Oklahoma Law Review

Volume 64 | Number 4
Symposium: Oklahoma's 21st Century Water Challenges

2012

Oklahoma Water Rights: What Good Are They?

Gary Allison
University of Tulsa, College of Law, gary-allison@utulsa.edu

OKLAHOMA LAW REVIEW

VOLUME 64 SUMMER 2012 NUMBER 4

OKLAHOMA WATER RIGHTS: WHAT GOOD ARE THEY?

GARY D. ALLISON*

I. Introduction

In Oklahoma water rights are entitlements to take water from surface and groundwater sources for reasonable/beneficial uses.[1] In an ideal world,

* Director of the Sustainable Energy & Resources Law Program, and Professor of Law at the University of Tulsa College of Law. B.S., 1968, University of Tulsa; J.D., 1972, University of Tulsa College of Law; LL.M., 1976, Columbia University School of Law.

This article is dedicated to the memories of the late Joseph F. Rarick, Professor of Law at the University of Oklahoma School of Law, who the author believes was the godfather of modern Oklahoma water law, and the late Eric B. Jensen, Assistant Dean and Assistant Professor of Law at the University of Tulsa College of Law, who introduced Water Law to the University of Tulsa College of Law curriculum. The author wishes to thank Dean Couch, General Counsel of the Oklahoma Water Resources Board, for his continuing willingness to share his knowledge and insight about how Oklahoma confers and manages water rights, and my research assistants, Wyatt Cox and Jason Groves, for their invaluable diligent and accurate work on this project.

1. With respect to stream and lake water, Oklahoma is a dual rights state, which means it "recognizes riparian and appropriative rights as coexistent." Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd., 855 P.2d 568, 571 (Okla. 1990). "[T]he modified common-law riparian right to the reasonable use of the stream is the controlling norm of the law in Oklahoma." *Id.* at 575. For appropriation rights, "[beneficial use shall be the basis, the measure and the limit of the right to the use of water . . . ." 82 OKLA. STAT. § 105.2.A (2011).

Oklahoma has a declared that it is "the public policy of this state . . . to utilize the ground water resources of the state, and for that purpose to provide reasonable regulations for the allocation of reasonable use based on hydrologic surveys of fresh groundwater basins or subbasins . . . ." *Id.* § 1020.2(A). However, in determining whether to grant a permit to take and use groundwater, the Oklahoma Water Resources Board (OWRB) must determine and find that "the use to which the applicant intends to put the water is a beneficial use." *Id.* § 1020.9(A)(1)(b), (2)(b).

Oklahoma water law should provide Oklahoma water users with "stability and certainty in water rights."[2] Unfortunately, the question what good are Oklahoma water rights must be asked because as documented below Oklahoma water law has three major flaws that potentially deprive Oklahoma water users of stability and certainty.

First and foremost, the unfortunate 1990 Oklahoma Supreme Court decision in *Franco-American-American Charolaise, Ltd. v. Oklahoma Water Resources Board*,[3] revived the Riparian Rights Doctrine[4] after it was all but extinguished in favor of the Prior Appropriation Doctrine[5] by water rights reforms enacted in 1963.[6] As a consequence, Oklahoma has once

---

2. *See* 82 OKLA. STAT. § 105.1(A).

3. 855 P.2d 568.

4. For purposes of this article, the Riparian Rights Doctrine refers to the right of all owners of land that abuts a water course (stream or lake) to have the equal right to make reasonable use of the water that flows through or by their land. 1 WATERS AND WATER RIGHTS §§ 7.01, 7.02 at 7-2, 7-14, 7-15 (Robert E. Beck & Amy K. Kelly eds., 3d ed. 2009) [hereinafter WATERS AND WATER RIGHTS 2009 ED.].

5. For purposes of this article, the Prior Appropriation Doctrine refers to

> [a] property right in the use of water . . . created by [the] diversion of the water from a stream (or lake) and its application to a beneficial use. Water can be used at any location, without regard to the position of [the] place of use in relation to the stream. In the event of a shortage of supply, water will be supplied up to a limit of the right in order of temporal priority: the last man to divert and make use of the stream is the first to have his supply cutoff.

