *The Public Trust Doctrine Expansion and Integration: A Proposed Balancing Test*, 23 SANTA CLARA L. REV. 211 (1983); *see also* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986).

70. The most famous public trust case involving water is National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983); *see also* Game & Fresh Water Fish Comm'n v. Lake Islands, 407 So. 2d 189 (Fla. 1981); and Save Ourselves v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152 (La. 1984).

71. 658 P.2d 709 (Cal. 1983).

72. *Id.* at 727.

73. *Id.*

74. *Id.* at 721.

75. *Franco*, 855 P.2d at 583 (Lavender, J., concurring and dissenting opinion).

76. *Id.* at 576.

77. *Id.* at 595.

ecological concerns. However, if the riparian landowners on a particular stream were not environmentally minded, ecological and conservationiist values would not be protected because these values would not be asserted by the riparian landowners.[78]

Second, the majority's holdings in *Franco* might eviscerate the public trust doctrine because these two holdings could be interpreted as not allowing the state to assert a public interest in the waters. The fundamentla focus of *Franco* is upon the constitutional protection owed the riparian right to initiate future uses of the water. If riparians have a vested right in the future use of the water, the Oklahoma legislature or courts could not take that right away without compensation. Therefore, the *Franco* opinion might mean that the state could not proclaim a public trust in the waters of Oklahoma because to do so would be a taking without compensation of a fundamental riparian right. While riparians could protect a minimum flow in a stream, *Franco* imposed no obligation that riparians do so. Of course, the state could still protect the public interest in water through condemnation, but the price is much higher because of the compensation costs.

Third, the two holdings of the *Franco* majority leave unclear whether the OWRB must take the public trust into account when it grants appropriation permits. The court does seem to recognize that the OWRB must take into consideration the amount of water available to supply riparian's reasonable use (which may include uses which further environmental values).[79] However, the appropriation system in Oklahoma lacks a public interest standard.[80] However, the OWRB under *Franco* may be required to consider public interest implicitly when considering water permit applications on stream systems where riparians are contesting the application on the basis of claiming a reasonable riparian use based on the enhancement of ecological value of land.[81]

Although the majority opinion in *Franco* does not explicitly adopt or reject the public trust doctrine, the *Franco* opinion does seem to promote ecological and conservationist valuses in the waters of Oklahoma. Because riparians have vested future rights to use the water, riparians may sue to prevent the use of water which would detrimentally affect wildlife or the quality or quantity of stream water. From an environmentalist perspective, these are significant advances for ecological and conservationist values in Oklahoma water law.

However, as stated earlier, the problem remains that only riparian landowners would have standing to sue to protect the "public trust". Unfortunately, riparian landowners may not be the persons or organizations most likely to champion the promotion of environmental quality. Typically the championing of environmental interests is done through public interest groups and federal or state governments. Those organizations would only be able to have standing if they owned or leased riparian lands or rights themselves or if one or more of their members owned or leased riparian lands or rights.

On the other hand, the advantage to regulating the public interest through private citizens or groups is that ordinarily they not subject to the same political pressures as state agencies or officials. Private citizens or private environmental groups puruse their interests, sometimes with an idealistic fervor that is unnerving to the political system. A public interest group like the Audubon Society devotes all of its time, efforts, and money to promotion of ecological and conservationist ideals. If such a group could acquire the riparian rights, they could take many steps towards fostering the ecological and conservationist valuse in Oklahoma's waters.

78. It is important to distinguish between riparians asserting their own riparian claims in contrast to a riparian, including an environmental organization owning riparian land, having standing to assert the public trust as private attorney generals on behalf of the State of Oklahoma. *See* Marks v. Whitney, 491 P.2d 374 (Cal. 1971).

79. *Franco*, 855 P.2d at 578 n.56.

80. *Compare* 82 OKLA. STAT. § 105.12 (1991) *with* 82 OKLA. STAT. § 25 (1961).

81. If such a use exits and is in fact deemed reasonable. *See supra* note 37 and accompanying text.

V. Conclusion

In sum, environmental concerns often get undervalued in a free market. The free market system places emphasis on valuing items according to their economic worth in the marketplace. Consequently, preservation of wildlife, water quality, and aesthetic and scenic beauty often are undervalued because it is hard to quantify their worth in dollars and cents. Moreover, the preservation of such values often comes at the expense of industrial or economic development.

Water indeed is one of the most precious natural resources known to humans, for without it the human race could not survive. As such a priceless resource, its preservation and conservation are important issues for any state. To adequately supply its citizens with water, and in order to promote growth and industry, any state should have a comprehensive water plan.

The holding in *Franco* can be used by the Oklahoma court, the OWRB, and riparian landowners to further environmental, ecological, and conservationist policies. In the absence of any further action by the Oklahoma legislature, Oklahoma courts and the OWRB should take advantage of their opportunity to promote values which are typically undervalued and underprotected.

Part Three: Oklahoma Water Law and Riparianism: A Pathfinder & Annotated Bibliography

Lee Sparks*

Table of Contents

I. Scope of This Pathfinder

* Lee Sparks earned his Juris Doctor at the College of Law, University of Oklahoma, on May 13, 1995. In his third year Mr. Sparks served as research assistant to Drew Kershen, Earl Sneed Centennial Professor of Law and director of the Oklahoma Water Law Project, University of Oklahoma. Mr. Sparks created this pathfinder as a directed legal research project for Professor Osborne M. Reynolds, Professor of Law, University of Oklahoma.

A "pathfinder" is a research guide, which serves as "a kind of map to the resources of the library; it is an information locator for the library user whose search for recorded materials on a subject is just beginning. A compact guide to the basic sources of information specific to the user's immediate needs, it is a step-by-step instructional tool that will locate, if followed, the items that the most skilled reference librarian would suggest as basic to an initial investigation to the topic."[1] The purpose of this pathfinder and annotated bibliography is to help researchers, attorneys, law clerks, students and other persons interested and involved in Oklahoma water law and riparianism to find relevant materials. Its scope is limited primarily to the riparian issues involved in the landmark Oklahoma water law case of *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board.*[2] This paper reviews the primary sources of water law such as statutes and cases as well as the secondary law sources, such as pertinent sections from the *Restatement (Second) Torts*, law review and journal articles, books and treatises, conference proceedings, government documents, and so on.

II. Introduction

1. Charles H. Stevens et al., *Library Pathfinders: A New Possibility for Cooperative Reference Service*, 34 COLLEGE & RESEARCH LIBRARIES 40, 41 (1973).

2. 855 P.2d 568 (Okla. 1990), *reh'g denied, opinion readopted and reissued*, No. 59,310 (Okla. Apr. 13, 1993), *reh'g on readopted and reissued opinion denied*, No. 59,310 (Okla. June 14, 1993).

Oklahoma has a "dual" or "hybrid" water rights system. It is a hybrid system in that its water rights system "originally recognized riparian rights but later converted to a system of appropriation while preserving existing riparian rights."[3] Riparian rights are those of the owners of lands on the banks of watercourses, relating to the water, its use, ownership of soil under the stream, accretions, etc.[4] "Appropriation," to be valid, must include an intent to apply the water to some beneficial use existing at the time or contemplated in the future, a diversion from the natural channel by means of a ditch or canal, or some other open physical act of taking possession of the water, and an actual application of it within a reasonable time to some useful or beneficial purpose.[5] Until 1963, both appropriation (also known as prior appropriation) and riparianism existed in Oklahoma.[6] In 1963, the Oklahoma Legislature amended the Oklahoma Statutes to severely restrict, if not totally abolish, the right of a riparian to control the water rights except for narrowly defined domestic uses.[7]

The issue of the extent of riparian rights under the 1963 amendments proved more unsettled than most water law experts expected in the colorful case of *Franco*. In *Franco*, owners of land along streams in Coal County sought to enjoin the Oklahoma Water Resources Board's approval of an application from the City of Ada to appropriate water for the municipality. Ada sought the water after a drought brought home the need to acquire more water for its citizens. Ada uses Byrd's Mill Spring and Mill Creek as principal sources of its water supply. The riparian land owners along these rivers argued the appropriations to Ada were takings without compensation, and would unreasonably interfere with their present or future use for recreation, preservation of wildlife, fighting grass fires, and lowering the body temperatures of cattle on hot summer days.[8]

After an unusually large number of appeals, rehearings and remands, the Oklahoma Supreme Court held the 1963 amendments were unconstitutional because they extinguished future riparian rights.[9] In essence, the court reasoned that the legislation was an unconstitutional taking of a riparian's core property interest, i.e., the unused portion of the right which, under common law, can be exercised in the future. The court remanded the case to the trial court to determine the amount of water the riparian land owners should receive as a reasonable benefit of their riparian rights.[10] This decision made the Oklahoma Supreme Court the only state supreme court in more than fifty years to hold restrictions on the future use of riparian rights unconstitutional.[11] Therefore, the status of Oklahoma water law in general, and rights of riparian land owners in particular, is clearly unsettled. The following sources of law are intended to help both legal and non-legal researchers find materials in their efforts to help settle Oklahoma water rights issues.

