North Dakota Law Review

Volume 54 | Number 3 Article 6

1977

Courts - Navigable Waters - State Law, Not Federal, Determines Riparian Rights to Accretions

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RECENT CASE

COURTS—NAVIGABLE WATERS—STATE LAW, NOT FEDERAL, DETERMINES RIPARIAN RIGHTS TO ACCRETIONS

The State of Oregon brought an ejectment action[1] against Corvallis Sand and Gravel Company to recover two distinct portions of the riverbed of the Willamette River and damages for the use thereof.[2] Corvallis Sand and Gravel Company had been digging in the riverbed for forty to fifty years without a lease from the state.[3] The Oregon courts awarded one portion of the riverbed to the state, which the state acquired on admission to the Union in 1859, and the second portion to the company on an avulsion theory.[4] The issue was whether title to the lands in question was in the state or the riparian owner. The United States Supreme Court *held* that Oregon's title to the riverbed vested absolutely at the time of its admission to the Union and is not subject to later defeasance by operation of any doctrine of federal common law. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977).

The common law rule was that title to land along rivers that are unaffected by the ebb and flow of the tides belonged to the riparian owner to the center of the stream.[5] Title to lands beneath the ordinary high water mark of rivers subject to the tides was vested in the Crown.[6] In this country, the test is not whether the river is

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1. OR. REV. STAT. § 105.005 (1975) provides as follows:
   Any person who has a legal estate in real property and a present right to the possession thereof, may recover possession of the property, with damages for withholding the possession, by an action at law. The action shall be commenced against the person in the actual possession of the property at the time, or if the property is not in the actual possession of anyone then against the person acting as the owner thereof.
2. State v. Corvallis Sand and Gravel Co., 18 Or. App. 524, 526 P.2d 469 (1974).
3. *Id.*
4. The case began in the Circuit Court of Benton County, Oregon. The Circuit Court awarded various parcels to each party and both parties appealed. The appellate court afffirmed on the basis of Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973), which had recently been decided. 18 Or. App. at ——. 526 P.2d at 475. Both parties sought review in the Supreme Court of Oregon. The appeal was limited to the factual question of the length of Fischer Cut, *see infra.* note 53. The court affirmed the decisions regarding title to the riverbed without discussion. State Land Board v. Corvallis Sand and Gravel Co., 272 Or. 545, 536 P.2d 517 (1975), *rehearing denied*, 272 Or. 550, 538 P.2d 70 (1975), *cert. granted*, Oregon *ex rel.* State Land Board v. Corvallis Sand and Gravel Co., 423 U.S. 1048 (1976).
5. Packer v. Bird, 137 U.S. 661, 666 (1891).
6. *Id.* The test in England which determines the extent of a riparian right is the ebb and flow of the tides. *Id.*

subject to the tides but whether the river is navigable.[7] The criterion for navigability is navigability in fact.[8] Once a river or lake is judicially determined to be navigable it remains so for legal purposes despite subsequent changes that render it non-navigable in fact.[9] In the United States, title to lands beneath navigable waters is in the states within whose boundaries the waters lie.[10] The rationale for sovereign title in navigable waterways is that private ownership would necessarily conflict with the public interest in the use of watercourses for commerce and public enjoyment.[11]

Various doctrines have developed at common law to reconcile the proprietary interests of the riparian landowner with the interests of the sovereign.[12] Three of these doctrines, accretion, erosion, and dereliction, have the same legal effect. Slow moving rivers have a tendency to gradually and imperceptibly deposit soil along the shore. This process is known as "accretion,"[13] and the deposits made are called "alluvion."[14] Dereliction occurs when the water gradually recedes, baring land in the process.[15] Erosion is a gradual withering away of the land along the water's edge.[16] The legal effect of these doctrines has been, at common law, that the riparian owner gains what the river chooses to give him and loses what it takes away.[17]

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7. The *Packer* court noted that there are no great navigable rivers in England which are not subject to the tides, whereas in the United States there are many great rivers, high above the limits of tidewater, which are navigable for hundreds of miles. *Id.*

8. *Id.* In United States v. Appalachian Power Co., 311 U.S. 377 (1940), the Court extended the test of navigability to include those rivers which could be made navigable with "reasonable improvements."

