North Dakota Law Review

Volume 38 | Number 2 Article 7

1962

A Regional View: Riparian-Appropriation Conflicts in the Upper Midwest

Wells A. Hutchins

How does access to this work benefit you? Let us know!

Follow this and additional works at: https://commons.und.edu/ndlr

Part of the Law Commons

Recommended Citation

Hutchins, Wells A. (1962) "A Regional View: Riparian-Appropriation Conflicts in the Upper Midwest," *North Dakota Law Review*: Vol. 38: No. 2, Article 7.
Available at: https://commons.und.edu/ndlr/vol38/iss2/7

This Article is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.commons@library.und.edu.

A REGIONAL VIEW: Riparian-Appropriation Conflicts in the Upper Midwest

By Wells A. Hutchins*

1. The Setting

The "upper midwest" with which this paper is concerned is confined chiefly to the states of North Dakota, South Dakota, Nebraska, Kansas, Montana, Wyoming, and Colorado, which contain a large part of the upper Missouri River system and which form the northeastern corner of the solid block of the "17 Western States" with which studies of western water law chiefly deal.[1] It includes both arid and semiarid areas, which is characteristic of the West as a whole. And its water rights problems have counterparts elsewhere in the West. This is true particularly with respect to conflicts between riparian and appropriation doctrine adherents, which have inevitably resulted from establishment of the dual systems of water rights in some states and attempted establishment of the riparian part of it in others.

Considering the West as a whole, the riparian-appropriation conflict has extended throughout the last century. It originated in controversies between (1) claimants of water rights which were acquired on a first come, first served basis and which were beneficially exercised in connection with lands regardless of their contiguity to streams, and (2) claimants of rights arising out of ownership of lands contiguous to streams whether or not the rights were exercised by diverting and using water. The first group of rights comprised *appropriative rights* for defined quantities of water required, pursuant to local customs or to formal legal procedures, by diverting stream water at definite places and applying it to reasonable beneficial use on or in connection with specific tracts of land; with the relative superiority of rights based on times of acquiring them, and with the rights being subject to loss for failure to use the water for periods of time that were un-

* LL.B. (1909), George Washington University; Farm Economics Division, Economic Research Service, United States Department of Agriculture.

1. With the recent admissions to statehood, the long established western group of 17 states is now enlarged to 19.

reasonable or that were fixed by statute. The second group, *riparian rights,* attached to lands by or through which streams of water flowed, from the times the lands passed to private ownership; they were not gained by use or lost by disuse; and they referred, not to specific quantities of water, but to use of all water of the stream reasonably required for utilization of the riparian land, with due regard to the like reasonable requirements of all other riparian proprietors. Thus the appropriative right contemplated a tenancy in severalty; the riparian, a tenancy in common.

In the earlier stages of development of western water law, while a "dog-in-the-manger" conduct violated the principles of the appropriation doctrine,[2] a riparian owner in California was "not limited by any measure of reasonableness" as against an appropriator who sought to divert water to nonriparian land.[3] The clash of such dissimilar ideologies, in developing communities where demands for water were crowding upon the extent of available supplies, was inevitable.

2. RECOGNITION AND REPUDIATION OF WATER LAW DOCTRINES

The riparian doctrine, under which rights to the use of streamflow became vested in contiguous private lands at the time title was acquired from the government, came into those states of the upper midwest that accepted it through the medium of adoption of the common law.[4]

The doctrine of prior appropriation, after being developed independently by the Mormons in Utah and the goldminers in California, came into the upper midwest chiefly as a result of customs established in the far western mining camps, which were both recognized by the courts and formalized into state and territorial statutes.

In the eastern tier of upper midwest states—North Dakota, South Dakota, Nebraska, and Kansas—both the doctrine of

---

2. Union Mill & Min. Co. v. Dangberg, 81 Fed. 73, 119 (D. Nev., 1897).
3. Miller & Lux v. Madera Canal & Irr. Co., 155 Cal. 59, 64, 99 Pac. 502 (1907, 1909).
4. For contrasting these as to when the riparian doctrine became a part of the common law of England, see: (1) Wiel, **Origin and Comparative Development of the Law of Watercourses in the Common Law and in the Civil Law,** 6 Calif. L. Rev. 245, 342 (1918); **Id., Waters: American Law and French Authority,** 33 Harv. L. Rev. 133, 147 (1919). (2) Maass, and Zobel, **Anglo-American Water Law: Who Appropriated the Riparian Doctrine?** Graduate School of Public Administration, Harvard, X Public Policy 109-156 (1960).

prior appropriation and the riparian doctrine were recognized. In the western tier—Montana, Wyoming, and Colorado—recognition was extended only to the appropriation doctrine. In each of these three states, the common law doctrine of rights to the use of streamflow was repudiated *in toto.*

Details for the seven upper midwest states follow:

North Dakota and South Dakota—The *riparian doctrine* was recognized in the Territory of Dakota in 1866 in what was probably the first western statute that dealt with the subject (aside from implied recognition in legislation adopting the common law).[5] The statute read as follows:

> Sec. 256. 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.

This statute was carried over into the laws of both North Dakota and South Dakota, which were organized out of Dakota Territory in 1899 on the same day.

Judicial recognition of riparianism was first accorded in a territorial decision rendered in 1888 and affirmed by the United States Supreme Court in 1890.[6] The territorial statute was quoted with approval by the Supreme Court in *Sturr v. Beck.* Then, as state law, it was cited as current authority by the supreme courts of both States in decisions in which riparian rights were involved or considered.[7] The South Dakota provision, after several amendments, was repealed in 1955.[8] The North Dakota section, in substantially its original form, remains in the 1961 Century Code.[9]

The *appropriation doctrine* was also recognized by a statute of Dakota Territory which was carried over into the laws of both North Dakota and South Dakota.[10] Enacted in 1881, it

---

5. Terr. Dak. Laws 1865-1866, Civil Code § 256, approved January 12, 1866. This later became § 255 of the Dakota Civil Code.
6. Sturr v. Beck, 6 Dak. 71, 50 N.W. 486 (1888); aff'd Sturr v. Beck, 133 U.S. 541, 547, 551 (1890).
7. See McDonough v. Russell-Miller Mill Co., 38 N.D. 465, 471-472, 165 N.W. 504 (1917); Johnson v. Armour & Co., 69 N.D. 769, 776-777, 291 N.W. 113 (1940); Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S.D. 519, 525-527, 91 N.W. 352 (1902); Redwater Land & Canal Co. v. Reed, 26 S.D. 466, 474, 128 N.W. 702 (1910).
8. S.D. Code § 61.0101 (1939), repealed by Laws 1955, ch. 430, § 1.
9. N.D. Cent. Code § 47-01-13 (1961).
10. Terr. Dak. Laws 1881, ch. 142.

declared rights of landowners to the use of water for mining, milling, agricultural, or domestic purposes, subject to prior rights acquired by doing the work necessary to comply with the law, and it also declared principles of the appropriation doctrine, including posting and filing certificates of location of water rights. In each state, it was superseded by statutes which invested administrative agencies with supervision over appropriation of water. The Supreme Court's decision in *Sturr v. Beck* recognized the existence of appropriation as well as riparian rights in the Territory.