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3. DAVID H. GETCHES, WATER LAW IN A NUTSHELL 6-7 (2d ed. 1990).
4. JOSEPH F. RARICK, THE RIGHT TO USE WATER IN OKLAHOMA 1 (2d ed. 1984).
5. *Id.*
6. WELLS A. HUTCHINS, THE OKLAHOMA LAW OF WATER RIGHTS 13 (1960).
7. RARICK, *supra* note 4, at 76.
8. For an excellent discussion of the *Franco* case, see Todd S. Hageman, Note, *Water Law: Franco-American Charolaise Ltd. v. Oklahoma Water Resources Board: The Oklahoma Supreme Court's Resurrection of Riparian Rights Leaves Municipal Water Supplies High and Dry*, 47 OKLA. L. REV. 183 (1994).
9. *Franco*, 855 P.2d at 577.
10. *Id.*; *see also* Hageman, *supra* note 8, at 188.
11. *Franco*, 855 P.2d at 582 (Lavender, J., with Hargrave & Reif, JJ., dissenting).

III. Primary Statutes and Administrative Regulations of Oklahoma Water Law

Research suggestion: Oklahoma's statutes are available in both the black-cover "official edition" and the green-cover "annotated" version. Both are published by West Publishing. Researchers will usually find the annotated version more helpful because West adds the research tools aids of historical and statutory notes, cross-references, citations to law review commentaries, library references, WESTLAW electronic research tips, and notes of court decisions involving the statutes. Here are the citations to primary statutes and administrative regulations concerning Oklahoma water law and riparianism:

Title 60: "Property," *Oklahoma Statutes* § 60 (1991 & 1994 Supp.) - "Ownership of water—Use of running water."

Title 82: "Waters and Water Rights," *Oklahoma Statutes* (1991 & 1994 Supp.) - Chapter 1.—"Irrigation and Water Rights—Stream Water Use" §§ 105.1A-105.32. Note that the Oklahoma Legislature, with Senate Bill No. 48 on June 7, 1993, added a new section in reaction to the *Franco* decision. See *Okla. Sess. Laws* ch. 310, § 1 (June 7, 1993).

Title 82: "Waters and Water Rights," *Oklahoma Statutes* (1991 & 1994 Supp.) — Chapter 11.—"Oklahoma Groundwater Law" §§ 1020.1—1020.22.

Title 82: "Waters and Water Rights," *Oklahoma Statutes* (1991 & 1994 Supp.) — Chapter 14.—"Oklahoma Water Resources Board" §§ 1085.1—1086.6.

Oklahoma Water Resources Board, *Rules, Regulations, Modes of Procedures* (as amended through June 13, 1994). This is a handbook of the rules and procedures promulgated by the OWRB, authorized by 75 O.S. §§ 307 et seq., and 82 O.S. §§ 1085.2 and 1085.10. Water rights researchers will need to use this book to understand the rules and procedures of the OWRB.

IV. Primary Oklahoma Water Rights Case Law

Research suggestions: In the *Pacific Digest* published by West, look for cases under "Waters and Water Courses" (key numbers 40, 101, 109, 127 et seq., 133, 142, 143, 144, 151, 159 et seq., 180 et seq.). In WESTLAW, search under Topic No. 405.

Atchison, T. & S.F. Ry. Co. v. Hadley, 35 P.2d 463 (Okla. 1934).
Baker v. Ellis, 292 P.2d 1037 (Okla. 1956).
Bowles v. City of Enid, 245 P.2d 730 (Okla. 1952).
Broady v. Furray, 21 P.2d 770 (Okla. 1933).
Canada v. City of Shawnee, 64 P.2d 694 (Okla. 1937).
Chicago R.I. & P. Co. v. Groves, 93 P. 755 (Okla. 1908).
Citizens' Action for Safe Energy, Inc. v. Oklahoma Water Resources Bd., 598 P.2d 271 (Okla. App. 1979).
City of Enid v. Crow, 316 P.2d 834 (Okla. 1957).
City of Moore v. Central Oklahoma Master Water Conservancy Dist., 441 P.2d 452 (Okla. 1968).
City of Stillwater v. Cundiff, 87 P.2d 947 (Okla. 1939).
City of Stillwater v. Oklahoma Water Resources Bd., 524 P.2d 938 (Okla. App. 1974).
Depuy v. Hoeme, 611 P.2d 228 (Okla. 1980).
Dowlen v. Crowley, 37 P.2d 933 (Okla. 1935).
Field v. Oklahoma Water Resources Bd., 645 P.2d 511 (Okla. 1982).
Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 58 *Oklahoma Bar Journal* 1406 (Okla. 1987). This opinion was later withdrawn.

Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 855 P.2d 568 (Okla.1990), *reh'g denied, opinion readopted and reissued*, No. 59,310 (Okla. Apr. 13, 1993), *reh'g on readopted and reissued opinion denied*, No. 59,310 (Okla. June 14, 1993).

Gates v. Settlers Milling, C & R Co., 91 P. 856 (Okla. 1907).

Gay v. Hicks, 124 P. 1007 (Okla. 1912).

Grand Hydro v. Grand River Dam Authority, 139 P.2d 798 (Okla. 1943).

Hargraves v. Wilson, 382 P.2d 736 (Okla. 1963).

Hodges v. Oklahoma Water Resources Bd., 580 P.2d 980 (Okla. 1978).

In re Arbuckle Master Conservancy Dist., 474 P.2d 385 (Okla. 1970).

Kline v. State ex rel. Oklahoma Water Resources Bd., 646 P.2d 1258 (Okla. 1981).

Kline v. State ex rel. Oklahoma Water Resources Bd., 759 P.2d 210 (Okla. 1988).

Kohler v. Clark, 525 P.2d 1401 (Okla. App. 1973).

Lowden v. Bosler, 163 P.2d 957 (Okla. 1946).

Lowrey v. Hodges, 555 P.2d 1016 (Okla. 1976).

Lynn v. Rainey, 400 P.2d 805 (Okla. 1964).

Mack Oil Co. v. Laurence, 389 P.2d 955 (Okla. 1964).

Markwardt v. Guthrie, 90 P. 26 (Okla. 1907).

Martin v. British American Oil Producing Co., 102 P.2d 124 (Okla. 1940).

Matador Pipelines, Inc. v. Oklahoma Water Resources Bd., 742 P.2d 15 (Okla. 1987).

Merritt v. Corporation Commission, 438 P.2d 495 (Okla. 1968).

Miller v. Marriott, 149 P. 1164 (Okla. 1915).

Mobil Oil Corp. v. State ex rel. Oklahoma Water Resources Bd., 673 P.2d 157 (Okla. 1983).

Nunn v. Osborne, 417 P.2d 571 (Okla. 1966).

Oklahoma City v. Tytenicz, 43 P.2d 747 (Okla. 1935).

Oklahoma Ry. Co. v. Bernard, 37 P.2d 272 (Okla. 1934).

Oklahoma Water Resources Bd. v. Central Oklahoma Master Conservancy Dist., 464 P.2d 748 (Okla. 1968).

Oklahoma Water Resources Bd. v. City of Lawton, 580 P.2d 510 (Okla. 1978).

Oklahoma Water Resources Bd. v. Foss Reservoir Master Conservancy Dist., 527 P.2d 162 (Okla. 1974).

Oklahoma Water Resources Bd. v. Franco-American Charolaise, Ltd., 646 P.2d 620 (Okla. App. 1982).

Oklahoma Water Resources Bd. v. Texas County Irr. & Water Resources Ass'n, Inc., 711 P.2d 38 (Okla. 1984).

Owens v. Snider, 153 P. 883 (Okla. 1915).

Reherman v. Oklahoma Water Resources Bd., 679 P.2d 1296 (Okla. 1984).

