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RIPARIAN RIGHTS UNDER THE TEXAS WATER RIGHTS ADJUDICATION ACT—A CONSTITUTIONAL ANALYSIS

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In 1967, subchapter G of chapter 5 of the Texas Water Code became effective.[1] This enactment, statutorily referred to as the Texas Water Rights Adjudication Act,[2] was designed to define and control existing water rights within the state and was in response to a constitutional mandate that the legislature enact laws for the development, control, preservation, and conservation of the state's natural resources.[3]

In its declaration of policy, the legislature states that the adoption of the Texas Act is in the exercise of the police powers of the state and is necessary for the protection of public welfare.[4] It is the purpose of this comment to analyze those parts of the Act which affect riparian rights in an attempt to determine whether the provision effects a lawful exercise of the police power, or whether it sanctions, instead, an unconstitutional expropriation of real property.

Origin of the Riparian Right in Texas

The riparian water right is derived from common law. In England the proprietor of each bank of a stream had an equal right to use water which flowed in the stream. The right was a vested property interest which could be divested only upon proof of an uninterrupted adverse possession for a period of twenty years.[5] The original Spanish and Mexican land grants in Texas did not carry with them riparian water rights, except where there was a specific grant of riparian right by the sovereign.[6] In 1840, however, the Republic of Texas adopted the English common law and, accordingly, the doctrine of riparian water rights.[7] As such, all grants of land by the state from 1840 through July 1, 1895, carried with them riparian rights. In 1895, however, Texas reverted to the civil law and, in so doing, provided

1. Tex. Water Code Ann. §§ 5.301-.409 (1972).
2. *Id.* § 5.301.
3. Tex. Const. art. XVI, § 59.
4. Tex. Water Code Ann. § 5.302 (1972).
5. Mason v. Hill, 110 Eng. Rep. 114, 117 (K.B. 1832); Wright v. Howard, 57 Eng. Rep. 76, 82 (V.C. 1823).
6. *See* State v. Valmont Plantations, 346 S.W.2d 853, 855, 869 (Tex. Civ. App.—San Antonio, 1961), *aff'd*, 163 Tex. 381, 355 S.W.2d 502 (1962) (extensive survey of Spanish and Mexican land grants in Texas).
7. Tex. Laws 1840, an Act to Adopt the Common Law of England, at 3, 2 H. Gammel, Laws of Texas 177 (1840).

that land granted by the state after July 1, 1895, did not include riparian rights.[8]

The riparian right is one of use only; it does not carry with it ownership in the corpus of the water itself.[9] It is inherent in and a part of the land, based on the theory that the land through which water runs receives benefits and is increased in value by reason of its accessibility to the water.[10] Riparian rights can attach only to waters below the "line of highest ordinary flow."[11] Under the common law, as it has been applied in Texas, the riparian proprietor's rights extended to the reasonable use of the riparian waters. Initially, this use was reasonable even though it may have injured the owner of lower riparian lands.[12] The reasonable use became limited, however, so that the owner had no right to use the water in such a way as to cause substantial injury to the common right of other riparian owners.[13]

The riparian right has consistently been considered a vested property right in Texas.[14] As such, it is protected by the constitution, and an owner thereof cannot be deprived of this right without compensation.[15]

Legislative Control of Riparian Rights in Texas

As recognized in the policy declaration in the Texas Water Rights Adjudication Act,[16] "[t]he conservation and best utilization of the water resources of the state are a public necessity."[17] It is only natural in a semi-arid state, such as Texas, that the use and distribution of water should be

8. Tex. Laws 1895, ch. 21, § 1, at 21, 10 H. Gammel, Laws of Texas 751 (1895).

9. Magnolia Petroleum Co. v. Dodd, 125 Tex. 125, 129, 81 S.W.2d 653, 655 (1935); Texas Co. v. Burkett, 117 Tex. 16, 25, 296 S.W. 273, 276 (1927); Rhodes v. Whitehead, 27 Tex. 304, 309 (1863).

10. *See* Magnolia Petroleum Co. v. Dodd, 125 Tex. 125, 128, 81 S.W.2d 653, 655 (1935); Parker v. El Paso Water Improvement Dist., 116 Tex. 631, 642, 297 S.W. 737, 742 (1927); Haas v. Choussard, 17 Tex. 588, 589 (1856).

11. Motl v. Boyd, 116 Tex. 82, 102, 286 S.W. 458, 472 (1926). "The 'line of highest ordinary flow' is the highest line of flow which the stream reaches and maintains for a sufficient length of time to become characteristic when its waters are in their ordinary, normal, and usual condition, uninfluenced by recent rainfall or surface run-off." *Id.* at 111, 286 S.W. at 468-69.

12. Tolle v. Correth, 31 Tex. 362, 365 (1868).

13. Great Am. Dev. Co. v. Smith, 303 S.W.2d 861, 864 (Tex. Civ. App.—Austin 1957, no writ); *see* Motl v. Boyd, 116 Tex. 82, 100, 286 S.W. 458, 470 (1926); Stacy v. Delery, 122 S.W. 300, 303 (Tex. Civ. App. 1909, no writ).