Nebraska—First recognition of the *appropriation doctrine* appears to have been in a right of way statute enacted in 1877, and in an 1889 law which specifically authorized appropriation of water and took cognizance of the pre-existence of appropriative rights.[11] Late in the last century the Nebraska Supreme Court took note of both acts; and in 1903 the court thoroughly considered them both and held that the brief 1877 enactment was an emplied recognition of the necessity of appropriating water for irrigation in the semiarid portions of the state.[12]

Existence of the *riparian doctrine,* as modified by the irrigation statutes, was recognized by the Nebraska Supreme Court in several cases decided late in the 19th century; and in two decisions rendered on the same day in 1903 it was thoroughly considered and held applicable to every part of the state except as altered or supplemented by legislation.[13]

Kansas—In this state, recognition of the *riparian doctrine* came first. It was accorded as early as 1877 and 1881,[14] and the doctrine was expounded at length in 1905.[15]

The first Kansas legislation authorizing appropriation of water, initiated by posting and filing notices, was in 1886.[16] Previously, according to the supreme court, rights to use water by priority of possession had not been recognized in the jurisdiction.[17] Irrigation had not been necessary in the early

11. Neb. Laws 1877, p. 168; Laws 1889, ch. 68.
12. Crawford Co. v. Hathaway, 67 Neb. 325, 343-350, 357-358, 362-364, 93 N.W. 781 (1903).
13. Crawford Co. v. Hathaway, 67 Neb. 325, 339, 342, 93 N.W. 781 (1903); Meng v. Coffee, 67 Neb. 500, 511-512, 93 N.W. 713 (1903).
14. Shamleffer v. Council Grove Peerless Mill Co., 18 Kan. 24, 31-33, 26 Am. Dec. 765 (1877); Emporia v. Soden, 25 Kan. 588, 604, 606, 608-609, 37 Am. Rep. 265 (1881).
15. Clark v. Allaman, 71 Kan. 206, 224-229, 237-241, 80 Pac. 571 (1905).
16. Kan. Laws 1886, ch. 115.
17. Clark v. Allaman, 71 Kan. 206, 240-241, 80 Pac. 571 (1905).

days, the court said, and local customs of appropriating water were invalid, so that it was not until 1886 that appropriative rights could accrue.

Montana—The first Territorial legislative assembly passed an act in 1865 providing that any holder of land adjacent to or near a stream was entitled to use the water for irrigation and to a canal right of way over intervening property.[18] Subsequent legislation recognized the *doctrine of appropriation* as applicable to mining, manufacturing, agricultural, and other purposes.[19] In its first water rights decision the Montana Supreme Court recognized this doctrine with respect to mining purposes,[20] and again in a case involving irrigation.[21]

For many years there was doubt as to whether or not the *riparian doctrine* prevailed in Montana. References to riparian rights in the opinions in several supreme court cases decided during that period resulted in confusing the issue. Finally, in 1921, the supreme court rendered a decision in which the question was squarely presented for consideration, and concluded "that the common-law doctrine of riparian rights has never prevailed in Montana since the enactment of the Bannack Statutes in 1865; that it is unsuited to the conditions here; . . . ."[22]

Wyoming—Earliest recognition of the *right to appropriate water* was in 1875, when the territorial legislature passed an act to the effect that persons possessing lands contiguous to or in the neighborhood of any stream were entitled to use the water for irrigation, and to the right of way for ditches intervening land.[23] An 1886 law provided specifically for the appropriation of unappropriated water.[24] Judicial recognition appears to have been first extended after statehood was acquired in 1890.[25]

Late in the last century the Supreme Court concluded that

---

18. Mont. Bannack Stat., p. 367, approved January 12, 1865.
19. Among other Territorial acts were Mont. Laws 1879, p. 52, and Laws 1885, p. 130.
20. Caruthers v. Pemberton, 1 Mont. 111, 117 (1869).
21. Gallagher v. Basey, 1 Mont. 457, 460-462 (1872); **aff'd.** Basey v. Gallagher, 87 U.S. 670, 681-682, 685-686 (1875).
22. Mettler v. Ames Realty Co., 61 Mont. 152, 157-158, 165, 166, 170-171, 201 Pac. 702 (1921). In Wallace v. Goldberg, 72 Mont. 234, 244, 231 Pac. 56 (1925), this holding was emphatically reiterated as against an assertion of riparian right to use streamflow for domestic use and watering livestock—"the so-called natural purposes," if not for irrigation.
23. Terr. Wyo. Comp. Laws 1876 ch. 65 (December 10, 1875).
24. Wyo. Laws 1886, ch. 61, p. 284.
25. Frank v. Hicks, 4 Wyo. 502, 531, 35 Pac. 475 (1894); McPhail v. Forney, 4 Wyo. 556, 560-561, 35 Pac. 773 (1894).

riparian rights were unsuited to the requirements and necessities of Wyoming and never had obtained therein.[26]

Colorado—The first Territorial legislature enacted a statute—still in the Revised Statutes of 1953—which was the mode of the earliest Montana and Wyoming water legislation.[27] It accorded to holders of lands contiguous to or in the neighborhood of any stream the use of water thereof for irrigation, and if necessary a ditch right of way across intervening lands. This enactment, said the Colorado Supreme Court, was intended to secure in such landholders rights to divert water for irrigation, not to vest title to any given quantity of the streamflow.[28] In its first reported decision respecting water rights, the Supreme Court held that the nonriparian's right of way arose not only by virtue of the 1861 statute, but from the necessity of successful irrigation in Colorado.[29] The Colorado constitution, adopted in 1876, dedicated the unappropriated water of every natural stream to appropriation by the people.[30] But, said the Supreme Court, the constitutional declaration was not the first recognition of the doctrine of *priority of appropriation;* it had "existed from the date of the earliest appropriations of water within the boundaries of the state."[31]