9. United States v. Appalachian Electric Power Co., 311 U.S. 377, 408 (1940).

10. Packer v. Bird, 137 U.S. 661 (1891); Pollards Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).

11. *See* Packer v. Bird, 137 U.S. 661 (1891). *See also* Lundquist, *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion*, 14 ARIZ. L. REV. 315 (1972).

12. *See generally* Beck, *Boundary Litigation and Legislation in North Dakota*, 41 N.D.L. REV. 424, 445 (1963).

13. Several justifications have been offered for the doctrine of accretion. The following were collected by the Court in Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 326 (1973):

> First, where lands are bounded by water, it may well be regarded as the expectancy of the riparian owners that they should continue to be so bounded. . . . Second, the quality of being riparian, especially to navigable water, may be the land's most valuable feature and is part and parcel of the ownership of the land itself. . . . [Third,] [r]ipariannes also encompasses the vested right to future alluvion, which is an 'essential attribute of the original property'. . . . [Fourth,] [b]y requiring that the upland owner suffer the burden of erosion and by giving him the benefit of accretions, ripariannes is maintained. Finally, there is a compensation theory at work. Riparian land is at the mercy of the wanderings of the river. Since a riparian owner is subject to losing land by erosion beyond his control, he should benefit from any addition to his lands by the accretions thereto which are equally beyond his control.

(citations and footnotes omitted).

14. County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46 (1874).

> [A]lluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. . . . The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process is going on.

Id. at 68.

15. Linthicum v. Coan, 64 Md. 439, 2 A. 826 (1886).

16. Arkansas v. Tennessee, 246 U.S. 158 (1918). *See also* Tavis v. Higgins, 157 N.W.2d 718, 727 (N.D. 1968).

17. New Orleans v. United States, 35 U.S. (10 Pet.) 662, 717 (1836) states as follows:

The common law theories of avulsion and reliction have a converse legal effect to that of accretion, dereliction, and erosion. Avulsion occurs when a stream "suddenly and perceptibly abandons its old channel."[18] The lands inundated by the water have undergone the process of "avulsion;" the baring of new land is known as "reliction."[19] An avulsion does not affect title[20] and if the stream forms a boundary, the boundary will remain in the abandoned riverbed,[21] even if the effect is to cut off riparian rights.[22] The rationale is that a shift in title, as the result of a sudden shift of the river, would work an undue hardship on the abutting landowner.[23] Because an avulsive change can cut off riparian rights and an accretive change does not affect riparian rights the factual determination whether the change was sudden and perceptible (avulsive), or gradual and imperceptible (accretive), is crucial to the riparian landholder.

As briefly mentioned earlier, title to beds of navigable waterways beneath the ordinary high water mark is vested in the states within whose boundaries the waters lie.[24] This is a right reserved to the states by the Constitution.[25] "By the American Revolution the people of each state, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them."[26] This, of course, applied only to the original thirteen states. When a new state is admitted to the Union it enters on an equal footing with the original thirteen states.[27] Consequently, upon admission the new state acquires title to the beds of navigable waterways within its boundaries to the high water mark.[28] When a state is admitted, under the equal footing doctrine, its title to the beds of navigable waterways vests absolutely "subject only to the paramount [federal] right of navigation."[29] If a state chooses, it can cede the submerged lands to the riparian owner.[30]

> The question is well settled at common law that the person whose land is bounded by a stream of water, which changes its course gradually by a series of alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded, is subject to loss, by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain.