Id. § 12.01, at 12-3 (quoting CHARLES J. MEYERS, A HISTORICAL AND FUNCTIONAL ANALYSIS OF THE APPROPRIATION SYSTEM 4 (1971)).

6. *Franco-American*, 855 P.2d at 571. Prior to the 1963 water reforms, the basis of Oklahoma Riparian rights was the statutory declaration that

> [w]ater running in a definite stream, formed by nature over or under the surface may be used by him [the owner of land] 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.

60 OKLA. STAT. § 60 (1961) (quoted in relevant part as found in Joseph R. Rarick, *Oklahoma Water Law, Stream and Surface in the Pre-1963 Period*, 22 OKLA. L. REV. 1, 12 (1969)) [hereinafter Rarick, *Pre-1963 Period*]. Under the 1963 water reforms, all persons, including riparian landowners, were required to seek appropriation permits if they sought to take water from Oklahoma streams for non-domestic uses. Act of June 10, 1963, ch. 205, §§ 1, 2(a), 1963 Okla. Sess. Laws 268 (codified as 60 OKLA. STAT. § 60 (2001)); 82 OKLA. STAT. § 105.2(A) (2001). All persons making non-domestic uses of water at the time the water rights reforms were enacted, whether as an appropriator or a riparian landowner, were required to participate in an adjudication to validate their uses as vested rights to use specific quantities of water for specific beneficial uses and to attach a specified priority date to their vested uses. Act of June 10, 1963, ch. 205, § 2 (b), 1963 Okla. Sess. Laws 268-69 (priority determinations), *modified by* Act of Apr. 7, 1972, ch. 256, § 2 B., 1972 Okla. Sess. Laws 593-94 (codified with modifications at 82 OKLA. STAT. § 105.2(B) (2001)); Act of June 10,

again rejoined the dwindling ranks of states that recognize a true dual water rights system.[7] Part II of this article chronicles the events leading to *Franco-American*'s revival of the Riparian Rights Doctrine, provides a critical analysis of the final *Franco-American* decision, describes the essential characteristics of the dual rights system *Franco-American* revived, demonstrates how the revived dual rights system inflicts instability and uncertainty on Oklahoma's existing and prospective water users, and proposes solutions for ending this instability and uncertainty.

Second, Oklahoma water law does not sufficiently recognize hydraulic connections between groundwater and stream water.[8] This leaves users of

---

1963, ch. 207, § 10, 1963 Okla. Sess. Laws 274-76 (vested rights determination process). Non-domestic uses which were not validated in the vested water rights procedures were effectively extinguished because they did not receive priority dates essential to their recognition within the appropriation rights system. Act of June 10, 1963, ch. 205, § 2 (b), 1963 Okla. Sess. Laws 268, *modified by* Act of Apr. 7, 1972, ch. 256, § 2 B., 1963 Okla. Sess. Laws 593 (codified with modifications as 82 OKLA. STAT. § 105.2(B) (2001)). So, these reforms converted the non-domestic uses by landowners of water from streams riparian to their land into appropriation rights subject to the appropriation doctrine's first-in-time, first-in-right and use-it-or-lose-it rules. 82 OKLA. STAT. § 105.2(B), 105.2(D). For a comprehensive history of the 1963 water reform, see Joseph R. Rarick, *Oklahoma Water Law, Stream and Surface Under the 1963 Amendments*, 23 OKLA. L. REV. 19 (1970); Rarick, *Pre-1963 Period*, *supra* note 6.

7. For purposes of this article, the term "true dual water rights system" means that the water laws of the state still recognize the rights of landowners to take water from streams riparian to their land for new or expanded non-domestic uses without obtaining an appropriation permit. As of now, California and Nebraska are the only other states with "true dual water rights systems." *See* 1 WATERS AND WATER RIGHTS 2009 ED., *supra* note 4, § 8.03(b)(5), at 8-59.