14. Chicago R.I. & G. Ry. v. Tarrant County Water Control & Improvement Dist., 123 Tex. 432, 448, 73 S.W.2d 55, 64 (1934); Martin v. Burr, 111 Tex. 57, 64-65, 228 S.W. 543, 545 (1921); Tolle v. Correth, 31 Tex. 362, 365 (1868).

15. Hidalgo County Water Control & Improvement Dist. v. Hedrick, 226 F.2d 1, 6 (5th Cir. 1955), *cert. denied,* 350 U.S. 983 (1956); Bigham Bros. v. Port Arthur Channel & Dock Co., 100 Tex. 192, 201, 97 S.W. 686, 688 (1906); Zavala County Water Improvement Dist. v. Rogers, 145 S.W.2d 919, 923 (Tex. Civ. App.—El Paso 1940, no writ).

16. Tex. Water Code Ann. § 5.301 (1972).

17. *Id.* § 5.302.

a matter for legislative control. This concern is not new to Texas, but has manifested itself in several attempts at adopting an adjudication and administration system.

The first such legislative initiative towards controlling the water supply in Texas was the enactment of the Irrigation Act of 1917.[18] Based on the "Wyoming System," the Act imposed upon the Board of Water Engineers the duty to make an administrative determination of the rights of various claimants to the waters of a stream.[19] In addition, the Act provided that any suit brought to determine rights to the use of such water could be transferred to the Board of Water Engineers for a final determination.[20]

In that same year the legislature passed article 7592,[21] which provided that an appropriator who filed a claim with the Texas Water Board was given the right to acquire title by limitation against unused rights of a riparian owner.[22] Neither the Irrigation Act of 1917 nor article 7592 were long-lasting. In 1921 the Texas Supreme Court overruled the Irrigation Act as being an unconstitutional attempt by the legislature to empower the Board of Water Engineers, an administrative agency, with the authority to make final judicial determinations of vested property rights.[23] In striking down the adoption of the "Wyoming System," the Texas Supreme Court recognized that Wyoming did not accept the common law doctrine of riparian rights, whereas Texas not only recognized such a common law right, but also treated it as an interest in real property.[24] Ten years later, article 7592 was also found to be unconstitutional.[25] The Galveston Court of Civil Appeals held that the statute allowed condemnation without adequate compensation and, thus, operated to divest a riparian owner of a part of his vested property rights in an impermissible manner.[26]

It was not until the late 1940's that further efforts were made toward enacting laws to control the use of water. In 1949 a bill was introduced setting forth a proposed water code, but it failed to pass the committee stage.[27]In 1964 the Texas Research League made a study of the Texas Water Commission and recommended changes in order to safeguard the

18. Tex. Laws 1917, ch. 88, §§ 1-140, at 211-43.

19. *Id.* § 105, at 235.

20. *Id.* § 105, at 235.

21. Tex. Rev. Civ. Stat. art. 7592 (1917).

22. *Id.*

23. Board of Water Eng'rs v. McKnight, 111 Tex. 82, 92-93, 229 S.W. 301, 303 (1921).

24. *Id.* at 92, 95, 229 S.W. at 304, 306. A subsequent opinion by the Texas Supreme Court in Corzelius v. Harrell, 143 Tex. 509, 513, 186 S.W.2d 961, 964 (1945) grants the Railroad Commission power to make administrative adjudications in oil and gas matters. This opinion indicates that the "Wyoming System" would be found to be constitutional today.

25. Freeland v. Peltier, 44 S.W.2d 404, 407 (Tex. Civ. App.—Galveston 1931, no writ).

26. *Id.* at 409.

27. Tex. S. 225, 51st Legis. (1949).

state's water resources.[28] Its report concluded that an adjudication system was needed. Finally, in 1967, the Sixtieth Legislature enacted the Texas Water Rights Adjudication Act,[29] a statute based on Oregon's water control system.

RIPARIAN RIGHTS UNDER THE TEXAS WATER RIGHTS ADJUDICATION ACT

The Texas Act provides for limitation of the riparian owner's rights in several separate provisions. First, the Act recognizes riparian claims in water, for purposes other than domestic or livestock use, as extending to only that amount of water which the riparian owner beneficially used during the years 1963 through 1967.[30] Second, the Act requires the riparian owner to file a claim on or before September 1, 1969, describing the beneficial use he has made of the water.[31] Finally, the Act provides that failure of the riparian owner to have filed a claim extinguishes and bars any claim to water which he might have previously had.[32]

These limitations on the riparian property right raise some substantial constitutional problems. The Act, in recognizing riparian rights only to the extent which they are applied to beneficial use, abrogates the prior vested riparian right to all reasonable uses of the water. Further, the provision for recognition of only those beneficial uses to which the water is applied during the years 1963 through 1967 serves to bar any claim by the riparian owner to uses made before 1963, and precludes him from asserting his right to water for any future, additional uses. The Act also extinguishes any riparian right, without compensation, upon failure by the riparian owner to file a claim in compliance with the statute, thus repudiating the concept that riparian rights are vested property rights.

The legislature, in its declaration of policy, asserts that the promulgation of the Act is in the exercise of the police power of the state.[33] Therefore,

28. Booth, *Adjudication of Water Rights—A General Discussion of Water Rights and Recent Legislation to Administer Water Rights in Texas*, in WATER . . . AND THE NEW TEXAS LAW 41 (1968).