18. Philadelphia Co. v. Stimson, 223 U.S. 605, 624-25 (1912).
19. *See* Beck, *supra* note 12. Professor Beck points out that courts often use the term reliction to mean dereliction and use the term avulsion for the entire swift change process. This is the more modern usage.
20. St. Louis v. Rutz, 138 U.S. 226, 245 (1891).
21. Nebraska v. Iowa, 143 U.S. 359, 361 (1892).
22. 138 U.S. at 245.
23. Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 327 (1973).
24. *See supra* note 10, and text accompanying.
25. Barney v. Keokuk, 94 U.S. 324, 333 (1876).
26. *Id.*
27. Coyle v. Smith, 221 U.S. 559 (1911).
28. Pollards Lessee v. Hagan, 44 U.S. (3 How.) 212, 225 (1845).
29. Mumford v. Wardwell, 73 U.S. (6 Wall.) 423 (1867).
30. Shively v. Bowlby, 152 U.S. 1, 43 (1894). It should be pointed out here that the term "riparian owner" as used in this discussion is meant to include littoral proprietors as well. The distinction is that riparian refers to lands along rivers and streams, while

Prior to admission of a state to the Union the riverbeds of navigable waterways within its boundaries are held in trust for the future state by the federal government.[31] Often during the term of this trust the federal government will sell riparian parcels of land to private landholders.[32] Federal common law often differs from state property law.[33] When a riparian owner traces his title to a federal grant he may attempt to invoke the jurisdiction of the federal courts to gain some advantage not offered by the property law of the state wherein his parcel lies.[34] Earlier cases held that a mere claim that title derives from a federal patent does not by itself raise a federal question and that "absent diversity the federal court would have no jurisdiction."[35] Title to the shore and lands under water is regarded as an "incident of state sovereignty" and cannot be retained or granted out to individuals by the United States.[36] But the trend in more recent cases has been that questions of ownership under a federal grant are to be determined by federal law.[37]

One of these cases is *Bonelli Cattle Co. v. Arizona*.[38] The Bonelli Cattle Company owned a parcel of land which its grantor had acquired by a federal patent two years prior to the admission of Arizona as a state.[39] The parcel of land in question was submerged by the Colorado River[40] as it gradually moved eastward.[41] In 1959 the river was deepened and rechanneled[42] and a substantial portion of

littoral refers to lands bordering on lakes and ponds. *See* Beck, *supra* note 12.

31. Pollards Lessee v. Hagan, 44 U.S. (3 How.) 212, 225 (1845).

32. Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 315 (1973). *See* note 39 *infra.* and text accompanying.

33. 429 U.S. at 378-79. Under federal common law title may be in one owner but if state property law is different title to riparian land may be in someone else. There is always the possibility that state property law and federal common law would lead to the same result, but that situation rarely leads to jurisdictional problems.

34. Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973); Hughes v. Washington, 389 U.S. 290 (1967).

35. Joy v. St. Louis, 201 U.S. 332 (1906).

36. Hardin v. Jordan, 140 U.S. 371 (1891). *Accord*, Shively v. Bowlby, 152 U.S. 1, 58 (1894), which states as follows:

> Grants by Congress of portions of the public lands within a territory to a settler thereon, though bordering on or bounded by navigable waters, convey of their own force, no title or right below high water mark, and do not impair the title and dominion of the future state, when created, but leave the question of the use of the shores by the owners of the uplands to the sovereign control of the state subject only to the rights vested by the Constitution in the United States.

37. Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973); Hughes v. Washington, 389 U.S. 290, 292 (1967).

38. 414 U.S. 313 (1973).

39. *Id.* at 315. Arizona was admitted to the Union on an equal footing with the other states in 1912. *Id.*

40. The Colorado River is a navigable river. Arizona v. California, 283 U.S. 423 (1931).

41. 414 U.S. at 316. In fact, only 60 acres out of the original 590 in the parcel remained above water. *Id.*

42. Rechannelling has no legal effect on the doctrine of accretion. Beaver v. United States, 350 F.2d 4, 11 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966). This may not be true if structures are erected for the specific purpose of causing the accretion. *See also* United States v. Rands, 389 U.S. 121, 123 (1967), where the Court stated as follows: "[W]ithout being constitutionally obligated to pay compensation, the United States may change the course of a navigable stream, or otherwise impair or destroy a riparian owner's access to navigable waters, even though the market value of the . . . land is substantially diminished."

the original parcel re-emerged.[43] The Arizona Court of Appeals found for Bonelli, reasoning that if the changes in the river were accretive, the surfaced land would belong to Bonelli as riparian owner and if the changes were avulsive the land would still belong to Bonelli under the doctrine of re-emergence.[44] The Arizona Supreme Court reversed, holding in favor of the state,[45] reasoning that the equal-footing doctrine[46] and the Submerged Lands Act[47] granted title to the beds of all navigable waters within the State of Arizona to the state and that this title encompassed the Bonelli lands submerged by the eastward movement of the Colorado.