Repudiation of the common law *riparian doctrine* was foreshadowed in the earliest decisions of the Colorado Supreme Court in water controversies.[32] In specific terms, a few years after admission to the Union, the Supreme Court declared the doctrine inapplicable to Colorado.[33]

Although the riparian question then appeared to be definitely settled in Colorado, some unnecessary confusion resulted late in the last century from *dicta* in two decisions rendered by the Supreme Court which stands alone, without value as precedents,[34] and from a conclusion in a Federal court de-

26. Moyer v. Preston, 6 Wyo. 308, 318-320, 44 Pac. 845 (1896); Farm Investment Co. v. Carpenter, 9 Wyo. 110, 122, 61 Pac. 258 (1900).
27. Colo. Laws 1861, p. 67. Rev. Stat. §§ 147-2-1, 147-3-1, 147-3-2 (1953).
28. Crippen v. White, 28 Colo, 302-303, 64 Pac. 184 (1901).
29. Yunker v. Nichols, 1 Colo. 551, 555, 570 (1872).
30. Colo. Const., art. XVI, §§ 5 and 6.
31. Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446 (1882). Explicit recognition of the appropriation doctrine was contained in the decision in Schilling v. Rominger, 4 Colo. 100, 103-104 (1878).
32. Yunker v. Nichols, 1 Colo. 551, 553-555, 570 (1872); Schilling v. Rominger, 4 Colo. 100, 103, 104 (1878).
33. Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446-447 (1882).
34. Montrose Canal Co. v. Loutsenhiser Ditch Co., 23 Colo. 233, 237, 48 Pac. 532 (1896); Broadmoor Dairy & Live Stock Co. v. Brookside Water & Improvement Co., 24 Colo. 541, 545-546, 550, 52 Pac. 792 (1898).

cision which was expressly disapproved in a later decision by a higher Federal court as not in accord with the decisions of the Colorado state courts.[35] In 1909 the Colorado Supreme Court declined to "reopen or reconsider" the question of abolition of the common law rule in the state inasmuch as "the matter has long ago been set at rest."[36]

3. ADAPTABILITY OF THE WATER LAW DOCTRINES TO WESTERN CONDITIONS

The West as a whole—Over the years it has been frequently said that the doctrine of prior appropriation was better suited to the development and betterment of western agriculture than was the riparian doctrine. The writer shares this overall view; nevertheless, the *degree* to which the appropriative principle excels in this respect bears some relation to the climatic differences between major parts of the great West. However well suited the common law riparian doctrine—which recognized no water rights outside the fringe of landownerships along the stream, and no priorities (except preference for domestic use) as among those contiguous to the stream—may have been to agricultural areas in which the rainfall was adequate for crop production year after year, it was less suited where the precipitation only partly supplied the requirements of the land on which it fell, which if outside the pale had no rights in the streamflow. But it was in the arid and semiarid regions, where the areas of good land far exceeded the quantity that could be adequately served by available water supplies, that riparian principles were so ill adapted and proved so generally unpopular.

Specifically, absence of time priority among riparian owners meant that the one who first fully developed his riparian tract would have his water supply reduced and his farming investment impaired if and when later developments by other proprietors caused the aggregate demands for water to exceed the total available supply. Again, if and when demands of all riparian lands exhausted the entire water supply, no water would be available for nonriparian lands for which appropriations had been made after the riparian lands passed

35. Schwab v. Beam, 86 Fed. 41, 44 (D. Colo., 1898); Snyder v. Colorado Gold Dredging Co., 181 Fed. 62, 68 (8th Cir., 1910).
36. Sternberger v. Seaton Min. Co., 45 Colo. 401, 402-404, 102 Pac. 168 (1909).

to private ownership, no matter how long and at what expense the nonriparian lands had been improved for irrigation farming, nor how much more productive they may have been than those closer to the stream. In these vast arid and semiarid regions, protection of diversions and beneficial uses of water according to priority in time of making them were essential to assurance of continued investment of capital and labor in developing, first, the small individual projects and thereafter, the larger and larger cooperative and public ones. To these conditions the riparian doctrine proved clearly unsuited. And the monopoly of water supplies accorded to the fringes of ownerships along the watercourses demonstrated the riparian doctrine to be inconsistent with emerging state policies concerned with maximum conservation and utilization of public water supplies, and hence not conducive to the public welfare.

Considering the entire West, the six states on the 100th meridian and the three on the Pacific Coast include both humid and semiarid areas and thus, on the whole, are "generally less arid" in comparison with the eight intermediate "generally more arid" ones. It is in these eight intermediate states that the riparian doctrine was repudiated. In the nine states of the eastern and western tiers it was recognized along with the appropriation doctrine, but in most states with ensuing limitations placed upon riparianism intended to facilitate and extended the prnciple of prior appropriation.

The upper midwest—In the three "generally more arid" states of the upper midwest, the appropriation doctrine became established as the exclusive means of acquiring rights to the use of streamflow, and the riparian doctrine was rejected for an overriding practical reason—that the common law riparian doctrine of rights to use water of watercourses was unsuited to conditions prevailing in these jurisdictions. It never had either legislative or judicial recognition therein. "Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith." This conclusion of the Colorado Supreme Court—of outstanding importance, both legally and economically—was also reached by the supreme courts of Wyoming and Montana in the first cases before them in which the question was squarely

presented.[37] In their wake were no vested riparian rights to the use of streamflow, for none had ever vested.

In the four adjoining states on the 100th meridian, rainfall conditions in the eastern counties are generally more favorable to agriculture than in the counties to the west. In some parts of such a state the incentive to irrigate and to seek new water supplies may continue in most years, while in other parts the degree of interest may tend to vary with varying drought conditions. The high court decisions rendered in these four states during the 19th century do not contain expressions of state policy—so familiar in the more arid regions—concerning the vital need of irrigation in the public economy, the imperative necessity of an exclusive appropriative system of water rights, and inapplicability of riparian principles in allocating water supplies under subhumid conditions. On the contrary, judicial acceptance of the appropriative principle was qualified by contemporaneous recognition of existence of superior riparian rights, and in some areas it was a grudging acceptance at best. Around the turn of the century, the Nebraska Supreme Court held that the two doctrines could and did exist in the jurisdiction at the same time; the Kansas court agreed, and observed further that the common law rules, as modified by statutes enacted "for the laudable purpose of encouraging irrigation," became the law of the state "for every stream within its borders."[38] Irrigation had not become of statewide concern when the riparian doctrine was established in these jurisdictions, and problems engendered by conflicting systems of water rights for various beneficial uses in an expanding economy were not foreseen.