29. TEX. WATER CODE ANN. § 5.301 (1972).

30. *Id.* § 5.303(b). That section provides: "Any [riparian claim] shall be recognized only . . . to the extent of maximum actual application of water to beneficial use without waste during any calendar year from 1963 to 1967, inclusive." *Id.* § 5.303(b). Use of water for domestic or livestock purposes is expressly excluded from the effect of the Texas Water Rights Adjudication Act. *Id.* § 5.303(1).

31. *Id.* § 5.303(c). Section 5.303(c) provides: "On or before September 1, 1969, every person claiming any water right to which this section applies shall file with the commission a statement . . ." establishing particular facts about the owner's claim.

32. *Id.* § 5.303(i), which provides that: "Since the filing of all claims to use public water is necessary for the conservation and best utilization of the water resources of the state, failure to file a sworn statement in substantial compliance with this section extinguishes and bars any claim of water rights to which this section applies."

33. *Id.* § 5.302.

what must be established in support of its constitutionality is that the nature of the riparian right is such that it is subject to modification and extinction by the operation of the state's police power.

POLICE POWER AND THE OREGON ACT OF 1909

The basis of the police power is public necessity; the proper exercise of that authority by the legislature rests on the need for safety, health, security, and protection of the general public welfare.[34] The exercise of that power by the legislature is, however, circumscribed by constitutional limitations designed to protect private property rights.[35]

As no recent Texas case has ruled on the constitutionality of modification and abrogation of riparian rights under the banner of the police power, it is necessary to consider other juridictions which have studied the issue. This analysis begins with an examination of the creation and subsequent judicial treatment of the Oregon Act of 1909,[36] which was the basis of the Texas Act.[37]

Before 1909 the riparian owner in Oregon had the right to the flow of the stream only to the extent actually needed and used.[38] Thus, the common law doctrine of riparian rights, prior to enactment of the statute, was recognized only to a limited extent;[39] the measure of that right was the amount of water which was put to beneficial use. In order to ascertain the amount of unclaimed water which might be available for appropriators and to make certain the extent of any riparian rights claimed, Oregon enacted a statute in 1909 designed to enable the state to determine these facts.[40] The statute defined a vested right as that "actual application of water to beneficial use prior to February 24, 1909 . . . provided such right has not been abandoned for a continuous period of two years."[41] In order to determine the amount of water needed and used by such a riparian owner, the amount of land irrigated, the character of the soil, and the amount of water

34. Spann v. City of Dallas, 111 Tex. 350, 357, 235 S.W. 513, 515 (1921); Jefco, Inc. v. Lewis, 520 S.W.2d 915, 922 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); City of Coleman v. Rhone, 222 S.W.2d 646, 648 (Tex. Civ. App.—Eastland 1949, writ ref'd).

35. U.S. CONST. amends. V, XIV; TEX. CONST. art. I, § 19.

36. OR. REV. STAT. § 539.010 (Supp. 1975).

37. Booth, *Adjudication of Water Rights—A General Discussion of Water Rights and Recent Legislation to Administer Water Rights in Texas,* in WATER . . . AND THE NEW TEXAS LAW 42 (1968).

38. Hough v. Porter, 98 P. 1083, 1098 (Ore. 1909); *see* Whited v. Cavin, 105 P. 396, 401 (Ore. 1909).

39. *In re* Willow Creek, 144 P. 505, 516 (Ore. 1914), *modified,* 146 P. 475 (Ore. 1915); Hedges v. Riddle, 127 P. 548, 549 (Ore. 1912); *see* Fitzstephens v. Watson, 344 P.2d 221, 226 (Ore. 1959).

40. Pacific Livestock Co. v. Lewis, 241 U.S. 440, 448-49 (1916).

41. OR. REV. STAT. § 539.010(1) (Supp. 1975).

needed per acre had to be established.[42] Thus, the legislature also provided that each claimant had to file a statement and submit proof of his claims, and that failure to make such application resulted in forfeiture of all rights to the use of water previously claimed by him.[43]

The constitutionality of the Act of 1909 was challenged in 1924, in the case of *In re Hood River.*[44] The Supreme Court of Oregon recognized that the riparian doctrine in their state, prior to the adoption of the Act of 1909, was a modified form of the common law.[45] The court concluded, therefore, that it was within the province of the legislature to define the vested right of a riparian owner as being limited to that water which he put to beneficial use, since such a definition was consistent with the historical nature of riparian rights within the state.[46] In support of this holding, the court stated that the common law riparian doctrine may be altered by statute, provided that such legislation does not affect some vested right.[47] The Oregon statute was subsequently tested in the case of *California-Oregon Power Co. v. Beaver Portland Cement Co.*[48] In that case the Ninth Circuit, like the Supreme Court of Oregon in *Hood River,* held that the modification of rights effectuated by the statute was not a drastic change from the former riparian law of the state and, hence, did not constitute a taking of property without due process of law.[49]

Unlike Oregon, the common law doctrine in Texas before enactment of the Texas Act in 1967 was not based on a beneficial use criterion. As stated earlier, the riparian doctrine existing in Texas at the time that the statute was enacted gave the riparian owner the right to any reasonable use of the water. The right was a vested property right, constitutionally protected from expropriation without compensation.[50] The Oregon statute was found to be constitutional because its limitation to beneficial use was a mere statutory enactment of what had been their common law interpretation.