The United States Supreme Court reversed the holding of the Arizona Supreme Court.[48] The Court held that the land is governed by federal law because the nature of the title conferred by the equal footing doctrine is a question of federal common law.[49] The Court recognized that the state holds title to the high-water mark of the river under the equal footing doctrine,[50] and explained that the Submerged Lands Act merely codified the states' pre-existing rights, quitclaiming all federal claims thereto.[51] The Court saw the issue to be not what rights the state as sovereign must extend to private owners but how far that right extends—"Whether the state retains title to lands formerly beneath the stream of the Colorado or whether

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43. Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 316 (1973).

44. 11 Ariz. App. 412, 464 P.2d 999 (1970). The doctrine of re-emergence is simply that if identifiable land is submerged and the waters later recede, revealing the lost parcel, title will return to the original landholder. Beaver v. United States, 350 F.2d 4 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966); Herron v. Choctaw & Chickasaw Nations, 228 F.2d 830 (10th Cir. 1956).

45. 107 Ariz. 465, 489 P.2d 699 (1971).

46. *See supra* notes 27-31, and text accompanying.

47. Submerged lands Act, Pub. L. No. 83-31, 67 Stat. 29 (1953) (codified at 43 U.S.C. §§ 1301-14 (1970)) which provides in part as follows:

> § 1311(a). It is determined and declared to be in the public interest that (1) title to . . . the lands beneath navigable waters within the boundaries of the respective states . . . and (2) the right . . . to manage . . . and use the said lands . . . in accordance with applicable state law be . . . vested in and assigned to the respective states. . . .
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> (b)(i) The United States . . . relinquishes unto said states, . . . except as otherwise reserved herein, all right, title and interest of the United States . . . in and to all said lands. . . . (d) Nothing in this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation and flood control or the production of power. . . .
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> § 1313 . . . Section 1311 shall not be construed to apply to land to which the United States has title and accretions thereto, and lands beneath navigable waters which it holds for Indian tribes.
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> § 1314. The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and the development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

48. Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973).

49. *Id.* at 317.

50. *Id.* at 317-18.

51. *Id.* at 318,

that title is defeasible by the withdrawal of the waters" as federal common law would require.[52] A balancing test was applied in answer to this question. The Court reasoned that although there was an apparent avulsive change,[53] the states' limited interest in navigation and public enjoyment of the watercourse would not warrant the windfall of thousands of acres of dry land to the state.[54] The Court also intimated that if the land were given to the state it would raise the question of a taking without just compensation.[55]

At the time *Corvallis* reached the Supreme Court the ad hoc interest balancing required by *Bonelli* was the state of the law.[56] In *Corvallis* title to two distinct portions of land was in question. One portion had been in the bed of the Willamette River[57] since Oregon's admission to the Union. The other portion underlay an area known as Fischer Cut.[58] The Oregon courts determined that avulsion[59] had occurred in 1909, creating the Fischer Cut lands, and title to that

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52. *Id.* at 319-320.

53. 414 U.S. at 322-23. The Court also considered the rationale underlying the avulsion doctrine. *Id.* at 327. *See supra* note 21, and text accompanying. The state had already benefitted from the rechanneling of the river and the hardship suffered under an application of the avulsion doctrine would fall on the Bonelli Cattle Co. as riparian owner and would unduly benefit Arizona. 414 U.S. at 328.

54. *Id.* at 331. *See also* Hughes v. Washington, 389 U.S. 290, 298 (1967) (J. Stewart concurring).

55. 414 U.S. at 331.