Purposes of use of water in the West—As time went on through the first few decades of the present century, although uses of water for power development and for municipal and other nonagricultural purposes were more and more involved in litigation, the greatest number of decisions in water rights controveries throughout the West continued to be rendered in irrigation cases. The century-long conflict between riparian

37. Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446-447 (1882); Moyer v. Preston, 6 Wyo. 308, 318-320, 44 Pac. 845 (1896); Mettler v. Ames Realty Co., 61 Mont. 152, 170-171, 201 Pac. 702 (1921). Compare Stowell v. Johnson, 7 Utah 215, 225-226, 26 Pac. 290 (1891), in which the Territorial supreme court said: "If that (the common law riparian doctrine) had been recognized and applied in this Territory, it would still be a desert; * * * ."

38. Crawford Co. v. Hathaway, 67 Neb. 325, 357, 93 N.W. 781 (1903); Clark v. Allaman, 71 Kan. 206, 229, 237-238, 80 Pac. 571 (1905).

and appropriative principles was not essentially a struggle between users of water for different purposes. In the earliest controversies, which involved chiefly mining and irrigation, neither the miners nor the agriculturists were arrayed as a class in reliance upon one water law doctrine as against another; nor were the industrialists in later disputes. The same held true with respect to expanded volumes of water use for various purposes as the western country grew. Important individual conflicts between riparian and appropriative claimants of water for different purposes there were indeed; but over the century as a whole, the largest part of water rights litigation in the high courts of the West involved uses or prospective uses of water for irrigation.

Purposes of use in the upper midwest—It was chiefly with respect to irrigation, then—although of course all uses of water were affected—that the riparian doctrine was rejected in the three "generally more arid" states of the upper midwest, and was retained along with the appropriation doctrine in the other four. The high courts of the first group agreed that from a practical standpoint the common law doctrine had no place in their water economy and therefore had never been made a part of the law. The judiciary of their four immediate neighbors on the east agreed among themselves that the riparian doctrine did have a place, that it had become a part of the law through adoption of the common law of England, and that coexistence of riparian and appropriative rights was both legal and practical.

Agricultural and industrial developments of the 20th century, with constantly increasing demands upon sources of water supply, offered proof to appropriative adherents in the western tier that rejection of riparianism had been wise, despite evidences that their exclusive appropriative system was not perfect. And to the waterconscious public in the eastern tier, these present and desired prospective developments raised serious questions as to adequacy of riparian principles to meet challenges of the changing economy, with the result that determined efforts were made, and are continuing to be made, to reduce the relative importance of the riparian right.

To the nature of these riparian-appropriation relationships in the four "generally less arid" states of the upper midwest, and measures taken to resolve the conflicts, we now turn.

4. DUAL-SYSTEM INTERRELATIONSHIPS

(1) *Conflicts*[39]

The conflicts arising under the dual system of riparian and appropriative rights stemmed from the superiority which the riparian owner enjoyed by reason of the situation of his land on the banks of the stream, which entitled him to have the stream flow down to his land. Even though the common law doctrine had been so modified as to allow a reasonable consumption of the water for irrigation, so that the riparian proprietor was required to suffer some diminution of the flow as the result of diversions by other riparian owners, his right to the uninterrupted flow was still good as against diversions to nonriparian lands. When appropriators attempted to make upstream diversions of water that from time immemorial had been flowing to riparian lands, conflicts with the riparian owners ensued, naturally. Bitter conflicts in some areas were precipitated by riparian claims of right to use water wastefully, or to withhold use without sacrificing the right, as against nonriparian diversions for useful purposes. But other conflicts resulted simply from competition between early and late comers for the use of water supplies of valleys, just as numerous contests arose in that way between senior and junior claimants of appropriative rights only.

To hold that the rights of owners of riparian lands along a stream attached to all the waters of that source necessarily left no water open to appropriation. In such case an appropriation could become effective only upon nullification of impeding riparian rights by some process sanctioned by the law of real property, such as grant, condemnation, or prescription.

Possible statewide remedies appeared to lie in some legislative or judicial attack against the common law riparian right—outright rejection of the right or modification of its extent and hence its relationship to the appropriative right.

(2) *Solutions*

As noted above, the riparian doctrine of rights to the use of streamflow was eliminated by court decision in the "gener-

39. The material under this and the two immediately following subtopics are taken chiefly from Hutchins, **History of the Conflict Between Riparian and Appropriative Rights in the Western States,** Proc. Water Law Conferences, Univ. of Texas, pp. 106-137, at pp. 134-135 (1952, 1954).

ally more arid" states of Montana, Wyoming, and Colorado owing to its unsuitability to conditions obtaining therein.

In the four states on the 100th meridian, parts of which are generally humid and other parts arid or semiarid, the dual systems of water rights proved so conflicting when applied to assertions of rights of both kinds on the same stream that adjustments resulted in modification or attempted modification of riparian principles. This was not done uniformly. Hence the extent of modification of the riparian doctrine and the accompanying degree of effectiveness of the appropriative principle vary considerably.

(3) *The Problem of the Unused Riparian Right*

In general, efficient utilization of a limited water supply can contribute as much to the public welfare under an individual riparian right as under an individual appropriative right. But where the riparian right entitles the holder to use the water inefficiently and wastefully, or to keep the right intact indefinitely while himself making no use of the water, then the successful assertion of that right can be an impediment to water development. In some states, modifications of riparian principles in the public interest, made as the result of conflicts, have lessened or removed the obstructive aspects of the early common law principles.

Solution of the perplexing problem of the unused riparian right was the major objective of the projects described below.

(4) *Adjustments in the Dual-System States*

Nebraska—The courts of this state took their major steps toward limiting the operation of the riparian doctrine shortly after the turn of the century. Among many points decided in the landmark case of *Crawford Co. v. Hathaway*[40] were these:

The common law riparian doctrine was not inapplicable to conditions prevailing in the whole or in any part of the state simply because irrigation was necessary in some parts. In the operation of the concurrently existing dual systems of water rights, preference is determined by the time when either rights accrues—riparian when title is taken to the land, ap-

---

40. 67 Neb. 325, 364, 93 N.W. 781 (1903).

propriative when the right is perfected. The statute of 1889 abrogated the riparian rule as to lands *thereafter* passing to private ownership and substituted prior appropriation, which had prevailed under prestatutory conditions. This legislation did not and could not abolish rights already accrued; it prevented their future acquirement. According to the court, "the conclusion appears to us irresistible" that one who acquires a valid appropriative right has a title to the use of water superior to that of a riparian proprietor whose right either was subsequently acquired or was lost by grant or prescription.