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42. *In re* Willow Creek, 144 P. 505, 517 (Ore. 1914), *modified,* 146 P. 475 (Ore. 1915); Hedges v. Riddle, 127 P. 548, 549 (Ore. 1912).

43. OR. REV. STAT. § 539.210 (Supp. 1975).

44. 227 P. 1065 (Ore. 1924).

45. *Id.* at 1086; *see In re* Willow Creek, 144 P. 505, 516 (Ore. 1914), *modified,* 146 P. 475 (Ore. 1915).

46. *In re* Hood River, 227 P. 1065, 1087 (Ore. 1924).

47. *Id.* at 1087.

48. 73 F.2d 555, 568 (9th Cir. 1934), *aff'd on other grounds,* 295 U.S. 142 (1935); *cf.* United States v. Ahtanum Irrigation Dist. 330 F.2d 897, 905 n.9 (9th Cir. 1964) (discussing application of case to Washington law), *cert. denied,* 381 U.S. 924 (1965).

49. California-Ore. Power Co. v. Beaver Portland Cement Co., 73 F.2d 555, 568 (9th Cir. 1934), *aff'd on other grounds,* 295 U.S. 142 (1935).

50. Hidalgo County Water Control & Improvement Dist. v. Hedrick, 226 F.2d 1, 6 (5th Cir. 1955), *cert. denied,* 350 U.S. 983 (1956); *see* Chicago R.I. & G. Ry. v. Tarrant County Water Control & Improvement Dist., 123 Tex. 432, 448, 73 S.W.2d 55, 64 (1934); Zavala County Water Improvement Dist. v. Rogers, 145 S.W.2d 919, 923 (Tex. Civ. App.—El Paso 1940, no writ).

The Texas Act, however, cannot be justified on similar grounds, since the Texas law prior to enactment of the statute did not limit the riparian owner to beneficial use but, rather, gave him a vested right in all water put to a reasonable use.[51]

In Oregon the requirement of filing a claim to protect such a vested right was a natural result of that state's prior modified common law interpretation of riparian rights, as this was the only way in which a vested right could be determined to exist. In Texas, however, such a filing requirement does not naturally arise out of the prior reasonable use doctrine but, instead, out of the new beneficial use criterion imposed by the statute. In order for the filing requirement to be deemed constitutional, the modification of the riparian right to beneficial use must first be justified. It is apparent, therefore, that the constitutionality of the Texas Act cannot be successfully supported by the decisions in favor of the Oregon Act.

Police Power and Riparian Rights in Other Jurisdictions

California

California, like Texas, has a dual system of water rights under which both riparian and appropriative rights are recognized. Before 1919 the riparian proprietor in California was entitled to the reasonable use of waters passing through his land.[52] This right was a vested right, inherent in the land, and could not be taken from the riparian owner except upon payment of due compensation.[53] In 1913 the California Legislature passed a statute attempting to limit the riparian right to that amount of water put to beneficial use and, also, providing that the riparian right to such water not beneficially used for a period of ten consecutive years was forfeited.[54] The statute came under judicial review in the case of *Herminghaus v. Southern California Edison Co.*[55] The Supreme Court of California recognized the riparian right to reasonable use of the water in its usual and ordinary course and stated that such right could neither be gained by use nor lost by disuse.[56] In holding in favor of the riparian owner, the court stated that:

51. *See* Motl v. Boyd, 116 Tex. 82, 100, 286 S.W. 458, 470 (1926); Great Am. Dev. Co. v. Smith, 303 S.W.2d 861, 864 (Tex. Civ. App.—Austin 1957, no writ).

52. Herminghaus v. Southern Cal. Edison Co., 252 P. 607, 616 (Cal. 1926); Lux v. Haggin, 10 P. 674, 704 (Cal. 1886).

53. Palmer v. Railroad Comm'n, 138 P. 997, 1001 (Cal. 1914); Lux v. Haggin, 10 P. 674, 704 (Cal. 1886); *see* Northern Light & Power Co. v Stacher, 109 P. 896, 901 (Cal. Ct. App. 1910).

54. 1913 Cal. Stats., ch. 586, § 11, *cited in* Herminghaus v. Southern Cal. Edison Co., 252 P. 607, 621 (Cal. 1926).

55. 252 P. 607 (Cal. 1926).

56. *Id.* at 616; *see* Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 45 P.2d 972, 988-89 (Cal. 1935); Spring Valley Water Co. v. Alameda County, 263 P. 318, 321 (Cal. Dist. Ct. App. 1927).