56. *Bonelli* had been severely criticized. Mr. Justice Stewart in his dissent argued that the later admitted states would not be on an equal footing with the original thirteen states. The theory of the majority that the right was asserted under federal law because the states derived title from the federal government does not apply to the thirteen colonies who did not take under a federal grant. Those states could apply their own property law while federal law would be applied elsewhere. 414 U.S. at 333-37. *See also* 50 WASH. L. REV. 777, 789 (1974) which states as follows:

> Before *Bonelli*, even a federal court was required to determine factually whether the movement of the river was slow and imperceptible [accretive] or rapid and visible [avulsive]. . . . In reversing the factual finding of the Arizona Supreme Court that the movement was avulsive, and in refusing to apply the traditional factual method of distinguishing between the two doctrines, the *Bonelli* court effectively denied the states power to "decide [a] controversy under law . . . in a way that [the Court] might think is wholly wrong." The new doctrine comprehends a type of ad hoc interest balancing whereby windfalls, public purposes, traditional principles of property law and possibly other factors heretofore unknown are weighed and applied as the Court sees fit.

(citations omitted).

57. The Willamette River is a totally intrastate, navigable river. Oregon *ex rel.* State Land Bd. v. Corvallis Sand and Gravel Co., 429 U.S. 363, 365 (1977). The river flows north 270 miles, draining 11,200 square miles of land, and empties into the Columbia River. WORLD ALMANAC AND BOOK OF FACTS 580 (1976). The land is located near the city of Corvallis, Oregon, 429 U.S. at 365.

58. Between 1890 and 1909, Fischer Cut was an overflow channel. The main channel of the river flowed two-and-one-quarter miles around Fischer Peninsula (now Fischer Island). During intermediate and high water stages the water would flow across Fischer Cut and back to the main channel of the river. In 1909, a major flood converted Fischer Cut to the main channel of the river. The abandoned channel of the river is no longer navigable. 18 Or. App. 524, 526 P.2d 469 (1974). *See supra* note 4 for the procedural history of the case.

59. The Oregon Court of Appeals awarded the land to Corvallis Sand and Gravel Company under the avulsion theory or under a recognized exception to the accretion rule, 18 Or. App. 524, 526 P.2d 469 (1974). That exception is found in Commissioners v. United States, 270 F. 110, 113-14 (1920), as follows:

> [W]here a river changes its main channel, not by excavating, passing over, and then filling in the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in

portion was awarded to the Sand and Gravel Company under the proper application of *Bonelli*.[60]

The Oregon Court of Appeals found that the extent of the state's interest under the equal footing doctrine in the bed of the Willamette River was a question of federal common law.[61] Therefore, the limited interest of the state in navigation, fishing, and other related goals did not require that Oregon acquire ownership of the new bed and the Fischer Cut lands were awarded to the Sand and Gravel Company under an avulsion theory or the so-called exception to the accretion rule announced in *Commissioners v. United States*.[62] The Oregon Supreme Court affirmed this decision without discussion.[63]

The State of Oregon and the Corvallis Sand and Gravel Company filed cross writs for certiorari in the United States Supreme Court.[64] Oregon urged the Court to modify its decision in *Bonelli Cattle Co. v. Arizona* or expound federal common law in such a way that the state's title to all the land in question would be established.[65] The Sand and Gravel Company urged the Court to interpret federal common law so it would prevail.[66] Neither party urged the Court to overrule *Bonelli*. The Court chose to do so, however, at the urging of *amici*.[67]

The Court examined *Bonelli* in light of previous decisions[68] and held that "although federal law may fix the initial boundary line

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> the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of the waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream.

60. 18 Or. App. 524, 526 P.2d 469 (1974). *Bonelli* was decided in December 1973. 414 U.S. at 313.

61. 526 P.2d at 475. The Oregon appellate court summarized *Bonelli* as holding that the state's title to the riverbed was as a bed. *Id.* From this the court reasoned that though the state owned the bed as a bed it did not own title to the bed for purpose of collecting damages for the use thereof, especially where it is no longer a bed because the river has abandoned it. *Id.*

62. 270 F. 110 (1920); Oregon v. Corvallis Sand & Gravel Co., 18 Or. App. ——, 526 P.2d at 475-76. *See supra* note 59.

63. 272 Or. 545, 536 P.2d 517 (1975).

64. 423 U.S. 1048 (1976).

65. 429 U.S. at 368.