Two cases decided soon thereafter dealt with remedial rights of riparian and appropriative claimants as against each other, rather than with substantive rights or interests in property of which they may have been possessed.[41] In each of these cases, the trial court's judgment was first reversed and in each one on rehearing the former judgment was reversed and the lower court's action was affirmed. The two opinions on rehearing were handed down on the same day. Comment herein refers only to the final decisions on rehearing.

(a) The *McCook* case. An appropriator (irrigation company) sued to restrain upstream riparians from depriving it of its appropriated water supply, the right to which had been adjudicated under the statutory procedure. The riparians had neither diverted nor attempted to divert water for irrigation until long after the appropriative right had vested.

The Nebraska Supreme Court held in the *McCook* case that the right of the riparians to damages, if any, to their riparian estate by denial of reasonable use of water when it interfered with the downstream appropriation, was problema-

41. McCook Irr. Water Power Co. v. Crews, 70 Neb. 109, 96 N.W. 996 (1903); 70 Neb. 115, 121-123, 127, 102 N.W. 249 (1905). Cline v. Stock, 71 Neb. 70, 71-72, 98 N.W. 454 (1904); 71 Neb. 79, 81-83, 102 N.W. 265 (1905). Citing the statement to this effect in the opinion on rehearing in the McCook case, (WIEL, WATER RIGHTS IN THE WESTERN STATES,) vol. 1, § 617, footnote 9 (1911), says "Yet denying the owner the procedure by which his right is protected, his right is, in effect, denied in substance. The court takes away the private right when it takes away the means by which it lives." And in the text of § 617, he offers the further criticism: "The cases arose after the court had declared riparian rights to exist in Nebraska (as in California), which was an unpopular position. The property taken in these cases was the riparian right, and the court took this way of largely nullifying its former decisions. One need not find fault with decisions making an open rejection of riparian rights, but only with decisions which go around by the back way to nullify rights which previous cases, at the front door, said they were upholding."

tical and would have to be determined in an action brought by the riparians; and that the question of substantial damages would depend upon the state of proof. This right might prove to be so infinitesimal that the law would not take note of it, and the damages might be nominal only. The court did not believe that a riparian who built irrigation works with full knowledge of existing appropriative rights should be entitled to greater compensation because of that after accrual of appropriations either upstream or downstream. A different situation would arise if the riparian actually diverted and used irrigation water before appropriative rights attached. So the order of injunction was affirmed by the Supreme Court, without prejudice to the defendants' rights to recover any damages that had been sustained.

(b) *Cline v. Stock.* Here, on the other hand, the plaintiff was a lower riparian owner who alleged upstream diversions by defendants but who did not state what their claims were; and who alleged his own riparian ownership, prescription, and if the appropriation doctrine were held to prevail, priority of his own appropriation. A general demurrer was sustained.

In upholding in *Cline v. Stock* the trial court's refusal to grant the riparian an injunction, the Nebraska Supreme Court held that: If defendant appropriators had duly applied to the state administrative agency and had obtained an adjudication giving them a right to appropriate water for irrigation and, in pursuance thereof, had constructed works and actually diverted and used their rightful quantity of water in the same manner and to the same extent that they proposed to use it in the future—then a lower riparian proprietor could not enjoin continued use of the water but must rely upon his action at law to recover such damages, if any, as he might sustain thereby. The court evinced no doubt of the soundness of this principle.

The Nebraska Supreme Court was apparently convinced, at the rehearings in these two cases, (1) that the public welfare would be served by the expansion of irrigation development in the state, and (2) that progress in this direction would be facilitated by a more liberal interpretation of the appropriation-riparian relationship, rather than by a doctrinaire reaffirmation of strict common law principles that were surely becoming outmoded in the growing West, and of pro-

cedures for perpetuating them. The decisions were rendered more than a half-century ago, and they have not been overruled. Their effect was to eliminate much of the advantage of location of the riparian tract under its common law right, with respect to appropriative rights on the same stream, except in case of a riparian who made actual use of the water on his land before conflicting appropriation rights vested.

Kansas—The decision in *Clark v. Allaman,* rendered almost contemporaneously with the Nebraska decisions above noted, expounded in considerable detail the facets of the riparian doctrine; but it also held that while fundamental in the jurisprudence of the state, this doctrine had been modified by irrigation legislation enacted in 1886 and following years, and that the dual systems of water rights existed in the state.[42] Of course the irrigation statutes could not operate to the destruction of previously vested common law rights. But that diversion and appropriation of water for beneficial purposes was a public use was evidenced by the statutes.

During the ensuing 30 years the principle of prior appropriation, subject to previously vested common law rights, appeared to have substance. Then in 1936 the Kansas Supreme Court again considered the appropriation statute of 1886, but withheld judgment as to its effect on the riparian status of lands that passed to private ownership after its enactment, inasmuch as in the instant case such a decision was not necessary.[43] Eight years later, in a ground water case, the Supreme Court emphatically reaffirmed the common law right of the landowner to waters either on or in his land, and held that the state officials had no statutory authority to consider an application to appropriate ground waters or to allocate or distribute them.[44] The unquestioned implication was that this disability applied equally to appropriations from surface streams.

The *Peterson* decision appeared to leave the Kansas water appropriation system in a legal vacuum. It was now imperative to appraise the situation and to do something about it. Accordingly, the Governor appointed a committee to study the

---

42. Clark v. Allaman, 71 Kan. 206, 237-239, 241, 80 Pac. 571 (1905).
43. Frizell v. Bindley, 144 Kan. 84, 91-93, 58 P.2d 95 (1936).
44. State ex rel. Peterson v. State Board of Agriculture, 158 Kan. 603, 605-614, 149 P.2d 604 (1944).

state water laws and make recommendations. The committee held conferences and, before the end of the year, made its report recommending enactment of a statute that would be effectual in bringing common law water rights under public control. The committee pointed out that the Kansas statutes, as a result of court decisions, had not been effective in establishing an orderly appropriation system to supersede the common law. But it was believed that conditions in the state, and the needs of the people, had changed so greatly since early adoption of the common law as applied to water use, as to justify such modification of the common law as would provide an effectual system of prior appropriation, while allowing anyone damaged by an appropriator's use of water to recover for actual damage.[45]