> [T]o concede that the state Legislature has the right arbitrarily to fix . . . the amount of water which the riparian proprietor may take and use thereon would be to concede . . . to the legislative department of the state government the arbitrary power to destroy vested rights in private property of every kind and character.[57]

The constitutionality of the act was litigated again in *Fall River Valley Irrigation District v. Mount Shasta Power Corp.*[58] There the Supreme Court of California found that the power of the legislature to modify or abrogate a rule of common law does not give it the power to take away a previously vested property right.[59] In holding in favor of the riparian owner and against the legislature's exercise of police power, the court, in both cases, based its decision on the fact that the rights being litigated involved the private property rights of individuals and did not concern the property rights of the public as a whole. The court suggested that if the state was seeking to uphold an effort to establish a general plan in the interest of the entire public, then perhaps the police powers might rightfully be invoked.[60] This dictum tends to support a limitation of riparian rights through the proper exercise of the police power for the benefit of the public as a whole. In 1935, however, the court considered the constitutionality of the legislature's provision for forfeiture of riparian rights upon ten years' nonuse,[61] and it concluded that riparian rights are not such as may be lost by statutory forfeiture.[62]

The holdings by the court in *Herminghaus* and *Fall River Irrigation District* precipitated a movement for amendment of California's state constitution in an attempt to circumvent the court's refusal to allow the imposition of restrictions on the riparian right.[63] In 1928 an amendment was passed providing for the adoption of a beneficial use water system in California and recognizing the rights of a riparian owner to no more of the flow than was used for beneficial purposes.[64] The provisions of the amendment relating to limitation of riparian rights were challenged as being unconstitutional shortly after it was adopted, the riparian owners arguing that the amendment should not be applied retroactively since that would amount

57. Herminghaus v. Southern Cal. Edison Co., 252 P. 607, 622 (Cal. 1926).

58. 259 P. 444 (Cal. 1927).

59. *Id.* at 449; *accord,* Miller v. McKenna, 147 P.2d 531, 536 (Cal. 1944).

60. Fall River Valley Irrigation Dist. v. Mount Shasta Power Corp., 259 P. 444, 449-50 (Cal. 1927); Herminghaus v. Southern Cal. Edison Co., 252 P. 607, 623 (Cal. 1926).

61. Tulare Irrigaton Dist. v. Lindsay-Strathmore Irrigation Dist., 45 P.2d 972, 988-89 (Cal. 1935).

62. *Id.* at 989; *cf.* City of Los Angeles v. City of Glendale, 142 P.2d 289, 294 (Cal. 1943) (statute has no application to pueblo rights).

63. United States v. Gerlach Livestock Co., 339 U.S. 725, 749-50 (1950) (riparian rights to seasonal overflow of stream).

64. CAL. CONST. art. XIV, § 3.

to a taking of vested property rights without compensation.[65] The court upheld the constitutionality of the amendment as a reasonable exercise of the police power and, as such, a lawful abridgment of the riparian right for which the riparian owner is not entitled to compensation.[66] The court recognized, however, that while the amendment limits the riparian owner to reasonable beneficial use, it expressly protects not only his present needs but, also, any prospective beneficial requirements.[67]

The issue of depriving a riparian owner of rights which had previously been vested, without compensation to him, was subsequently addressed by the United States Supreme Court in *United States v. Gerlach Livestock Co.*[68] The Court found that in adopting the 1928 amendment, California confiscated a private property right for which the riparian owner was entitled to compensation.[69] The Court recognized that the right of the riparian owner before the amendment was to have the unintercepted flow of the water and that such right may not be divested.[70] In discussing the question of compensation for loss of private property rights, the Court stated that the public welfare requires claimants to sacrifice some of their uses, but it does not require that their loss be uncompensated.[71]

It is apparent that the California courts' experience with limitation of riparian rights has more heavily favored the riparian owner than it has the exercise of the police power by the legislature. Essentially, it is recognized in California that the riparian owner's rights may be limited to beneficial use, but such limitation may not be imposed without adequate compensation for any property taken as a result.[72] Furthermore, the courts did not permit the California Legislature to provide for forfeiture of the riparian rights merely upon the happening of the specific conditions set forth by the statute.

Kansas

While the California decisions concluded that legislative attempts to extinguish vested riparian rights were unconstitutional, the Kansas courts have found that their legislature's limitation of riparian rights was a valid exercise of the police power.[73]

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65. Tulare Irrigaton Dist. v. Lindsay-Strathmore Irrigation Dist., 45 P.2d 972, 987-88 (Cal. 1935).

66. *Id.* at 988; Chow v. City of Santa Barbara, 22 P.2d 5, 17 (Cal. 1933).

67. Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 45 P.2d 972, 989 (Cal. 1935); *see* Albaugh v. Mount Shasta Power Corp., 73 P.2d 217, 224 (Cal. 1937).

68. 339 U.S. 725 (1950).

69. *Id.* at 753; *see* Joslin v. Marin Mun. Water Dist., 60 Cal. Rptr. 377, 385 (1967).

70. United States v. Gerlach Livestock Co., 339 U.S. 725, 753-54 (1950).

71. *Id.* at 752-53.

72. Joslin v. Marin Mun. Water Dist., 60 Cal. Rptr. 377, 385 (1967); *see* United States v. Gerlach Livestock Co., 339 U.S. 725, 754-55 (1950).