Ricks Exploration Co. v. Oklahoma Water Resources Bd., 695 P.2d 498 (Okla. 1984).

Smith v. Stanolind Oil & Gas, 172 P.2d 1002 (Okla. 1946).

State ex rel. Corporation Commission v. Texas County Irr. & Water Resources Ass'n, Inc., 818 P.2d 449 (Okla. 1991).

Story v. Hefner, 540 P.2d 562 (Okla. 1975).

Talley v. Carley, 551 P.2d 248 (Okla. 1975).

Texas County Irr. & Water Resources Ass'n, Inc. v. Cities Service Oil Co., 570 P.2d 49 (1977).

Texas County Irr. & Water Resources Ass'n v. Dunnett, 527 P.2d 578 (Okla. 1974).

Texas County Irr. & Water Resources Ass'n v. Oklahoma Water Resources Bd., 803 P.2d 1119 (Okla. 1990).

Watchorn Basin Ass'n v. Oklahoma Gas & Elec. Co., 525 P.2d 1357 (Okla. 1974).

West v. Oklahoma Water Resources Bd., 820 P.2d 454 (Okla. App. 1991).

V. Water Law Texts and Treatises

Research suggestion: As more libraries go "on-line" and replace their card catalogs, researchers can use Library of Congress subject headings to more quickly find materials. For searching water law, start with a

subject search under "water-law and legislation," "water resources development," and "riparian rights." Below are some of the more frequently cited water law texts and treatises:

Robert E. Beck, editor-in-chief, *Waters and Water Rights*, 1991 edition, 7 volumes (Michie 1991 & 1995 replacement for volume 6). This multi-author treatise is the starting point for virtually any issue in water law, the current "bible" on the subject. Each year a cumulative supplement (a.k.a. "pocket part") is published for each volume to update the basic text.

Oklahoma water law researchers should go first to Gary D. Allison's survey on Oklahoma water law in volume 6 (pp. 687-698), in which he carefully analyzes the law regarding diffused surface water, stream water (including analysis of *Franco*), operation of Oklahoma's riparian doctrine, operation of Oklahoma's appropriation doctrine, and groundwater.

The *best* "restatement" of the current law of riparianism is found in Joseph W. Dellapenna's "Riparianism," which starts at p. 87 in volume 1 and extends through p. 61 of volume 2.

Richard L. Dewsnup & Dallin W. Jensen, editors, *A Summary-Digest of State Water Laws*, 826 pp. (National Water Commission 1974). Although it is growing a bit dated, this is a very helpful guide to each state's development of its water law. See chapter 36 (pp. 603-618) for a summary of Oklahoma's water law.

Henry Philip Farnham, *The Law of Water and Water Rights*, 3 volumes (Lawyers' Co-operative Publishing 1904). This enduring treatise is still often cited by courts, especially in riparian jurisdictions.[12] Riparian rights emerge in a number of contexts in this treatise. Fortunately there is an exhaustive index to find relevant material.

David H. Getches, *Water Law in a Nutshell*, 2d. ed., 459 pp. (West Publishing 1990). The author's purpose is to provide a basic text for law students as well as an "orientation device for lawyers who do not regularly practice in the field and for non-lawyers who need a background in the subject." (p. xix) Includes an overview and introduction to water law, riparian rights, prior appropriation, hybrid systems, surface waterways rights, groundwater, diffused surface waters, federal and Indian reserved rights, federal power over water development, interstate allocation, water service, and supply organizations. Good index. No bibliography.

Wells A. Hutchins, *The Oklahoma Law of Water Rights*, 81 pp. (Oklahoma Water Resources Board 1955). The best description of this indispensable treatise is offered by Professor Rarick: "The significance of [the book] cannot be too strongly suggested. It is not only a definitive analysis of the development of every facet of Oklahoma water law down to the date of its publication, it quite forcefully pointed up the need for attention to Oklahoma's chaotic, cumbersome, and antiquated water law, and it detailed those problems which were most in need of solution."[13] Includes chapters on watercourses, systems of water rights, appropriation of water, the appropriative right, the riparian right, protection of water rights, loss of water rights, adjudication of water rights, administration of water rights, diffused surface waters, seepage waters, and ground waters.

Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States*, 3 volumes (Government Printing Office 1977). Published after the death of the great water law scholar, this treatise includes chapter on riparianism (volume 2) and a summary of the development of Oklahoma water law (volume 3). Also includes a bibliography of Mr. Hutchins many works.

Joseph F. Rarick, *The Right to Use Water in Oklahoma*, 2d ed., 612 pp. (Continuing Legal Education, University of Oklahoma College of Law 1984). Compiled by the late "dean" of Oklahoma water law,

12 A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT 915 (4th ed. 1993).

13 Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface in the Pre-1963 Period*, 22 OKLA. L. REV. 1, 3 (1969).

Professor Rarick traces the history of water rights in this state by interweaving the major cases, statutes, and legal literature. Includes many excerpts from legal articles, legislative materials, and cases (including several harder-to-find trial court decisions). Part I, "Water Rights in Oklahoma Under State Law," is particularly important to researchers of the riparian doctrine in this state. Part II is "Water Rights and the Impact of Federal-State Relations." Professor Rarick's book is essential to understanding the water law of Oklahoma.

VI. Casebooks, Practice Manuals, Model Codes and Other Books

American Society of Civil Engineers, *Model State Water Rights Code*, Third Draft, 382 pp. (Model Water Code Task Committee of the Water Laws Committee of the Water Resources Planning and Management Division, American Society of Civil Engineers 1993). Over one hundred water and water rights experts are working on an ambitious and impressive model water code that will no doubt greatly impact water law well into the next century. The project's ultimate goal is legislative adoptions of all or parts of the model code. To reflect the reality of the differences between western and eastern United States water rights systems, the drafters have produced two separate codes. First, there are "Regulated Riparian Chapters" for riparian states and for "dual" or "hybrid" states such as Oklahoma. Second, there are "Prior Appropriation Chapters" for the other states. The water law researcher will find this model code every bit as helpful as any treatise or other source of water law. Each section provides commentary including exhaustive citations to treatises and law reviews. Each section also provides equally exhaustive *cross-references* to the model code and *comparable statutes* in jurisdictions in the various states. The task committee has been working on the project since 1989. It plans to finish the project in 1995 or 1996. The chair of the task committee is Ray Jay Davis, Professor of Law, J. Rueben Clark Law School, Brigham Young University, Provo, UT 84602.

Kathleen Marion Carr and James D. Crammond, editors, *Water Law: Trends, Policies, and Practice*, 364 pp. (ABA Section on Natural Resources, Energy, and Environmental Law 1995). Includes perspectives on water law, takings and water rights, reallocation of water supplies, state water issues, Indian water law, federal regulations, interstate water issues, and the future of water law. The authors include water law professors and practitioners. Of particular interest to Oklahoma riparian issues is the chapter "Takings and Water Rights," by Barton H. Thompson, Jr., in which *Franco* is briefly discussed as an example of a small but growing trend among state courts to scrutinize water regulations. (See pp. 47-48). Another significant chapter is "The Alabama Water Resources Act: A Hybrid Model of 'Regulated Riparianism,'" by William S. Cox III, which illustrates the growing trend in eastern states to limit "natural flow" riparian rights to "reasonable use" as water becomes less plentiful than it was historically. Index: None. Bibliography: None.

William Goldfarb, *Water Law*, 2d ed., 284 pp. (Lewis Publishers 1988). The author's approach recognizes water issues as "increasingly multidisciplinary and comprehensive." His goal is to introduce legal concepts to primarily non-lawyer readers involved in water law, such as engineers, scientists, public administration officials, planners, sociologists, etc. Part I, "The Law of Water Diversion and Distribution," is particularly helpful for a basic understanding of riparianism, appropriation, groundwater doctrines, etc. The citations are helpful but cumbersome, since they are arranged at the end of each part instead of at the bottom of each page. Good index. No bibliography.

J. Myron Jacobstein & Roy M. Mersky, *Water Law Bibliography 1847-1965*, 250 pp. (Jefferson Law Book Company 1966). The subtitle to this helpful finding tool is "Source book on U.S. Water and Irrigation Studies: Legal, Economic and Political." In addition to the original work, the authors produced three supplements covering 1966-1977.