66. *Id.*

67. *Id.* Twenty-six states filed three *amicus* briefs. Washington filed one. California filed another, joined by Alabama, Alaska, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maryland, Montana, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, North Dakota, South Carolina, South Dakota, Texas, Virginia, and West Virginia. *Id.* at 364. A third *amicus* brief was filed by Utah and New Mexico in which the Court was asked to overrule Hughes v. Washington, 389 U.S. 290 (1967), as well as *Bonelli*. *Id.* at 377.

68. *Id.* at 382. Some of the previous decisions discussed were: Borax Ltd. v. Los Angeles, 296 U.S. 10 (1935); Joy v. St. Louis, 201 U.S. 332 (1906); Shively v. Bowlby, 152 U.S. 1 (1894); Barney v. Keokuk, 94 U.S. 324 (1877); Weber v. Harbor Comm'rs, 85 U.S. (18 Wall.) 57 (1873); Mumford v. Wardwell, 73 U.S. (6 Wall.) 423 (1867); The Propellor Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1852); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Wilcox v. Jackson, 38 U.S. (13 Pet.) 498 (1839).

between fast lands and riverbeds at the time a state is admitted to the Union, the state's title vests absolutely and is not subject to later defeasance by operation of any doctrine of federal common law."[69] The *Corvallis* Court noted that the error in *Bonelli* was in viewing the equal footing doctrine as requiring federal common law to supersede state property law.[70] The Court also noted that the mere existence of a federal patent would not call into operation federal common law where the land has long been in private ownership and subject to state property law.[71] If the lands in question pass under the equal footing doctrine, state title is not subject to defeasance and state law governs subsequent dispositions.[72]

The Court went on to say that state property law governs riparian ownership even if the lands in question did not pass under the equal footing doctrine, unless some other principle of federal law would require a different result.[73] Property ownership is governed by state law,[74] and this extends to the rights of riparian proprietors.[75] The application of state law, however, is subject to the rights "vested by the Constitution in the United States."[76] The United States has a paramount interest in navigation and commerce.[77] "Whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee."[78] Because the Court could find no reason why federal law should be applied, other than *Bonelli*, which it overruled, it vacated and remanded the *Corvallis* case for a determination by the Oregon Supreme Court under applicable Oregon property law.[79]

The decision in *Corvallis* could have important ramifications in North Dakota. The Missouri River is known for its "perpetual dis-

69. *Id.* at 371, *citing* Weber v. Harbor Comm'rs, 85 U.S. (18 Wall.) 57 (1873); Wilcox v. Jackson, 38 U.S. (13 Pet.) 498 (1839).
70. 429 U.S. at 371.
71. *Id.* at 372. The Court later said that even in the hey day of federal common law under Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842) an "exception was carved out for the local law of real property," *citing* United States v. Little Lake Misere Land Co., 412 U.S. 580, 591 (1973).
72. 429 U.S. at 378.
73. *Id.*
74. Davies Warehouse Co. v. Bowles, 321 U.S. 144, 155 (1944).
75. 429 U.S. at 379.
76. Shively v. Bowlby, 152 U.S. 1, 58 (1894).
77. United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 703 (1899).
78. Packer v. Bird, 137 U.S. 661, 669 (1891).
79. Mr. Justice Marshall filed a vigorous dissent which was joined by Mr. Justice White. He chastised the Court for overruling *Bonelli* and suggested that they effectively overruled Hughes v. Washington, 389 U.S. 290 (1967), by implication. He was appalled that these nearly unanimous recent decisions could be swept away in the name of *stare decisis*. 429 U. S. at 383. He called it both a mystery and a puzzle. *Id.* at 384. He pointed out that this holding "allows states to divest federally granted lands of their valuable quality of being riparian simply by refusing to recognize the titleholders common law rights. *Id.* at 389.

satisfaction with its bed."[80] North Dakota has codified the common law doctrines of accretion[81] and avulsion.[82] North Dakota allows the riparian owner title to the low water mark,[83] but has reserved the power to change this.[84] Under the logic of the *Corvallis* decision, that the state's title to the riverbed is not subject to defeasance, any time there is an avulsion the state would retain title to the dry riverbed and, it appears, acquire title to the new riverbed because of its paramount interests in commerce and navigation.