73. Williams v. City of Wichita, 374 P.2d 578, 595 (Kan. 1962); *see* Emery v. Knapp,

Initially, Kansas accepted the reasonable use theory as its basis for determining the nature and extent of the vested riparian right.[74] In 1945, however, the legislature enacted the Water Appropriation Act,[75] which recognized riparian rights as being vested in only that amount of water having been applied to beneficial use as of June 1945[76] and providing for termination of any right not put to beneficial use for three consecutive years.[77] The provision recognizing riparian rights only in that amount of water applied to beneficial use was further extended by the Kansas Supreme Court so as to restrict the riparian owner's vested right to only that amount of water having been beneficially used on or within three years before June 1945.[78] The Kansas Act did recognize, however, that a riparian claimant is entitled to compensation by an appropriator for any damages resulting from the taking of his property.[79]

In a landmark case testing the constitutionality of the act, the Supreme Court of Kansas upheld the legislature's limitations of vested riparian rights on the ground that it allowed the common law claimant relief by proper compensation for restrictions imposed upon his rights.[80] A federal court subsequently stated that, in Kansas, the mere modification of the doctrine of riparian rights is not, in and of itself, a deprivation of equal protection without due process of law, and in order for the riparian owner to recover compensation, he must demonstrate that damages were actually suffered.[81] In a more recent decision, the Kansas Supreme Court again upheld the constitutionality of that state's act as a valid exercise of the police power.[82] The court initially addressed itself to the modification of the riparian right through adoption of the beneficial use theory, and it concluded that it was within the authority of the legislature to define the

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207 P.2d 440, 447-48 (Kan. 1949).

74. Clark v. Allaman, 80 P. 571, 585 (Kan. 1905); *see* Heise v. Schulz, 204 P.2d 706, 710 (Kan. 1949).

75. KAN. STAT. §§ 82a-704 to -725 (1969).

76. *Id.* § 82a-701(d).

77. *Id.* § 82a-718.

78. Williams v. City of Wichita, 374 P.2d 578, 591 (Kan. 1962).

79. KAN. STAT. § 82a-716 (1969). This section provides in part that "[i]f any appropriation, or the construction and operation of authorized diversion works results in an injury to any common-law claimant, such person shall be entitled to due compensation in a suitable action at law against the appropriator for damages proved for any property taken." In essence, the statute appears to be conferring on private persons the right of eminent domain. The constitutionality of such a provision as relating to riparian rights in Kansas has not been tested.

80. Emery v. Knapp, 207 P.2d 440, 448 (Kan. 1949).

81. Baumann v. Smrha, 145 F. Supp. 617, 625 (D. Kan.), *aff'd* 352 U.S. 863 (1956); *see* Williams v. City of Wichita, 374 P.2d 578, 595 (Kan. 1962).

82. Williams v. City of Wichita, 374 P.2d 578, 595 (Kan. 1962). Although the case applies to groundwater, the court stated that the same principles would also apply to surface water. *Id.* at 590.

vested rights of water users.[83] In support of its holding, the court stated that the riparian owner's right is to the use of the water and not to the water itself, and hence, legislation restricting the right to its use is not objectionable.[84] The court then considered the restriction placed on vested rights by the legislative recognition of only those beneficial uses made within three years prior to 1945[85] and the provision for extinguishment of those rights not put to beneficial use for three consecutive years.[86] While the court recognized these provisions could have the effect of taking property by legislative fiat, it concluded, nevertheless, that there was adequate constitutional protection since the act provided for a cause of action for damages in favor of a common law owner who has not initiated any beneficial use of water against an appropriator for property taken.[87]

South Dakota

The Kansas Act was deemed constitutional primarily because it provided the riparian owner with a cause of action for compensation for any property rights taken. South Dakota, however, has restricted riparian rights without allowing for compensation to the riparian owner. South Dakota enacted a water rights statute in 1955[88] substituting the beneficial use doctrine for the reasonable use theory, which had been the previous basis of its vested riparian right.[89] The South Dakota Act defines a vested riparian right as that amount of water beneficially used on March 2, 1955, or within the three years immediately preceding that date.[90] As such, the act not only restricts previously vested rights but also extinguishes those vested rights not exercised within the given period.

The Supreme Court of South Dakota upheld the act as a proper exercise of the police power, stating that the public welfare requires protection of the water supply, and that the legislature was acting within its authority

83. *Id.* at 594.

84. *Id.* at 594-95.

85. KAN. STAT. §§ 82a-701(d), 82a-718 (1969). The act defines a vested right as extending to the use of water "having actually been applied to any beneficial use, including domestic use, on or before June 28, 1945." *Id.* § 82a-701(d). It also provides for termination of every water right when no "beneficial use is henceforth made of the water under such right for three successive years." *Id.* § 82a-718. Apparently the court is construing these two provisions together. Recognition is extended to only those beneficial uses made within three years prior to 1945. Williams v. City of Wichita, 374 P.2d 578, 591 (Kan. 1962).

86. KAN. STAT. § 82a-718 (1969).

87. Williams v. City of Wichita, 374 P.2d 578, 595 (Kan. 1962); *see* Cities of Hesston & Sedgwick v. Smrha, 391 P.2d 93, 94 (Kan. 1964).

88. S.D. COMPILED LAWS ANN. §§ 46-1 to -5 (1967).

89. *See* St. Germain Irrigating Co. v. Hawthorn Ditch Co., 143 N.W. 124, 127 (S.D. 1913) (abrogates attempt by legislature to adopt the beneficial use doctrine and to terminate all water rights not put to beneficial use prior to 1907).