Frank E. Maloney, Richard C. Ausness, & J. Scott Morris, *A Model Water Code with Commentary*, (University of Florida Press 1972). This famous model code grew out of years of research, meetings among water law scholars, and many revisions. If nothing else, its commentary, which comprises the bulk of the work, is a great "gold mine" of sources for the water law researcher. The six chapters of the model code are: administrative structure and operation; regulation of consumptive use; construction, operation, and regulation of water wells; construction, operation, and regulation of surface water works; protection of water quality; and, weather modification operations.

Frank E. Maloney, Sheldon J. Plager, and Fletcher N. Baldwin, Jr., *Water Law and Administration: The Florida Experience* (University of Florida Press 1968). Florida may be a long way from Oklahoma. But researchers of water law in general, and riparianism in particular, will find helpful the chapters on "Rights in Defined Waterbodies: Basic Considerations" and "Ownership of Upland as the Source of Riparian Rights."

Joseph L. Sax, Robert H. Abrams, & Barton H. Thompson, Jr., *Legal Control of Water Resources*, 2d ed., 987 pp. (West 1991). One of three major casebooks in the water law area. Chapter Two is devoted exclusively to riparianism. The authors discuss the *Franco* case (pp. 346-352) in the context of statutory abolition of riparian rights. The notes and questions (pp. 350-352) will help researchers and attorneys frame the issues as these three prominent authors suggest.

A. Dan Tarlock, *Law of Water Rights and Resources*, loose-leaf pagination (Clark Boardman Callaghan 1995 [updated annually]). A single-volume treatise designed for practicing attorneys who need a basic, working, practical knowledge of water law. Includes a good chapter on the common law of riparian rights.

A. Dan Tarlock, James N. Corbridge, Jr., & David H. Getches, *Water Resource Management: A Casebook in Law and Public Policy*, 4th ed., 930 pp. (Foundation Press 1993). One of three major casebooks in the water law area. Chapter Two is devoted exclusively to riparian law and includes excerpts from major historical cases in England and the United States. Of special interest to water law researchers is "Appendix B: Sources of Water Law and Resources Literature." In their appendix, authors offer a "mini-pathfinder" for finding relevant water law treatises, history, official documents, economics, political science, law reviews, and popular literature.

Frank J. Trelease & George A. Gould, *Water Law: Cases and Materials*, 4th ed., 816 pp. plus supplement (West 1986). One of three major casebooks in the water law area. Chapter Three is devoted exclusively to riparian rights, including the basis of the right, nonriparian uses; prescription and grant, municipal supply, state regulation, abolition and combination (including the "California Doctrine"). As with most casebooks, the notes following the cases are the most helpful portions and the authors include an abundance of citations to other literature.

Kenneth R. Wright, editor, *Water Rights of the Fifty States and Territories*, 123 pp. (Amer. Water Works Ass'n 1990). An excellent summary of each state's water rights doctrine and administrative system. Appendix A also offers a good comparison of the riparian and appropriation doctrines.

VII. Restatement of the Law Materials

A Restatement is a series of volumes published by the American Law Institute that "tell what the law in a general area is, how it is changing, and direction the authors (who are leading legal scholars in each field covered) think the law should take."[14] The primary Restatement in this area is volume four of the *Restatement (Second) of Torts* (American Law Institute 1977). Chapter 41, "Interference with the Use of Water ("Riparian Rights") of the *Restatement (Second) of Torts* §§ 841-864 cover five topics: definitions, interference by means other than the use of water, interference with the use of watercourses and lakes by use of the water, interference with the use of ground water, and interference with the use of surface water. The associate reporter for the chapter was Frank J. Trelease, and the advisers to the chapter were Clifford Davis, N. William Hines, Frank E. Maloney and Charles J. Meyers. All of these men are recognized authorities of the first rank in water law. The *Franco* court cited § 850, "Harm by one riparian appropriator to another," in its discussion of "reasonable use doctrine" issues for the parties in the suit.[15]

The *Restatement* should always be used in tandem with the Appendix to relevant sections to retrieve cases, reporter's notes, and cross references. The cross references are particularly helpful for finding West Digest Key Numbers, *Corpus Juris Secundum* materials, and *American Law Reports Annotations*. For chapter 41, the researcher will also need to consult the *Supplement* (including the pocket-art) to retrieve materials from January, 1978 to the present.

VIII. Law Review, Journal, and Newsletter Articles, Notes and Comments

Research suggestion: The best places to look for law review and law journal materials are the *Index to Legal Periodicals and Books* (*ILP*) and *Current Law Index*. Most law libraries have both the bound version and the CD-ROM version of *ILP*, published by WILSONDISC. For materials dealing with or relating to Oklahoma water law/riparianism, search under the subjects: "Water and Watercourses/Oklahoma" and "Water and Watercourses" for other states. Other good subjects are "water," "natural resources," and "riparian!" Researchers may also search WILSONDISC by author, case names, statutes, date, etc. One limitation to WILSONDISC is that its coverage is limited to materials published since August, 1981. For earlier materials, see the bound volumes.

Another source for materials in legal periodicals is the *Current Law Index*, which comprehensively indexes over 875 law journals in the United States and several other common law countries. Materials are indexed by subject, author/title, table of cases, and table of statutes. For materials in this area, search the subject index under "Water rights," "Riparian rights," "Water," and "Water use." Particularly good cross references.

Another source for law review materials is WESTLAW and LEXIS, the two competing on-line legal databases. In WESTLAW, researchers may search in the "journals and law reviews" (JLR) or "all texts and periodicals" (TP-ALL). TP-ALL includes law reviews AND a variety of practice manuals, legal periodicals, and guides. To save time and money, researchers should use "ENV-TP," which limits searches to law reviews, texts and bar journals that specialize in environmental law. WESTLAW also carries several databases from the "Dialog" system. Dialog carries a vast array of databases in many disciplines. One of the Dialog databases available on WESTLAW is "Water Resources Abstracts" (WR-ABS), with coverage from 1968.

In LEXIS, search in the "LAWREV" database. "LAWREV" is similar to WESTLAW's JLR database, although coverage does vary between the two.

14 BLACK'S LAW DICTIONARY 1313 (6th ed. 1990).

15 *Franco* at 574 n.25, 575 n.40.

One important cautionary note about WESTLAW and LEXIS: Not only are they more expensive than the *Index to Legal Periodicals* and *Current Law Index*, their coverage is "selective," which means the services do NOT include everything published in the law reviews. The electronic databases have also restricted their coverage to within only the last ten years or so. Water law is an ancient doctrine and many of the most relevant articles are older then ten years. For all of these reasons, the researcher will need to check both the hardbound indices as well as the on-line research services. Oklahoma water law researchers should also take note that the *Oklahoma Bar Journal* is *not* indexed or included in *ILP*, *Current Law Index*, WESTLAW, or LEXIS.

Annotated below are the major law review and journal articles directly on *Franco*, riparian rights, and Oklahoma water rights:

Robert H. Abrams, "Charting the Course of Riparianism: An Instrumentalist Theory of Change," 35 *Wayne Law Review* 1381-1446 (1989). Traces the history of riparianism in the eastern United States and argues for changes based on an "instrumentalist theory"[16] of law to hasten the eclipse of the doctrine. The author suggests how several factors will lead to water shortages in the east, such as the "greenhouse effect." These changes will require eastern states to severely limit or abolish riparianism.

Robert H. Abrams, "Interbasin Transfer in a Riparian Jurisdiction," 24 *William and Mary Law Review* 591-624 (1983). The author argues for legislative action to address possible riparian frustration of interbasin transfers. The author shows how water shortages in historically water-rich states such as Virginia often cause changes in riparian rights law.

Robert H. Abrams, "Replacing Riparianism in the Twenty-First Century," 36 *Wayne Law Review* 93-124 (1989). Assuming that riparianism will ultimately fail as a viable water rights system in the eastern United States due to increased demands and droughts, the author proposes an "instrumentalist theory." This theory uses "reverse engineering" to determine societal water needs, and then "works back" to legal mechanisms that promote them. Proposes to replace riparianism with a "hierarchical permit-based water right system that features transferable permits." (p. 93)

Robert H. Abrams, "Water Allocation by Comprehensive Permit Systems in the East: Considering a Move Away from Orthodoxy," 9 *Virginia Environmental Law Journal* 255-285 (1990). The author questions the need for comprehensive permit systems in the eastern United States, arguing instead for ad hoc allocation solutions. The first part of the article includes a good review of common law riparianism and its weaknesses.