8. For purposes of this article, hydraulic connection "means that water can move between a surface water source and an adjacent aquifer." OR. ADMIN. R. 690-009-0020(6). In some states, such as Colorado, hydraulically connected stream water and groundwater are managed conjunctively with respect to the allocation of water rights. *See* Park Cnty. Sportsmen's Ranch LLP v. Bargas, 986 P.2d 262, 265-66 (Colo. 1999). Thus, in Colorado, groundwater aquifers that are hydraulically connected to streams are treated as stream water subject to the prior appropriation water rights system. *Id.* at 265.

With one exception described below, Oklahoma allocates the right to use water from groundwater basins through its Groundwater Law and allocates the right to use stream water through the application of the Riparian Rights Doctrine as defined in *Franco-American* and its statutorily based Prior Appropriation system. 60 OKLA. STAT. § 60; *Franco-American*, 855 P.2d at 571. Moreover, with one exception, hydraulic connection is not a factor that influences the granting or scope of water rights.

Oklahoma's application of different water right systems to groundwater sources and streams with little consideration of hydraulic connection is a function of how it defines stream water and groundwater. Stream water is water that flows in a definite stream, 60

water from streams that are hydraulically connected to a groundwater source vulnerable to supply disruptions caused by groundwater pumping.[9]

OKLA. STAT. § 60 (2011); 82 OKLA. STAT. §§ 105.2(A) (2011), 1020.1(1) (2011), and groundwater is "fresh water under the surface of the earth regardless of the geological structure in which it is standing or moving outside the cut bank of any definite stream," 82 OKLA. STAT. § 1020.1(1) (2011). Thus, the terms "definite stream" and "cut bank" are the keys to distinguishing stream water from groundwater.

In Oklahoma, a "definite stream" is "a watercourse in a definite, natural channel, with defined beds and banks." 82 OKLA. STAT. § 105.1(1) (2011). The term "cut bank" is not defined either by other Oklahoma Groundwater statutes, *see* 82 OKLA. STAT. §§ 1020.1-1020.22 or the OWRB's Groundwater regulations, OKLA. ADMIN. CODE §§ 785: 30-1-1 – 785: 30-13-9, but it seems clear from Oklahoma's definitions of groundwater and "definite stream" that groundwater is freshwater found below the surface and outside vertical extensions of the boundaries of streams as defined by their banks regardless of its hydrological connection to a definite stream." *See* Eric B. Jensen, *The Allocation of Percolating Water Under the Oklahoma Ground Water Law of 1972*, 14 TULSA L.J. 437, 445-46 (1979). In turn, groundwater found within the area defined by the vertical extensions of a stream's boundary belongs to the stream above even if it is within a groundwater source that is not hydraulically connected to the stream. *Id.*

Prior to 2003, the OWRB awarded groundwater permits without regard to any hydraulic connections between groundwater sources and surface sources. Applicants would receive a groundwater permit upon the OWRB finding that the applicant owns land that overlies the groundwater basin, seeks the water for a beneficial use, and will not commit waste. 82 OKLA. STAT. § 1020.9(A)(1)(a)-(c), (2)(a)-(c). In 2003, Oklahoma modified its Ground Water Law so that now the OWRB will not award a groundwater permit unless it also finds "the proposed use . . . [will not] . . . degrade or interfere with springs or streams emanating in whole or in part from water originating from a sensitive sole source groundwater basin . . . ." Act of June 3, 2003, ch. 365, § 3, 2003 Okla. Sess. Laws 1576-77 (codified at 82 OKLA. STAT. § 1020.9(A)(1)(d), (2)(d) (constitutionality upheld in Jacobs Ranch L.L.C. v. Smith, 148 P.3d 842 (Okla. 2006). Sole source groundwater basins are those that the United States Environmental Protection Agency has designated in whole or in part as a sole or principal drinking water source for purposes of implementing the Safe Drinking Water Act. Safe Drinking Water Act § 2(a), 88 Stat. 1678 (codified at 42 U.S.C. § 300h-3 (e) (2011)); 82 OKLA. STAT. § 1020.9(A)(B)(1). It is therefore clear that the OWRB does not have to consider hydraulic connection issues when determining whether to grant permits for pumping water from groundwater basins that are not sole source groundwater basins as defined above.