90. S.D. COMPILED LAWS ANN. § 46-1-9 (1967).

in providing for conservation and preservation of that natural resource.[91] More recently, the South Dakota Supreme Court sustained that decision as being constitutional, provided that vested rights of a landowner, acquired at the time of passage of the statute, are protected.[92] While this statement seems to indicate that the court is recognizing those riparian claims in existence before adoption of the Act, it is clear from the remainder of the opinion that the only vested rights which could have been acquired at the time of passage of the statute would be in those beneficial uses made during the period 1953 through 1955.[93] Thus, South Dakota has sustained its legislature's limitation and extinction of riparian rights as a proper exercise of the police power.

North Dakota

North Dakota has also adopted a water rights statute[94] that alters its former reasonable use doctrine, which had previously been held to be a vested property right.[95] The North Dakota Act applies the beneficial use theory and provides for recognition of riparian rights only to the extent to which they were beneficially used as of the date on which the legislation was enacted.[96] In upholding the validity of the act, the North Dakota Supreme Court based its decision on the fact that there is no absolute ownership in water which has not actually been used, and it concluded, therefore, that the legislature had acted within its police power since the regulation of water rights was for the public welfare.[97]

DECISIONS OF FOREIGN JURISDICTIONS APPLIED TO THE TEXAS ACT

This analysis of authority from other jurisdictions reveals that the trend in the western semi-arid states is toward an adoption of the beneficial use theory of water rights. What does not emerge from this examination is a uniform method of effecting a changeover from prior reasonable use doctrines.

The California decisions indicate that the riparian owner is entitled to compensation for water losses resulting from abrogation of the reasonable

91. Knight v. Grimes, 127 N.W.2d 708, 711-14 (S.D. 1964) (applying the act to underground water); *see* Belle Fourche Irrigation Dist. v. Smiley, 204 N.W.2d 105, 107-08 (S.D. 1973).

92. Belle Fourche Irrigation Dist. v. Smiley, 176 N.W.2d 239, 245 (S.D. 1970).

93. *Id.* at 246; S.D. COMPLILED LAWS ANN. § 46-1-9 (1967).

94. N.D. CENT. CODE §§ 61-01-01 to -23 (1960).

95. Bigelow v. Draper, 69 N.W. 570, 573 (N.D. 1896); *see* Johnson v. Armour & Co., 291 N.W. 113, 116 (N.D. 1940); McDonough v. Russell-Miller Milling Co., 165 N.W. 504, 505 (N.D. 1917).

96. N.D. CENT. CODE § 61-01-01 (1960).

97. Baeth v. Hoisveen, 157 N.W.2d 728, 732-33 (N.D. 1968).

use doctrine and adoption of the beneficial use theory,[98] and that the legislature may not deprive the riparian owner of any future beneficial uses of the water.[99]

It might be argued that the California Supreme Court's decision that riparian rights may not be lost by statutory forfeiture[100] should not be followed in Texas since the riparian right in Texas is an incorporeal hereditament and is therefore subject to abandonment.[101] It would follow, then, that the provisions of the Texas Act simply define the criteria for determining whether abandonment has occurred. It is a well-established rule in Texas, however, that abandonment of an incorporeal hereditament requires proof of the owner's actual intent to abandon, in addition to establishing his nonuse of that right.[102] Thus, it is clear that even if it were shown that the Texas Act was merely providing for abandonment of an incorporeal right, the statute would fail under this theory because there can be no such abandonment without proof of the requisite intent.

The conclusion to be drawn from the California courts' holdings is that the riparian right is not subject to diminution by the legislature's exercise of police power, except upon providing for compensation to the property owner. Apparently, such compensation would be paid by the state as an exercise of eminent domain. An adoption of the California policy by the courts of Texas would necessitate a finding that the Texas Water Rights Adjudication Act is unconstitutional since it provides for both a limitation and an extinguishment of prior vested riparian rights without compensation.[103]

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98. United States v. Gerlach Livestock Co., 339 U.S. 725, 753-55 (1950); Joslin v. Marin Mun. Water Dist. 60 Cal. Rptr. 377, 385 (1967).

99. United States v. Fallbrook Pub. Util. Dist., 193 F. Supp. 342, 347 (S.D. Cal. 1961), *modified on other grounds,* 347 F.2d 48 (9th Cir. 1965); Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 45 P.2d 972, 989 (Cal. 1935).

100. Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 45 P.2d 972, 988-89 (Cal. 1935).

101. Hidalgo County Water Control & Improvement Dist. v. Hedrick, 226 F.2d 1, 6 (5th Cir. 1955), *cert. denied,* 350 U.S 983 (1956); Martin v. Burr, 111 Tex. 57, 64, 228 S.W. 543, 545 (1921); Rhodes v. Whitehead, 27 Tex. 304, 316 (1863); *see* Magnolia Petroleum Co. v. Dodd, 125 Tex. 125, 129, 81 S.W.2d 653, 655 (1935). The fact that the riparian right is an incorporeal hereditament is not settled law in Texas. An early Texas case indicated that the riparian right was a corporeal interest in real property, holding that it is a part of the land, not in the nature of an easement. Fleming v. Davis, 37 Tex. 173, 201 (1872). Such a determination is supported by decisions in other jurisdictions. *E.g.*, Cary v. Daniels, 46 Mass. 236, 238 (1842); Water Power & Control Comm'n v. Niagra Falls Power Co., 1 N.Y.S.2d 915, 917 (Sup. Ct. 1938); Akron Canal & Hydraulic Co. v. Fontaine, 50 N.E.2d 897 (Ohio Ct. App. 1943).