Gary D. Allison, "*Franco-American Charolaise*: The Never Ending Story," 30 *Tulsa Law Journal* 1-60 (1994). The best article published thus far on *Franco*, the author includes a great deal of helpful material about the administrative hearings before the OWRB as well as interviews with attorneys involved in the litigation.

Robert H. Anderson, "The Conveyance of Water Rights," 50 *Oklahoma Bar Journal* 2711-2721 (1979). An excellent overview of Oklahoma water law and a "primer" for understanding transfers of title for water rights. See pp. 2716-2717 for problems Oklahoma attorneys need to be aware of when dealing with riparian rights.

Robert H. Anderson, "Oklahoma's 1973 Groundwater Law: A Short History," 43 *Oklahoma Law Review* 1-26 (1990). Legislative and common law history of groundwater reform in Oklahoma, plus a basic understanding of hydrology in Oklahoma.

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16. A term from R. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982): "A theory of this type is instrumentalist in its view that legal rules and other forms of law are most essentially tools devised to serve practical end, rather than general norms laid down by officials in power, secular embodiments of natural law, or social phenomena with a distinctive kind of past." *Id.* at 20.

William R. Attwater and James Markle, "Overview of California Water Law," 19 *Pacific Law Journal* 957-1031 (1988). Since the *Franco* majority decision referred to the California Doctrine of dual rights, this article provides a good basic understanding of that state's water law history and current status.

Richard C. Ausness, "Water Use Permits in a Riparian State: Problems and Proposals," 66 *Kentucky Law Journal* 191-265 (1977). Although the article concentrates on water problems in Kentucky, the author offers a lot of helpful research and analysis on riparian issues relevant to Oklahoma such as the constitutionality of "taking" water rights, permit systems, and the beneficial use standard.

C.E. Barnes, "Legal Quicksands in Oklahoma Riverbeds," 17 *Oklahoma Law Review* 159-168 (1964). Analyzes the problems of accretion and its effect on riparian rights.

Christopher L. Barnes, Note, "Notice to Fresh Water Rights Owners of OCC Hearings: *Oklahoma ex rel. Corporation Commission v. Texas County Irrigation & Water Resources Association*," 28 *Tulsa Law Journal* 477- 495 (1993). Criticizes the Oklahoma Supreme Court's holding that owners of fresh water rights were not entitled to notice on hearings on applications to conduct enhanced recovery operations in oil fields. This is relevant to a notice issue in subsequent litigation between the parties after *Franco*.

Lynda L. Butler, "Allocating Consumptive Water Rights in a Riparian Jurisdiction: Defining the Relationship Between Public and Private Interests," 47 *University of Pittsburgh Law Review* 95-181 (1985). In a very well-documented article, the author argues that riparian rights must be modified as to the "traditional restrictions of the land which may be benefited by particular riparian rights, the defining of 'reasonable use' in terms of low density consumption, and narrow restrictions of the transferability of riparian rights." (from the article's abstract, p. 95). She further argues that unless legislatures enact statutes to modify the doctrine, courts should actively lead in limiting riparian rights.

Mark E. Chandler, "A Link Between Water Quality and Water Rights?: Native American Control Over Water Quality," 30 *Tulsa Law Journal* 105-122 (1994). A brief overview of possible cases that might seek a reserved water quality right under *Winters* along with one brought under the Clean Water Act.

Dan Connally, Note, "Water Law: Changes in Water Permit Application After *Ricks Exploration Co. v. Oklahoma Water Resources Board* — Were Vested Rights Lost?" 40 *Oklahoma Law Review* 155-176 (1987). Although the author deals more with the groundwater issues instead of riparianism, the note offers important legislative history, constitutional issues, and analysis of vested rights in Oklahoma groundwater law.

Dean Couch, "Stream Water Right: Why Does the OWRB Require Permittee to Use It or Lose It?" *Oklahoma Water News* (Nov./Dec. 1994, pp 4-5). Explains for non-legal audience the reasons for Oklahoma's appropriation doctrine.

Michael P. Cox, "Has Administrative Law Finally Arrived in Oklahoma?" 40 *Oklahoma Law Review* 63-67 (1987). The author analyzes the *Oklahoma Water Resources Board v. Texas County Irrigation & Water Resources Association*[17] decision and concludes that the Oklahoma Supreme Court clearly ruled that administrative agencies must properly promulgate procedural and substantive rules before deciding the merits of controversies coming before them.

[17]. 771 P.2d 38 (Okla. 1985).

W.E. Cox, "Water Law Primer," 108 *Journal of the Water Resources Planning and Management Division* 107-122 (Mar. 1982). An overview of legal principles controlling the use and development of water designed primarily for use by engineers and others who do not have a background in water law but need a concise treatment of basic issues.

Robert W. Dace, Note, "The Right to Use Fresh Groundwater in Waterflood Operations," 35 *Oklahoma Law Review* 158-166 (1982). In addition to discussing Oklahoma water law as it relates to the oil field operation of waterflooding, the author offers good overview of the concepts of "reasonable use" and "beneficial use" of groundwater.

Peter N. Davis, "The Riparian Right of Streamflow Protection in the Eastern States," 36 *Arkansas Law Review* 47-80 (1982). The author discusses the need for protection of water levels of lakes and reservoirs and watercourses, maintenance of water assimilative capacity, and the public right to protect streamflows.

Ray Jay Davis, "Revisiting State Water Rights Law," 30 *Water Resources Bulletin* 183-187 (1994). A basic introduction to the work thus far on the Model State Water Rights Code, sponsored by the American Society of Civil Engineers (ASCE). The purpose of the ASCE model code is to help provide uniform regulation of water resources, based on "concerns about the adequacy of the present law." (p. 184) For a description of the ASCE's Model State Water Rights Code, see "Casebooks, Practice Manuals, Model Codes and Other Books," *supra.*

Joseph W. Dellapenna, "Groundwater Law for Mineral Lawyers," 13 *Eastern Mineral Law Institute*, ch. 3 (1992). An excellent primer on groundwater law for lawyers and law students. Professor Dellapenna succinctly covers groundwater hydrology, ownership models, an economic analysis of groundwater law, and remedies for groundwater contamination. Students of Oklahoma water law and riparianism will find useful his overview of regulated riparianism on pp. 3-16 to 3-18.

Joseph W. Dellapenna, "The Regulated Riparian Version of the ASCE Model Water Code: The Third Way to Allocate Water," 30 *Water Resources Bulletin* 197-204 (1994). Professor Dellapenna himself best describes his article in its prefatory abstract: "Lawyers, engineers, and hydrologists are accustomed to thinking of water law as falling into one of two incompatible models: riparian rights (under which water is allocated by courts according to the relative reasonableness of the competing uses) and appropriative rights (under which water is allocated according to the temporal priority of the competing uses, largely by the action of the water users themselves but perfected by the issuance of an administrative permit). Usually unnoticed is the existence of a third approach, which I have dubbed 'regulated riparianism.' Under regulated riparianism, water is allocated by water permits issued after an administrative determination of the reasonableness of the proposed use before the use is commenced. This system . . . thus is fundamentally different from either the traditional riparian rights that it replaces or the appropriative rights found in western states." Professor Dellapenna specifically named Oklahoma (and the *Franco* case) as a state that would benefit by the "regulated riparian" version of the ASCE Model State Water Rights Code.

Joseph W. Dellapenna, "Riparian Rights in the West." 43 *Oklahoma Law Review* 51-70 (1990). An overview of whether and how riparian rights are recognized at all in western states and the differences between the western and eastern forms of riparian rights.

Mark D. Dickey, Note, "Effect of the Oklahoma Groundwater Law on the Common Law Right to Use Water," 37 *Oklahoma Law Review* 157-167 (1984). An analysis of the impact of 82 O.S. §§ 1021.1-1020.22 (1981) on the common law right of a mineral owner or lessee to take and use fresh groundwater.

Janet M. Drewry, Note, "Water Law — Riparian Rights — Neither Conservation Amendment Nor Police Power of State Justifies the Taking of Vested Riparian Rights Without Compensation Under Texas Water Rights Adjudication Act of 1967," 14 *St. Mary's Law Journal* 127-137 (1982). The author argues that riparian property owners should be compensated for water appropriated by the state on the theory that such regulations are de facto takings without compensation, and thus unconstitutional.

William H. Farnham, "The Permissible Extent of Riparian Land," 12 *Land and Water Law Review* 31-61 (1972). The author argues for legislative answers to the question of whether all land bordering a lake or stream is riparian regardless of the fact that much of it is far distant from the water.