The ensuing legislature of 1945 passed an act that followed closely the legislation recommended in the committee's report.[46] Its purpose was to strengthen the appropriation doctrine in Kansas, and to reduce the advantage of location of lands riparian to surface streams and overlying ground waters as against appropriations for beneficial use on nonriparian and nonoverlying lands. Experiences in other states in deflating the importance of unused common law rights were drawn upon and adapted to Kansas conditions. The precedents in point were chiefly from Nebraska, noted immediately above, and from Oregon,[47] both early in the present century. In 1957, after conferences by the state administrators with representatives of other state and federal agencies, extensive amendments of the 1945 law were made.[48]

---

45. "The Appropriation of Water for Beneficial Purposes. A Report to the Governor on Historic, Physical and Legal Aspects of the Problem in Kansas. Submitted to the Honorable Andrew F. Schoeppel, Governor of Kansas, December, 1944," 79 pp. Topeka, Kansas. The committee's meetings included a two-day conference at Topeka, to which several persons experienced in western water law, including the present writer, came from distant points at the committee's invitation to assist in its deliberations.
46. Kan. Laws 1945, ch. 390; Gen. Stat. §§ 82a-701 to 82a-722 (1949).
47. Ore. Laws 1909, ch. 216, § 70; Rev. Stat., § 539.010 (1955). This section provided, in brief, that actual application of water to beneficial use prior to enactment of the statute should be deemed to create in the riparian proprietor a vested right to the extent of such use, if not abondoned for a continous period of 2 years; likewise, if work were then being constructed and water was applied to beneficial use within a reasonable time thereafter; and that all such rights should be adjudicated under the proceedings set up in the statute. This riparian legislation was sustained by majority decisions of State and Federal courts in: **In re** Hood River, 114 Ore. 112, 173-182, 227 Pac. 1065 (1924); dismissed for want of jurisdiction for want of a final judgement, Pacific Power & Light Co. v. Bayer, 273 U.S. 647 (1926). California-Oregon Power Co. v. Beaver Portland Cement Co., 73 F.2d 555, 562-569 (9th Cir., 1934). The Federal court's decree that assertion of a common law riparian right could not be sustained was affirmed, but on a different ground, in: California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 155-165 (1935).
48. Kan. Laws 1957, ch. 539.

Nowhere in the 1945 law or in the 1957 amendments is the term "riparian" used. Instead, "common law claim" relates to both surface and ground waters. Subject to vested rights, all waters in the state may be appropriated for beneficial use (§§ 82a-702 and 82a-703). "Vested right" is the right of a common law or statutory claimant to continue use of water actually applied to beneficial use on or before the effective date of the 1945 act or within a reasonable time thereafter with the use of works then under construction; it may not be impaired except for nonuse (§§ 82a-701 and 82a-703). No permittee may be prevented from proceeding with his appropriation by anyone without a vested right, or a prior appropriation right, or an earlier permit (§82a-712). A common law claimant injured by an appropriation or by authorized works may have compensation in a suitable action at law for damages proved for any property taken. Any holder of a valid water right or permit may enjoin a subsequent diversion by a common law claimant who has no vested rights, without first having to condemn those common law rights. And an appropriator may protect his priority by injunction as against a later appropriator. (§ 82a-716.)

Validity of the 1945 statute was passed on by the Kansas Supreme Court in a decision which was confined to questions of unconstitutionality that had been presented for determination, all of which the court answered in the negative.[49] No specific claims of rights to use water were involved, and so none were adjudicated. But the court took note of activities of the Governor's committee and its recommendations; quoted with approval the legislative declaration that all water in the state was dedicated to public use, subject to state control and regulation; and stated that pursuant to the legislation a new approach to the problem of use of water resources must now be taken. "Unused or unusable rights predicated alone upon theory become of little if any importance." Broad judicial statements previously made respecting riparian rights must now be disregarded or modified to harmonize with the new approach. The key principle in the supreme court's thesis is the beneficial use that the individual is making of the water or has the right to make of it.

---

49. State *ex rel.* Emery v. Knapp, 167 Kan.. 546, 555-556, 207 P.2d 440 (1949).

Subsequently a three-judge Federal District Court concluded that the statute does not violate the Fourteenth Amendment to the United States Constitution, and that it is constitutional.[50]

Opponents of the change in basic state policy evidenced by the 1945 and 1957 legislation did not give up. Several proceedings in one controversy extending over a period of years were decided on appeal on procedural grounds, without passing on the constitutional issue.[51] In an appeal in a different case, in which allegations of unconstitutionality were made, the supreme court discussed no matters other than pleadings and propriety of the trial court in acting upon them, observed that other questions raised by the parties were premature, and remanded the case with instructions.[52]

South Dakota—Early in the present century the South Dakota Supreme Court emphasized that the two systems of water rights prevailed in the state; that the trial court should be able to properly adjust conflicting rights on a stream after full consideration of all circumstances; and that as between appropriators only, or between an appropriator and a riparian owner, relative superiority of rights would be determined by their respective times of accrual—appropriation as of the date of priority, riparian at the time of settlement on the tract with the intention of making formal entry, provided that title was finally acquired from the government.[53] It was also held that the riparian right could not be lost by disuse and hence did not depend upon its being exercised, but that it afforded to the proprietor the right to use all water needed at any reasonable time to properly irrigate all his riparian land, and that it was only the surplus (if any) over what might be legally used by riparians and other lawful appropriators that might be the subject of permit under the statute.[54]

A judicial limitation on the purposes for which a riparian

---

50. Baumann v. Smrha, 145 F. Supp. 617 (D. Kan. 1956); **affirmed per curiam**, 352 U.S. 863 (1956).
51. Hesston & Sedgwick v. Smrha, 179 Kan. 72, 293 P.2d 241 (1956); 184 Kan. 223, 336 P.2d 428 (1959); 186 Kan. 477, 351 P.2d 204 (1960); 186 Kan. 785, 352 P.2d 1053 (1960).
52. Huber v. Schmidt, 188 Kan. 36, P.2d 854 (1961).
53. Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S.D. 519, 521-522, 527-530, 91 N.W. 352 (1902); Stenger v. Tharp, 17 S.D. 13, 20, 94 N.W. 402 (1903); Redwater Land & Canal Co. v. Jones, 27 S.D. 194, 203-204, 130 N.W. 85 (1911).
54. Redwater Land & Canal Co. v. Reed, 26 S.D. 466, 487-488, 128 N.W. 702 (1910); St. Germain Irrigating Ditch Co. v. Hawthorne Ditch Co., 32 S.D. 260, 268, 143 N.W. 124 (1913).