By legislative enactment, North Dakota could abandon the common law doctrine of accretion, and acquire title to all lands which become submerged by the "wandering Missouri" and all other navigable waters in the state. The state would consistently acquire land by these natural processes, and would never have to yield land so acquired, because its title, once vested, is not subject to defeasance by later withdrawal of the waters.

There is a common situation which has occurred in North Dakota, where the state could exercise this new found right. *A* owns one-hundred acres of riparian land which is submerged by erosion. *B* is a nonriparian landowner whose land becomes riparian by the erosion of *A*'s land. The river changes course and by accretion restores the land where the original parcel of *A* once was. Who gets title to the land? In *Perry v. Erling*,[85] the North Dakota Supreme Court held for *A*. By changing the law of accretion, the State of North Dakota could acquire title to this land under the logic of *Corvallis*.

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80. Beck, *The Wandering Missouri River: A Study in Accretion Law*, 43 N.D.L. REV. 429 (1967).

81. N.D. CENT. CODE § 47-06-05 (1960) provides as follows:
Where from natural causes land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank.

82. N.D. CENT. CODE § 47-06-06 (1960) provides as follows:
If a river or stream, navigable or not navigable, carries away by sudden violence a considerable and distinguishable part of a bank and bears it to the opposite bank or another part of the same bank, the owner of the part carried away may reclaim it within a year after the owner of the land to which it has been united takes possession thereof.

83. N.D. CENT. CODE § 47-01-15 (1960) provides as follows:
Except when the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on a navigable lake or stream, takes to the edge of the lake or stream at low water mark. All navigable rivers shall remain and be deemed as public highways. In all cases when the opposite banks of any stream not navigable belong to different persons, the stream and the bed thereof shall become common to both.
See Hogue v. Bourgois, 71 N.W.2d 47 (N.D. 1955).

84. N.D. CENT. CODE § 47-01-14 (1960) provides as follows:
The ownership of land below ordinary high water mark and of land below the water of a navigable lake or stream is regulated by the laws of the United States, or by such laws as under the authority thereof, the legislative assembly may enact.

85. 132 N.W.2d 889 (N.D. 1965). *See also* Tavis v. Higgins, 157 N.W.2d 718, 727 (N.D. 1968). The majority of states are *contra*, reasoning that the riparian owner holds title subject to this loss and the new riparian owner acquires title to the accreted lands. *See, e.g.*, Payne v. Hall, 192 Iowa 780, 185 N.W. 912 (1921); Yearsley v. Gipple, 104 Neb. 88, 175 N.W. 641 (1919).

The potential for abuse illustrated by the preceeding paragraph may never be exercised by the states but under the reasoning in *Corvallis* it could be. The windfalls to the states that *Bonelli* sought to avoid can no longer be prevented by federal common law. A riparian landowner could try to make an argument that the state is taking his property without just compensation under the fifth and fourteenth amendments. It is difficult to predict whether a taking argument would be successful.

The *Corvallis* Court failed to extend the doctrine to lands bordering the ocean, and expressly refused to overrule *Hughes v. Washington*,[86] suggesting that the federal interest in the oceans is greater than the federal interest in intrastate navigable streams.[87] The dissent suggested that the logic used in the *Corvallis* decision would apply to lands riparian to the ocean as well as lands riparian to rivers and all that is required is that an action be brought.[88]

Corvallis has done away with many of the safeguards to riparian ownership created in *Bonelli*. If the states take the initiative to change their accretion laws, riparian owners on the oceans, lakes, and rivers of this country could, in a matter of time, be separated by state land from the waters which were once the boundaries of their land. Riparian land would lose the most essential feature of its character. Such a windfall to the state is unwarranted.

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86. 389 U.S. 290 (1967).

87. 429 U.S. at 377 n.6. The Court said it had no occasion to address the issue, but quoted the following reasoning from Hughes v. Washington, 389 U.S. 290, 293 (1967):

> The rule deals with waters that lap both the lands of the state and the boundaries of the international sea. This relationship, at this particular point of the marginal sea, is too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the "supreme Law of the Land."

Id.

88. *Id.* at 383 n.1.