9. For example, in *Messer-Bowers Co. v. Oklahoma Water Resources Board*, the Oklahoma Supreme Court held that water that is the source of a spring that feeds a stream is to be deemed groundwater, regardless of its impact on the availability of stream water, if the applicant for a groundwater permit seeks to "drain water directly from [a] groundwater basin." 8 P.3d 877, 880 (Okla. 2000). In reaching this holding, the court distinguished *Messer-Bowers* from its holding in *Oklahoma Water Resources Board. v. City of Lawton*, in which it deemed water that is the source of a spring that feeds a stream to be stream water when the applicant sought to access it at the point where the spring flowed from the earth. 580 P.2d 510, 513 (Okla. 1978). Thus, although groundwater is the source of all springs,

Part III of this article demonstrates how Oklahoma water law fails to coordinate sufficiently the management of groundwater pumping with stream water uses and proposes the means for establishing a workable co-management system.

Third, Oklahoma groundwater law mandates the mining of water from major groundwater sources in a manner that could end their useful lives as sources of fresh water within twenty years.[10] As a matter of policy,

---

and many springs are the sources of stream water, an overlying landowner may take groundwater in a manner that dries out hydrologically connected streams as long as the landowner does so by taking the water directly from the groundwater basin. *Messer-Bowers*, 8 P.3d at 880.

10. Oklahoma considers groundwater basins to be major sources of water if they are bedrock aquifers yielding on average fifty gallons per minute (gpm) per well or are alluvium or alluvium and terrace aquifers yielding on average 150 gpm per well. 82 OKLA. STAT. § 1020.1(3). For purposes of regulating the withdrawal of water from major groundwater sources, the OWRB is directed to establish a maximum annual yield that "shall be based upon a minimum basin or subbasin life of twenty (20) years". 82 OKLA. STAT. § 1020.5(B) (2001). Despite this language, the OWRB sets maximum annual yields so that twenty years of extracting water at the maximum annual yield will not deplete the basin or subbasin but rather will leave enough water below half the overlying acreage to satisfy only domestic needs and enough water below the remaining half of the overlying acreage to exceed the volume of water needed to meet domestic needs. Telephone Interview with Dean Couch, General Counsel, Oklahoma Water Resources Board (Feb. 24, 2012).

This mining mandate emanates from a dramatic change in Oklahoma's groundwater policy. From June 6, 1949, to July 1, 1973, it was the groundwater policy of Oklahoma to "conserve and protect the ground water resources of the State and for that purpose to provide reasonable regulations for the taking and use of ground water." Oklahoma Ground Water Law, ch. 11, § 3, 1949 Okla. Sess. Laws 642. In furtherance of this policy, the 1949 Oklahoma Ground Water Law prohibited the Oklahoma Planning and Resources Board from issuing permits for withdrawing ground water if it found that "such use would result in depletion above the annual ratio of recharge." *Id.* § 13, at 645.

In 1972, the Oklahoma legislature rewrote Oklahoma's groundwater laws. Act of Apr. 7, 1972, ch. 248, 1972 Okla. Sess. Laws 529-34. In doing so, it declared that is was now the groundwater policy of Oklahoma

> to utilize the ground water resources of the state, and for that purpose to provide reasonable regulations for the allocation for reasonable use based on hydrologic surveys of fresh ground water basins or subbasins to determine a restriction on the production, based upon the acres overlying the ground water basin and subbasin.