right might be exercised in South Dakota was imposed for about two decades and was then removed. Prior to 1921 the South Dakota Supreme Court adhered to the principle that the riparian right of use not only for domestic purposes but for reasonable irrigation is a vested property right.[55] In that year, however, in *Cook v. Evans,* the court was called upon to decide for the first time the effect of the Desert Land Act of 1877,[56] and as a result expressed its agreement with the conclusion of the Oregon Supreme Court in *Hough v. Porter*[57] to the effect that by that act Congress severed from all public lands not then entered all rights to the use of waters adjacent thereto except the riparian right of use for domestic purposes, all remaining waters being dedicated to the public for appropriation for irrigation and other proper purposes under applicable laws and customs. Subsequently the United States Supreme Court declared that following enactment of the Desert Land Act, if not before, all nonnavigable waters then a part of the public domain became *publici juris,* subject to the plenary control of the public land states and territories, "with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain."[58] Thereafter, in the light of this authoritative high court interpretation, the South Dakota Supreme Court re-examined its own 1921 decision in *Cook v. Evans* and concluded that it had been in error therein, because previously thereto its decisions had established the principle that riparian rights including the right to irrigate were obtainable though settlement on land as well as under the territorial appropriation statute.[59] Thus was the right to irrigate riparian land re-established in the jurisprudence of South Dakota as a part of the riparian right.

Restrictions upon agricultural expansion under irrigation inherent in the problem of unused riparian rights continued to plague proponents of the appropriation doctrine. Studies were made and conferences were held; and in 1955, in a care-

55. St. Germain Irrigating Ditch Co. v. Hawthorne Ditch Co., 32 S.D. 260, 267, 143 N.W. 124 (1913).
56. Cook v. Evans, 45 S.D. 31, 38-39, 185 N.W. 262 (1921). Followed in Haaser v. Englebrecht, 45 S.D. 143, 146-147, 186 N.W. 572 (1922). Desert Land Act: 19 Stat. 377 (1877).
57. Hough v. Porter, 51 Ore. 318, 383-407, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909).
58. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-164 (1935).
59. Platt v. Rapid City, 67 S.D. 245, 248-250, 291 N.W. 600 (1940).

fully worded act relating to appropriation of water of surface streams, the South Dakota legislature undertook to define and to protect vested rights to the use of water so far as they pertain to actual beneficial use, following the precedents set by the legislatures of Oregon and of Kansas as sustained by the high courts in those states.[60] The term "vested rights" was defined as including the right of a riparian owner to continue beneficial use of water to the extent actually made at the time of enactment of the statute or within the immediately preceding three years, or to make such use with works then under construction if they were completed and application of water was begun within a reasonable time thereafter. "Vested rights" also included use of water for domestic purposes as that term is defined in the act. (§ 61.0102(7).) All vested rights as defined were validated (§ 61.0106); and subject to vested rights and prior appropriations, all waters flowing in definite streams were declared open to appropriation (§ 61.-0109).

Constitutionality of the 1955 legislation has not yet been passed on by the South Dakota Supreme Court.[61] Assuming its validity: (1) Land that conformed to riparian criteria but that was not, when the act was passed, under irrigation or recently irrigated or in preparation therefor, has no longer a riparian right for irrigation. (2) Similarly, unless perpetuated by these requirements, the right of a riparian to use water for other so-called artificial purposes (for example, mining, manufacturing, development of power) no longer exists. (3) The right to use riparian water for domestic purposes as defined in the act is not subject to these restrictions. On the contrary, domestic use is unqualifiedly declared to be a vested

60. S.D. Laws 1955, ch. 430; Code (1960 Supplement), §§ 61.0101 to 61.0156. A companion statute relating to appropriation of ground waters was also passed: Laws 1955, ch. 431; Code (1960 Supplement), §§ 61.0401 to 61.0430.

61. A ruling by the South Dakota Supreme Court on the constitutionality of the 1955 water legislation is expected to be sought in a suit pending in the circuit court in Butte County, South Dakota. According to a letter to the author from J.W. Grimes, Executive Officer, South Dakota State Water Resources Commission, dated March 5, 1962 (quoted with his permission), the suit is titled Belle Fourche Irrigation District v. Smiley and was brought February 1, 1961; the State of South Dakota and the State Water Resources Commission intervened in the public interest July 21, 1961; complaints and amended complaints have been filed and answered; adverse examinations of the defendant and the manager for the irrigation district have been taken; agreement on substantial stipulations as to the facts had not been reached on March 5, 1962 but is anticipated by lawyers representing both sides; and neither the anticipated pre-trial conference nor the trial had then been scheduled.

right and is accorded a preferential status in the state water policy.[62]

North Dakota—Although relations as between appropriators only, and as between riparians only, have been considered by both the legislature and the courts of North Dakota, interrelationships of the two groups have been meager.

The first territorial legislative declaration on water rights in 1866, long before the appropriation doctrine was recognized, referred to riparian rights only, and it is still on the state statute books. The second, in 1881, which announced certain rights of landowners for certain purposes of use but subjected them to valid prior appropriations, was replaced in North Dakota by the present state water rights statute first enacted in 1905.

The latest pronouncement of the North Dakota legislature, in 1955, is a major declaration as to what are the several and reciprocal rights of nonmunicipal riparian owners—without mentioning appropriators—thus:[63]

> 61-01-01.1. Reciprocal Rights of Riparian Owners. The several and reciprocal rights of a riparian owner, other than a municipal corporation, in the waters of the state comprise the ordinary or natural use of water for domestic and stockwatering purposes.

In the earliest territorial water rights case, *Sturr v. Beck,* it was adjudged that an earlier homesteader had made a prior appropriation of both land and water even without making use of the water, as against a later downstream entryman who trespassed upon the upper land in order to locate a water right thereon.[64] But no later supreme court decision involved a controversy over rights to use the waters of a particular source in which the adverse parties consisted of appropriative claimants on the one hand and riparian claimants on the other. In fact, in none of the succeeding North Dakota Supreme Court cases in which riparian rights were litigated was any question of appropriative rights involved.[65] In the absence of

62. The statute declares the established policy of the state to be that use of water for domestic purposes is the highest use and takes precedence over all appropriative rights (§ 61.0101 (5a)); and it exempts "reasonable use of water from any source for domestic purposes" from appropriation permit requirements (§ 61.0107).