Roger Florio, Note, "Water Rights: Enforcing the Federal-Indian Trust After *Nevada v. United States*," 13 *American Indian Law Review* 79-98 (1988). An analysis of a United States Supreme Court decision concerning the federal Indian reserved water rights doctrine.

J.S. Garrett, Note, "Federal Intervention in Groundwater Regulation: *Sporhase v. Nebraska ex rel. Douglas*," 18 *Tulsa Law Journal* 713-722 (1983). An analysis of the decision by the United States Supreme Court that struck down Nebraska's water embargo statute.

David H. Getches, "Controlling Groundwater Use and Quality: A Fragmented System," 17 *Natural Resources Law* 623-645 (1985). The author calls for an end to the legal fictions that view ground and surface waters as separate entities when most often they are interconnected. He reviews legislative trends toward ground water in the areas of mining and pollution.

Todd S. Hageman, Note, "Water Law: *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board*: The Oklahoma Supreme Court's Resurrection of Riparian Rights Leaves Municipal Water Supplies High and Dry," 47 *Oklahoma Law Review* 183-199 (1994).

Alexander Hamilton, Note, "The Plight of the Riparian Under Texas Water Law," 21 *Houston Law Review* 577-593. A discussion of a decision from the Texas Supreme Court, *In re the Adjudication of the Upper Guadalupe Segment of the Guadalupe River Basin*. In this case, the court held the state can constitutionally regulate riparian rights. This note discusses the court's reasoning of how the regulation of riparian rights do not constitute a taking or a violation of the separation of powers.

Linda M. Harris, Note, "Annual Survey of Oklahoma Law: Water Use," 3 *Oklahoma City University Law Review* 63-82 (1978). Briefs of the Oklahoma water law cases of *Oklahoma Water Resources Board v. City of Lawton*,[18] *Lowery v. Hodges*,[19] and *Hodges v. Oklahoma Water Resources Board*.[20]

Philip D. Hart, "Joinder of Parties in Statutory Appropriation Suits," 13 *Oklahoma Law Review* 101-104 (1960). An interesting analysis of the problems of riparianism and appropriation written before the passage of the 1963 amendments to the Oklahoma water law code.

Philip F. Horning, Comment, "The Right to Use Ground Water in Oil and Gas Production in Oklahoma," 22 *Oklahoma Law Review* 99-105 (1969). An analysis of the Oklahoma ground water case of *Merritt v. Corporation Commission*[21] and a call for statutory reform of the Oklahoma Ground Water Law.

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19. 580 P.2d 510 (Okla. 1978).
20. 555 P.2d 1016 (Okla. 1976).
21. 580 P.2d 980 (Okla. 1978).
. 438 P.2d 495 (Okla. 1968).

Aaron H. Hostyk, "Who Controls the Water? The Emerging Balance Among Federal, State, and Indian Jurisdictional Claims and Its Impact on Energy Development in the Upper Colorado and Upper Missouri River Basins," 18 *Tulsa Law Journal* 1-78 (1982). An excellent and exhaustive analysis of the complicated relationship between federal and state jurisdiction of water rights disputes.

Robert E. Hough, Jr., Note, "Fresh Groundwater and Tertiary Oil Recovery: *Oklahoma Water Resources Board v. Texas County Irrigation & Water Resources Association (Mobil Oil Corp.)*, 21 *Tulsa Law Journal* 565-590 (1986). A detailed analysis of a Oklahoma Supreme Court decision dealing with the administrative procedures of the OWRB and judicial review of the courts.

Ronald R. Hudson, "Riparian and Appropriation Rights to Foreign Water in Oklahoma," 19 *Oklahoma Law Review* 462-467 (1966). The author comments on a 1965 Oklahoma Attorney General's opinion (65-441) that discusses riparian and appropriation issues as to "water brought into a watershed or stream that is not a part of the natural flow or which would not have found its way to the stream but for some artificial condition." (p. 462) A good review of older water law cases.

James Jackson, Comment, "Water: A New Liquid Gold," 38 *Oklahoma Law Review* 907-930 (1985). A broad analysis of the nation's abuse of water resources and how scarcity in the future will require comprehensive water plans and regulation.

Gail Jacobs-Babb, Comment, "Water Rights in Oklahoma: Where Do We Stand?" *in* "Oklahoma Supreme Court Survey, September 1986-87," 41 *Oklahoma Law Review* 103, 143-147 (1988). An excellent synopsis of the riparian right in Oklahoma from statehood to the then-present as well as a good critique of the original decision in *Franco*.

Eric B. Jensen, "The Allocation of Percolating Water Under the Oklahoma Ground Water Law of 1972," 14 *Tulsa Law Journal* 437-476 (1979). Excellent scholarly analysis of important distinctions in Oklahoma water law, property interests in Oklahoma groundwater, and regulation of Oklahoma groundwater.

E.P. Krauss, "The Legal Form of Liberalism: A Study of Riparian and Nuisance Law in Nineteenth Century Ohio," 18 *Akron Law Review* 223-253 (1984). This historical essay looks at the rise of riparian and nuisance laws as Ohio grew more of an agricultural and industrial leader in the last century.

A. Lynne Krogh, "Water Right Adjudications in the Western United States: Procedures, Constitutionality, Problems, & Solutions," 30 *Land and Water Law Review* 9-56 (1995). An excellent comparison and contrast of the ways the seventeen continental states, from North Dakota south to Texas, and states west, adjudicate water rights disputes. The author's necessarily general scope helps to show how various states regulate their water resource. Therefore there is not too much here specifically on Oklahoma.

T.E. Lauer, "The Common Law Background of the Riparian Doctrine," 28 *Missouri Law Review* 60-107 (1963). An intensely scholarly and historical article that traces the development of riparianism from the Norman conquest of England to the reported cases through 1825. The introduction includes helpful analysis of Justice Story's opinion in *Tyler v. Wilkinson*,[22] the first reported riparian rights case in the United States.

R. Thomas Lay, "The Beneficial Use Requirements of the Appropriative Water Right and the Forfeiture of Rights Through Nonuse," 37 *Oklahoma Law Review* 67-101 (1984). The author of this article is actively involved in the *Franco* controversy in his role as counsel for the defendants. His article "reviews and

[22]. 24 Fed. Cas. 472 (No. 14,312) (C.C.D.R.I. 1827).

analyzes the beneficial use requirements incidental to the appropriative water right and provisions for the forfeiture and loss of rights, both historically and under the present Oklahoma statutes." (p. 68)

Donald R. Levi & Kenneth C. Schneeberger, "The Chain and Unity of Title Theories for Delineating Riparian Land: Economic Analysis as an Alternative to Case Precedent," 21 *Buffalo Law Review* 439-447 (1972). The authors investigate the nature and scope of the two theories, analyze the theories' economic implications of their application, and suggest an economic model for determining water permits on both theories.

J.W. Looney, "An Update on Arkansas Water Law: Is the Riparian Rights Doctrine Dead?" 43 *Arkansas Law Review* 573-630 (1990). Part of a symposium on agriculture law, this article focuses on the effect of 1985 legislation that seriously reduced riparian rights in Arkansas. A detailed look at the code's provisions for water permits, interbasin and intrabasin transfers, unused common law water rights, etc.

Arthur Maas and Hiller B. Zobel, "Anglo-American Water Law: Who Appropriated the Riparian Doctrine?" 10 *Public Policy* 109-140 (1960). The authors argue that riparianism had developed over centuries in England. This view is disputed by water law experts such as Professors Tarlock, Corbridge and Getches.[23]

Frank E. Maloney and Richard C. Ausness, "A Modern Proposal for State Regulation of Consumptive Uses of Water," 22 *Hastings Law Journal* 523-560 (1971). Reviews the essential elements of any water regulatory system and introduces and explains the authors' general rationale for their Model Water Code. (See description in "Casebooks, Practice Manuals, Model Codes and Other Books," *supra.*) In particular, the authors explain Chapter Two of their Model Water Code. The article also includes a good overview of the Model Water Use Act, the Iowa Water Resources Act, and the constitutionality of legislation regulating water rights.

Clyde O. Martz, "The Law of Underground Waters," 11 *Oklahoma Law Review* 26-37 (1958). This article was presented as an address at on University of Oklahoma College of Law Annual Law Day program and thus has few footnotes for the researcher. But it is a good summary of law as it existed at the time. The author discusses the appropriation doctrine, absolute ownership by the overlying owner, reasonable use, and correlative rights.