Id. § 2, at 530 (codified with modifications at 82 OKLA. STAT. § 1020.2 (2011)). Reflecting this pro-use philosophy, the 1972 groundwater modifications relegated the recharge rate to being just one factor the OWRB must consider in determining the maximum annual yield for each groundwater basin of subbasin, and decreed that maximum annual yields "shall be based upon a minimum basin or subbasin life of twenty (20) years." *Id.* § 5, at 530 (codified

allowing groundwater aquifers to be mined is defensible only as applied to aquifers with recharge rates that are too low to provide water users with useful quantities of water.[11] Part IV of this article describes the dynamics of sustainable groundwater sources, assesses the degree to which Oklahoma authorizes the mining of aquifers with recharge rates capable of making them sustainable sources of water, and proposes changes to Oklahoma groundwater law that will effectively prevent the mining of sustainable groundwater sources and more rationally regulate the withdrawals of water from groundwater sources that cannot deliver useful quantities of water unless they are mined.

II. The Dual/Riparian Rights Problem

A. The Riparian Revival

The controversy leading to the Oklahoma Supreme Court reviving riparian rights through its Franco-American decision was a saga lasting nearly thirteen years.[12] It began in the summer of 1980, when drought conditions coupled with the City of Ada's (Ada) continuing exercise of an appropriation water right to take water from Byrds Mill Spring allegedly caused Mill Creek to go dry to the detriment of downstream senior appropriators and riparian domestic users (hereinafter referred to as

---

as modified to apply the twenty year minimum life mandate only to major basins and subbasins at 82 OKLA. STAT. § 1020.5(A), (B) (2011)).

11. *See* 3 WATERS AND WATER RIGHTS 2009 ED., *supra* note 4, § 18.05, at 18-49 to 18-54; Peter H. Gleick, *Mining Groundwater for Profit: The Cadiz Project*, HUFF POST GREEN (Jan. 24, 2012, 1:36 PM), http://www.huffingtonpost.com/peter-h-gleick/cadiz-project-environment_b_1228398.html.

12. For a detailed account of this saga, see Gary D. Allison, *Franco-American Charolaise: The Never Ending Story*, 30 TULSA L.J. 1, 24-50 (1994). The saga included the nearly six years it took the Oklahoma Supreme Court to finalize its decision after first issuing a decision that was the polar opposite of the final one. In its first decision, by a vote of six to three, the court preserved the unitary water rights system created by the 1963 water rights reforms. Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd., 58 OKLA. BAR J. 1406, 1407, 1411, 1414 nn.30-32 (Okla. May 19, 1987); Allison, *supra* note 12, at 45. This decision was withdrawn pursuant to petitions for rehearing, and the court subsequently issued a new decision in which it effectively reversed its first decision and revived the riparian rights doctrine. Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd., 61 OKLA. BAR J. 1114 (Okla. Apr. 24, 1990). The second decision was also promptly withdrawn, and nearly three years later it was issued unchanged and became the official Franco-American decision. *Franco-American*, 855 P.2d 568.

landowners).[13] Thereafter, Ada filed an application with the OWRB to increase its appropriation rights to take water from Byrds Mill Spring.[14] Ada's application was bitterly opposed by disgruntled landowners in the OWRB proceedings.[15] Riparian rights were never asserted or mentioned during the OWRB proceedings,[16] and the OWRB issued Ada a new appropriation permit granting it the right to appropriate significantly more water from Byrds Mill Spring.[17] Accordingly, in the various appeals that followed there were numerous non-riparian issues at stake. However, these non-riparian issues are not discussed because the focus of this article in on how *Franco-American* revived riparian rights.

On appeal in state district court, the disgruntled landowners asserted a riparian rights argument for the first time.[18] They contended that by granting additional appropriation rights to Ada, the OWRB had allocated the entire flow of Byrds Mill Spring to consumptive users and therefore the streams fed by the spring would go dry even during average flow years.[19] The landowners then argued that OWRB orders permitting appropriations that would dry out Byrd Mills Creek would unconstitutionally deprive them of their riparian right to a minimum stream flow in the streams abutting

---

13. *Franco-American*, 855 P.2d at 571; Transcript of Protest Hearing on City of Ada Stream Water Application No. 80-107, at 105, 106, 118 (Dec. 18, 1980) (testimony of George Braly) [hereinafter G. Braly Testimony] (on file with author).