102. Dallas County v. Miller, 140 Tex. 242, 245, 166 S.W.2d 922, 924 (1942); *see* Adams v. Rowles, 149 Tex. 52, 58, 228 S.W.2d 849, 852 (1950). *But see* Hicks v. City of Houston, 524 S.W.2d 539, 544 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) (inference of intent to abandon arises out of long, continued, and unexplained failure to use).

103. TEX. WATER CODE ANN. § 5.303(b), (c), (i) (1972).

The courts of Kansas and North Dakota upheld the constitutionality of their statutory enactments of the beneficial use doctrine on grounds that the riparian owner's property right is in the use of the water and not in the water itself.[104] In Texas such an argument in favor of the constitutionality of the Texas Act would be untenable. While it is true that the Texas riparian owner's right is one of use and not ownership,[105] his right is a property right which is protected by the constitution.[106] Another distinction between the Kansas Act and the Texas Act is that the former provides the damaged riparian owner with a cause of action against an appropriator of prior water rights,[107] while the latter allows no cause of action for compensation, either public or private. The fact that the Kansas Act allows for compensation was the basis for the Kansas Supreme Court's holding that those provisions of the act which limited or terminated a prior vested right were constitutional.[108] While it may be questioned whether providing the damaged property owner with a remedy against private appropriators satisfies constitutional requirements for compensation, it is clear that such relief is more equitable than none at all. Hence, neither the decisions of Kansas nor those of North Dakota, holding that the adoption of the beneficial use doctrine was a proper exercise of the police power, can support the constitutionality of the Texas Act.

It appears, however, that the South Dakota experience with modification of riparian rights does support the Texas Act. There, it was held that such limitation was a valid exercise of the police power, even though no compensation was provided for lost property rights.[109] When weighed against the reasoning of the decisions in California, Kansas, and North Dakota, though, the holding of the South Dakota court is not compelling.

CONCLUSION

In Texas the riparian right has long been recognized as a property right in the nature of a right in the land itself.[110] The Texas Water Rights Adjudi-

104. Williams v. City of Wichita, 374 P.2d 578, 594-95 (Kan. 1962); Baeth v. Hoisveen, 157 N.W.2d 728, 732 (N.D. 1968).

105. Magnolia Petroleum Co. v. Dodd, 125 Tex. 125, 129, 81 S.W.2d 653, 655 (1935).

106. Hidalgo County Water Control & Improvement Dist. v. Hedrick, 226 F.2d 1, 6 (5th Cir. 1955), *cert. denied,* 350 U.S. 983 (1956); Bigham Bros. v. Port Arthur Channel & Dock Co., 100 Tex. 192, 201, 97 S.W. 686, 688 (1906); Zavala County Water Improvement Dist. v. Rogers, 145 S.W.2d 919, 923 (Tex. Civ. App.—El Paso 1940, no writ).

107. KAN. STAT. § 82a-716 (1969).

108. Williams v. City of Wichita, 374 P.2d 578, 593-94 (Kan. 1962); *see* Cities of Hesston & Sedgwick v. Smrha, 391 P.2d 93, 94 (Kan. 1964).

109. *See* Belle Fourche Irrigation Dist. v. Smiley, 176 N.W.2d 239, 245 (S.D. 1970); Knight v. Grimes, 127 N.W.2d 708, 711-14 (S.D. 1964).

110. Magnolia Petroleum Co. v. Dodd, 125 Tex. 125, 129, 81 S.W.2d 653, 655 (1935); Parker v. El Paso Water Improvement Dist. No. 1, 116 Tex. 631, 643, 297 S.W. 737, 742-43 (1927); Martin v. Burr, 111 Tex. 57, 64, 228 S.W. 543, 545 (1921).

cation Act provides for modification of the reasonable use doctrine, which had long served as the benchmark for determining the vested property interest of the riparian owner. Furthermore, the act provides for nonrecognition of any riparian right for purposes other than domestic or livestock use, to the extent that it was not applied to beneficial use during the period 1963 through 1967 or for which no claim was made in accordance with the statute.

While it is axiomatic that the public welfare can require a degree of servitude on the part of a vested property owner in order to preserve the physical and economic health of society, it is manifest that when the public needs demand acquisition of a vested property right, the owner of that right is entitled to compensation. It would be reasonable to impose a beneficial use restriction on the riparian owner and thus prevent any waste that might have been permissible under the reasonable use theory. It would then be proper for the state to require a filing of these riparian claims, in order that it might determine what is, and what is not, a beneficial use. Such would be a reasonable exercise of authority over vested property rights and, therefore, would be compatible with the notion of the police power. But to allow the legislature to confiscate the property rights of riparian owners who have either not put their right to beneficial use over the designated five year period or who have failed to comply with statutory filing requirements would be to sanction a wrongful abridgment of their constitutional guarantees. "Public interest requires appropriation; it does not require expropriation."[111]

111. United States v. Gerlach Livestock Co., 339 U.S. 725, 753 (1950).