Dean T. Massey & Gordon R. Sloggett, "Managing Groundwater in the Ogallala Aquifer for Irrigation," 9 *Oklahoma City University Law Review* 379-410 (1984). The authors summarize and explain the current and projected usage from the Ogallala Aquifer and the regulatory systems of the major states that use it, including Oklahoma.

Oklahoma Water News, "Court Decision in *Franco* Case Clouds Water Rights Issues," *Oklahoma Water News* (May/June 1993, pp. 1-2). A predictably bitter response to the then-recent announcement of the Oklahoma Supreme Court's decision. "No irrigator, industry or town can be sure if they can rely on their water rights anymore," said Robert Anderson, longtime member of the Oklahoma Water Advisory Committee. (p. 2)

Kevin L. Patrick & Kelly E. Archer, "A Comparison of State Groundwater Laws," 30 *Tulsa Law Journal* 123-156 (1994). A comparison and contrast of the groundwater laws in Oklahoma, Arizona, California, Colorado.

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23. TARLOCK, *supra* note 12, at 54.

Joseph F. Rarick, "Appropriator v. Riparian: A Preliminary Examination," 10 *Oklahoma Law Review* 416-427 (1957). One of several authoritative articles written by the undisputed late "dean" of Oklahoma water law, Professor Rarick presents a basic history of the two essentially incompatible doctrines affecting Oklahoma, and predicted that "in the next fifty years of the state's history, developments in the immediate area under examination here will provide a good show for the student of water law." (p. 427) The *Franco* case proved him correct.

Joseph F. Rarick, "The Right to Use Water From a Stream," 29 *Oklahoma Bar Journal* 1958-1964 (1958). The author again summarized the inadequacy of then-existing Oklahoma water law of competing doctrines of riparianism and appropriation, and called for legislative action to cure some of the conflicts.

Joseph F. Rarick, "The Streams of Oklahoma as a Source of Municipal Water Supply," 30 *Oklahoma Bar Journal* 1281-1295 (1959). The author analyzes the problems raised by riparianism when a city attempts to appropriate water from Oklahoma streams. He also looks at supplies from the Bureau of Reclamation and major features of water contracts. He also predicted the very problem raised by *Franco*.

Joseph F. Rarick, "Oklahoma Water Law, Stream and Surface in the Pre-1963 Period," 22 *Oklahoma Law Review* 1-44 (1969). This is the first of an often-cited four-part series of authoritative articles by Professor Rarick to "bring to the bar information concerning the legislative program which sought to supply answers" to the problems of Oklahoma's "dual" water rights system. Essential to any researcher of Oklahoma water law in its presentation of the legislative, judicial and executive events that led to the 1963 amendments.

Joseph F. Rarick, "Oklahoma Water Law, Stream and Surface Under the 1963 Amendments," 23 *Oklahoma Law Review* 19-70 (1970). The second article in Professor Rarick's four-part series traces the process and product of the work of the "Citizens Committee" established to study and recommend changes to Titles 60 and 82 of the *Oklahoma Statutes*. Since Professor Rarick was one of the committee members, the article shows a unique "insider's viewpoint" of the committee's process and its efforts to deal with the legislature.

Joseph F. Rarick, "Oklahoma Water Law, Stream and Surface, The Water Conservation Storage Commission and the 1963 and 1967 Amendments," 24 *Oklahoma Law Review* 1-16 (1971). The third article in Professor Rarick's four-part series deals with the statute that created the Water Conservation Storage Commission and with amendments to surface and stream water law in the 1965 and 1967 legislatures.

Joseph F. Rarick, "Oklahoma Water Law, Ground or Percolating in the Pre-1971 Period," 24 *Oklahoma Law Review* 403-426 (1971). The final article in Professor Rarick's four-part series summarizes the major Oklahoma groundwater cases that led to the legislation that ultimately led to the 1973 amendments to Title 82.

"Research Project: The System of Riparian Rights in Minnesota," 7 *Hamline Law Review* 369-390 (1984). A sort of "Riparianism 101 in Minnesota," this project gathered all of the cases and statutes in the historical development of Minnesota's predominant reasonable use theory.

Judith V. Royster, "A Primer on Indian Water Rights: More Questions Than Answers," 30 *Tulsa Law Journal* 61-104. The author keeps her word by presenting the basic framework of very complex Indian reserved rights, as well as keeping an Oklahoma readership in mind. Her section, "*Winters* Rights in Riparian Jurisdictions," points out that "no court has ever adjudicated a tribal claim to *Winters* rights in a purely riparian jurisdiction," (p.103) and concludes that Oklahoma has a unique opportunity to account for tribal water rights of the thirty-six tribes within its borders.

Joseph L. Sax, "The Constitution, Property Rights, and the Future of Water Law," 61 *University of Colorado Law Review* 257-282 (1990). The author argues that water rights can be altered or reduced in the public interest without the payment of compensation, on the theory that water has a "public, common, systemic" nature and as it becomes more scarce, the reality of a "spaceship economy" will require the severe limitation or outright abolition of private water rights. (p. 281)

Clifford W. Schulz and Gregory S. Weber, "Changing Judicial Attitudes Towards Property Rights in California Water Resources: From Vested Rights to Utilitarian Reallocations," 19 *Pacific Law Journal* 1031-1110 (1988). A survey of the California Supreme Court's movement from protecting traditional common law riparian rights to its current use of the public trust doctrine to avoid compensation for reallocation of private interests in water resources.

Marcia J. Steinberg and Michael Schoenleber, "Salinity Control and the Riparian Right," 19 *Pacific Law Journal* 1143-1164 (1988). Although the article deals with a specific problem of protecting riparian owners on the Sacramento-San Joaquin Delta to reasonable protection from seawater intrusion, it also has a good summary of riparian rights in a dual system such as Oklahoma's.

Frank J. Trelease, "New Water Legislation: Drafting for Development, Efficient Allocation and Environmental Protection," 12 *Land and Water Law Review* 385-429 (1977). One of the pre-eminent water law scholars calls for the elimination of any private water rights, including riparianism, because the state "must superimpose controls upon the initiation of uses, the exercise of water rights, the diversion of water among users, and the reallocation of water rights to new uses as needs change." (p. 388)

Robert B. Webber II, Note, "Mineral Lessee's Right to Fresh Groundwater: *Ricks Exploration Co. v. Oklahoma Water Resources Board*," 21 *Tulsa Law Journal* 91-120 (1985). An excellent examination of the conflicts of property rights between surface landowners and mineral lessees in regard to their right to groundwater. The author also includes helpful analysis on due process required of OWRB to owners of groundwater rights.

Laura M. Zawisa, Note, "Property — Riparian Rights. *Thies v. Howland*," 64 *University of Detroit Law Review* 579-591 (1987). This note discusses a case from the Michigan Supreme Court involving owners of land abutting a private walk contiguous to a navigable body of water. The court held the owners are presumed to own the fee in the walk and, as a matter of law, possess exclusive riparian rights which include the right to erect docks and permanently anchor boats. Includes a good summary of riparian rights in the *Restatement (Second) of Torts.*

IX. Journals and Periodicals of Significance to Water Law

The Groundwater Newsletter, published twice monthly by Water Information Center, Inc., 1099 18th St., Suite 2150, Denver, CO 80202. A potpourri of notes on recent cases and legislation, conferences, new books and other materials, courses offered, etc.

Land and Water Law Review, published by the University of Wyoming College of Law, Laramie, WY 82071.

Natural Resources Journal, published by the University of New Mexico School of Law, Albuquerque, NM 87131.

Oklahoma Energy/Environment Report, published weekly by the Oklahoma Business News Company, P.O. Box 1177, Oklahoma City, OK 73101. A weekly synopsis of news and bits on a wide scope of Oklahoma government activity in energy and the environment. Includes a calendar of the upcoming week's various administrative agencies meetings.

Oklahoma Water News, the bimonthly newsletter of the Oklahoma Water Resources Board, P.O. Box 150, Oklahoma City, OK 73101-0150. In addition to news of the OWRB, administrative hearing notices, legislative news, etc., there are occasional short articles on water law, written primarily for the non-lawyer and always in favor of the OWRB.

Public Land Law Review, published by the School of Law, University of Montana, Missoula, MT 59812. This journal focuses primarily on public land issues in the western United States, but also occasionally publishes an article, comment, or note on water law, e.g., David H. Getches, "Water Use Efficiency: The Value of Water in the West," in volume eight, pp. 1-32 (1987). This review also hosts the annual "Public Land Law Conference" in Missoula, Montana.