63. N.D. Laws 1955, ch. 345, § 2. Codified as § 61-01-01.1. There may possibly be some question of sufficiency of the title of the bill which was enacted into law as chapter 345, Laws of 1955. The title referred only to amendment and reenactment of § 61.0101, which was done in § 1 of the act; it did not mention reciprocal rights of riparian owners which comprised § 2.

64. Sturr v. Beck, 6 Dak. 71, 50 N.W. 486 (1888); aff'd., 133 U.S. 541 (1890).

65. Bigelow v. Draper, 6 N.D. 152, 69 N.W. 570 (1896); Brignall v. Han-

riparian versus appropriative litigation in North Dakota throughout nearly three-quarters of a century—during which period irrigation development expanded slowly by contrast with most Western states —a study of doctrinal interrelationships yields a paucity of explicit criteria as to the relative importance in this jurisdiction of conflicting philosophies of rights to the use of water.

While the legislature in 1955 redeclared that owners of riparian land have certain rights arising out of such ownership, it took a further step in undertaking to limit these rights. But what is the full purport of this section? By use of the word "reciprocal" it would seem evident that rights of riparian owners are limited at least as against each other, provided of course that the word "compromise" relates to the whole and therefore excludes all purposes of using water other than domestic and stockraising. But in making this declaration in the second section of a statute which in its first section amended and enlarged a section of the water appropriation statute declaring what waters are public and subject to appropriation, was it intended to go further and to limit these riparian rights as against conflicting appropriations as well? One might assume from the juxtaposition of statutory sections that the arrangement was intended to serve as a basis for denying irrigation water rights to riparian owners except through the process of appropriating water therefor under the general statutory procedure, and that the lack of explicit statement is unintentional. However, the purpose of the legislation is not clearly expressed, and the supreme court has not yet had occasion to pass upon the purport of this section, or upon its constitutionality, in a litigated case.

It is obviously impossible at this time to make a definitive statement of the respective legal importance of the riparian right and appropriation right as against each other, in the jurisprudence of North Dakota. Conclusions, however plausible, are necessarily tentative and qualified by absence of direct authority.

(5) *Summary of Adjustments*

Nebraska's solution of the problem of the unused riparian

---

nah, 34 N.D. 174, 157 N.W. 1042 (1916); McDonough v. Russell-Miller Mill. Co., 38 N.D. 465, 165 N.W. 504 (1917); Johnson v. Armour & Co., 69 N.D. 769, 291 N.W. 113 (1940); Ozar-Mahoning Co. v. State, 76 N.D. 464, 37 N.W. 2d 488 (1949).

right was made by the state supreme court, without specific direction by the legislature. In Kansas, South Dakota, and North Dakota, the legislatures took the initiative, the first two states building their respective state policies on precedents set by the Nebraska Supreme Court and by the Oregon legislature.

The Nebraska judicial solution consisted of limiting the riparian owner's available remedies as against an appropriator but without denying the right of the former to use water. It met both approbation as being justified in the public interest, and criticism as destroying the water right through denial of the remedy of injunction. In both Kansas and South Dakota the legislatures defined vested rights, limited them to present actual beneficial use of water, and protected them as such; thus precluding new uses of water in the future by riparian proprietors unless they should elect to appropriate the new water under the statutory procedure. The North Dakota legislature chose to declare what are the several and reciprocal rights of a nonmunicipal riparian owner.

It is inevitable that radical changes in water rights doctrines of a state in which the water economy is vitally important should, in the first instance, be difficult to achieve and, when enacted, be subjected to powerful attacks on grounds of invalidity by reason of conflict with the federal and state constitutions. The Nevada Supreme Court spoke understandingly of such attacks, thus: "We do not accept radical changes without protest. If a statute radically different from anything to which we have been accustomed is enacted, the average lawyer becomes alarmed and at once brands it as unconstitutional."[66] And with respect to the same subject, a California District Court of Appeal remarked that "every forward-looking piece of legislation meets the old and time-honored objection—unconstitutional."[67] Certainly, the right to the use of water is a right of real property, protected by well-established safeguards within our constitutional framework. As judicial holdings in the Western states are not in accord as to whether the riparian right applies to future as well as to present use of water, a move in an undeclared state to limit the riparian right to the actual beneficial use made

66. Vineyard Land & Stock Co. v. District Court, 42 Nev. 1, 26-27, 171 Pac. 166 (1918).
67. Bray v. Superior Court, 92 Cal. App. 428, 441, 268 Pac. 374 (1928).

currently may find support in out-of-state precedents and in the materially changed economic conditions of the area, and at the same time may invite opposition on the ground that the right of future riparian use is *stare decisis* in the jurisdiction.

The legal process adjudged by the Nebraska Supreme Court with respect to present and future uses of water by riparians is an established part of the state's jurisprudence, with no successful challenge in the 57 years that have elapsed since the decisions were rendered. The Oregon legislature's declaration on the same subject, upon which Kansas drew so heavily, has had 53 years of experience during which it survived attacks of invalidity in both State and Federal courts. In both Oregon and Kansas many riparian cases had been decided in the high courts before the legislatures spoke,[68] but thereafter neither court said that the matter of future use of water was *stare decisis*. On the contrary, the Oregon Supreme Court was of the opinion that the common law having been partially adopted by statute, the common law rule as to riparian rights might be changed by statute except as such change might affect some vested right, and that it was within the province of the legislature to define a vested right of a riparian owner.[69] And the Kansas Supreme Court, instead of turning to *stare decisis*, observed that broad judicial statements previously made respecting riparian rights must now give way to the legislative declaration subjecting all water in the state to public regulation; and that the change was an appropriate one for the legislature to make.[70]

The 1955 statutes of both Dakotas await judicial scrutiny. Apparently the North Dakota legislation was not taken from other western water administration statutes, and it will probably require construction of its purport and effectiveness as well as its constitutionality. In South Dakota, it was with consideration of successful precedents set in Oregon and Kansas, both of which had the approval of both state and federal courts, that the legislature made its bold declaration of state water policy in the interest of the public welfare.

---

68. Hutchins, **The Common-Law Riparian Doctrine in Oregon: Legislative and Judicial Modification,** 36 Ore. L. Rev. 193-220 (1957); **Id.,** THE KANSAS LAW OF WATER RIGHTS (1957).
69. **In re** Hood River, 114 Ore. 112, 181, 227 Pac. 1065 (1924).
70. State **ex rel.** Emery v. Knapp, 167 Kan. 546, 555-556, 207 P.2d 440 (1949).