Water Law Newsletter, published by the Rocky Mountain Mineral Law Foundation, 7039 E. 18th Ave., Denver, CO 80220. Features contributions on recent developments in case law and legislation from a variety of state reporters.

Water Resources Bulletin, 950 Herndon Parkway, Suite 300, Herndon, VA 22070. Owned and published bimonthly by the American Water Resources Association, the *Bulletin* publishes primarily technical papers for engineers and such. But it also publishes two or three articles per issue relating to water law and policy in its section on "Dialogue on Water Issues." There is a title index and an author index at the end of each volume. Unfortunately, there is no subject index to assist the water law researcher find quickly the law and policy articles.

Water Strategist, P.O. Box 963, Claremont, CA 91711. This newsletter describes itself as a "quarterly analysis of water marketing, finance, legislation and litigation" and seems to concentrate on issues in the West.

X. Water Law Conference Proceedings and Symposia

"Oklahoma Water Law," October 6-7, 1994, sponsored by CLE International, Denver, CO. The papers from this conference tend to be of a more general, introductory nature. The attorney for the riparian landowners participated in the conference and provided several trial court and administrative documents of the *Franco* decision that might be of interest to Oklahoma water law researchers.

"Oklahoma Water Law: What Every Oklahoma Lawyer Should Know About Water Quality and Water Quantity," April 2, 1993, sponsored by the University of Oklahoma Department of Continuing Legal Education. The title is says it all. The paper of particular interest for researchers of water rights issues is "An Overview of Oklahoma's Water Law Relating to Stream Water and Groundwater" (Dean A. Couch).

"Symposium Issue: Eastern Water Law," 9 *Virginia Environmental Law Journal* 249-466 (1990). Of particular interest for our purposes is "Water Allocation by Comprehensive Permit Systems in the East: Considering a Move Away from Orthodoxy," discussed in "Law Review, Journal, and Newsletter Articles, Notes and Comments," *supra*.

Symposium on Minnesota Water Law," 7 *Hamline Law Review* 203-429 (1984). Of particular interest for our purposes is "Research Project: The System of Riparian Rights in Minnesota," pp. 369-390, discussed in "Law Review, Journal, and Newsletter Articles, Notes and Comments," *supra.*

"Symposium: Revisiting California Water Law," 19 *Pacific Law Journal* 957-1433. Of particular interest for our purposes are articles by William R. Attwater and James Markle, Clifford W. Schulz and Gregory S. Weber, and Marcia J. Steinberg and Michael Schoenleber, all of which are listed in "Law Review, Journal, and Newsletter Articles, Notes and Comments," *supra.*

"Water Law Symposium," 43 *Oklahoma Law Review* 1-141 (1990). Of particular interest for our purposes are the articles by Robert A. Anderson and Joseph W. Dellapenna, listed in "Law Review, Journal, and Newsletter Articles, Notes and Comments," *supra.*

"Water Law Symposium," 24 *William and Mary Law Review* 535-793 (1983). Entire issue devoted to water law, with primary emphasis on issues in Virginia and other east coast states. Riparian issues are discussed most often in Robert H. Abrams, "Interbasin Transfer in a Riparian Jurisdiction," pp. 591-624. (See articles listed in "Law Review, Journal, and Newsletter Articles, Notes and Comments," *supra.*)

"Water Wars: The Return of the Riparian: A Renewed Focus on Water Rights," Proceedings from a conference sponsored by the University of Tulsa College of Law, March 18, 1994. The papers from this one-day seminar on directly "on point" to the issues of this pathfinder. Indeed, the seminar itself was a response to the *Franco* decision. The papers presented (with authors in parentheses): "Franco: Why, What, and How" [this paper was published in a revised and expanded form as "*Franco-American Charolaise*: The Never Ending Story," 30 *Tulsa Law Journal* 1-60 (1994)] (Gary D. Allison), "Administering a Dual System of Appropriative and Riparian Rights - The Nebraska Experience" (Norman W. Thorson), "Legislative Solutions/Lake Sardis Water Sales" (Patricia P. Eaton), "Water Markets: An Overview of Current Law, Institutions, & Issues" [includes excellent bibliography] (Barton W. Thompson, Jr.), "Oklahoma Groundwater Allocation: Past, Present and Future" (Dean A. Couch), "Native American Water Rights Regime" (Judith V. Royster), and "A Link Between Water Quality and Water Rights?" (Mark Chandler).

XI. Government Documents

National Water Commission, *Water Policies for the Future: Final Report to the President and Congress of the United States by the National Water Commission*, 580 pp. (Government Printing Office 1973). Now over twenty-five years old, this enduring work is often cited in law review literature and courts. Chapters include forecasting future demands for water, water and the natural environment, water and the economy, water pollution control, improving water-related programs, procedures for resolving differences over environmental and developmental values, making better use of existing supplies, interbasin transfers, means of increasing water supply, better decision-making in water management, improving organizational arrangements, water problems of metropolitan areas, federal-state jurisdiction in the law of waters, Indian water rights, paying the costs of water development projects, financing water programs, and basic data and research for future progress. Includes an excellent index. Pages 280-298 offer a good summary of riparian rights in a permit system. Tarlock, Corbridge and Getches call the report "the most searching analysis of state and federal water policy to date and frames the policy debate in a still-poignant manner."[24]

[24] *Id.* at 919.

National Technical Information Service, U.S. Department of Commerce, *Citations from the Selected Water Resources Abstracts Database: Groundwater Law (1977-84)* (1984). This bibliography contains citations and abstracts concerning state and federal control of groundwater. In addition to riparianism, other topics include pollution control, international programs and the appropriation doctrine.

Oklahoma Water News, published by the Oklahoma Water Resources Board. See description in "Journals and Periodicals of Significance to Water Law," *supra*.

Oklahoma Water Resources Board, *Oklahoma Comprehensive Water Plan* (1980). This is a guide for the long-range use and protection of Oklahoma's water resources. Among the many topics covered in this truly comprehensive tome is a chapter on Oklahoma water law and administration. An updated version of this publication is due in September, 1995.[25]

Oklahoma Water Resources Board, *Oklahoma Water Atlas* (1990). A detailed and richly illustrated description of the vast water resources in Oklahoma.

XII. Water Law and Water Rights Organizations

American Bar Association, Section of Natural Resources, Energy, and Environmental Law ("SONREEL"), 750 N. Lake Shore Dr., Chicago, IL 60611. Publishes and/or sponsors a variety of books, conferences, newsletters, *Natural Resources & Environment* (quarterly), practice-oriented materials, and *The Year in Review* (a summary of state, federal, and international trends). SONREEL sponsors the annual San Diego Water Law Conference, out of which developed *Water Law: Trends, Policies, and Practice* (*See* "Casebooks, Practice Manuals, Model Codes and Other Books," *supra*.) Because the San Diego Water Law Conference concentrates primarily on western water issues, the SONREEL intends to initiate an "Eastern Water Law Conference" in the near future.[26]

Eastern Mineral Law Foundation, West Virginia University College of Law, P.O. Box 6130, Morgantown, WV 26506-6130. Phone: (304) 203-2470. Sponsors an annual institute and several other conferences as well as a variety of published materials. The foundation publishes the proceedings of the annual institute. Although the published proceedings of the annual institute focus on legal issues regarding coal, timber, oil and gas, landmen, etc., there is an occasional article on water law. The proceedings are well indexed and cross-indexed under "water and water rights," "groundwater," etc.

Rocky Mountain Mineral Law Foundation, 7039 E. 18th Ave., Denver, CO 80220. Phone: (303) 321-8100. Since 1955, this foundation has sponsored annual institutes focusing on current legal problems of concern to the natural resources industry. Each annual institute has a session devoted to water law. The papers from the institute are published annually as the *Rocky Mountain Mineral Law Institute*. Each annual volume has an index, and the foundation has published three consolidated indices for earlier volumes. The Rocky Mountain Mineral Law Foundation limits its membership to and focuses its attention on the western United States. Consequently, the annual institute papers on water law focus almost exclusively on water law issues of importance to the western states, which means that the riparian system of water law receives very little attention.

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25 ANNUAL REPORT OF THE OKLAHOMA WATER RESOURCES BOARD 5 (1993).

26 WATER LAW: TRENDS, POLICIES, AND PRACTICE at xvii (Kathleen M. Carr et. al. eds., 1995).