14. Application of City of Ada to Oklahoma Water Resources Board (Aug. 21, 1980), *in* Records at 1, *Franco-American*, 855 P.2d 568 (No. 59,310) (on file with author) (seeking to appropriate an additional 7842 AF/y from the Byrds Mill Spring).

15. Protest Hearing on City of Ada Stream Water Application No. 80-107, *supra* note 13, at 97-101 (testimony of Mack Braly, Sr.); G. Braly Testimony, *supra* note 13, at 101-18. At the time of the Protest Hearing, Mack Braly, a rancher, was nearly seventy years old, and he had the assertiveness that may be expected of a person who had been on General George Patton's Third Army officer staff. Interview with George Braly, in Ada, Okla. (Mar. 14, 1994). Mack Braly's son George Braly, an attorney rancher who had earned an undergraduate engineering degree with a concentration in fluid mechanics from Brown University, acted as an attorney in these proceeding on behalf of his father, himself, and domestic riparian users and appropriators located downstream from Bryds Mill Spring. G. Braly Testimony, *supra* note 13, at 102. He was a very aggressive cross-examiner of opposition witnesses.

16. *Id.* at 120-26 (closing argument of George Braly).

17. *Id.*; Permit to Appropriate Stream Water, No. P80-107 (Okla. Water Res. Bd., May 12, 1981), *in* Records, *supra* note 14, at 323 (authorizing City of Ada to appropriate another 5340 AF/y from Bryds Mill Spring).

18. Brief for Appellant at 2, 20-22, Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd, No. C-81-23 (Coal Cnty. Dist. Ct. Okla. Sept. 21, 1981).

19. *Id.*

their land.[20] They also asserted that the riparian landowners' rights to a minimum stream supports "a beneficial use of water; beneficial for fish, wildlife, and aesthetic purposes."[21]

The district court found for the landowners, issuing a narrow constitutional holding that riparian landowners have a vested right to a natural, normal flow or underflow of the stream that cannot be taken without compensation, and that this right is taken when appropriations granted pursuant to the 1963 water rights reforms would dry up substantial streams.[22] This was a far cry from restoring fully riparian rights and re-establishing Oklahoma's Dual Rights System. As *Franco-American* left the district court for the Oklahoma Supreme Court, no one had as yet asked for

---

20. The landowners cited language from the court's syllabus in *Baker v. Ellis*, 292 P.2d 1037 (Okla. 1956), for the proposition that "each [riparian] is limited to a reasonable use, with due regard to the rights and necessities of others interested. It is the right of all to have the stream substantially preserved in its natural size, flow, and purity and protected from material diversion." Brief for Appellant, *supra* note 18, at 21.

In fact, the riparian law applied by the *Baker* court was based on the reasonable use theory of riparian rights: "Where plaintiff and defendant both own land adjacent to a definite water course, both of them are entitled to a reasonable use of the waters thereof so long as such use does not cause substantial damage or detriment to the other." *Baker*, 292 P.2d at 1039. The court applied this language to the facts of the case to enjoin the construction of a dam on the defendants' land that would have severely diminished the flow of water the plaintiff had relied on to water his cattle. *Id.* at 1039-40.

21. Brief for Appellant, *supra* note 18, at 22.

22. *Id.* at 5, 7-11. Judge Fishel reached this conclusion by misreading *Baker*, for the proposition that in Oklahoma riparian landowners have a vested right to some maintenance of a stream flow through or by their land. In fact, the Oklahoma Supreme Court has long held that Oklahoma is a reasonable use state, meaning that riparian land owners may diminish the flow of the stream to accommodate reasonable uses of water. Smith v. Stanolind Oil & Gas Co., 172 P.2d 1002, 1004-06 (1946); *Franco-American*, No. C-81-23, at 8. He then bolstered this conclusion by citing *Wasserburger v. Coffee*, 141 N.W.2d 738 (Neb. 1966) (holding that riparian rights acquired by the settlement of riparian lands prior to the Nebraska legislature enacting the prior appropriation system were superior to all appropriative rights, *id.* at 742-47, and that conflicts between the two would be settled by a comparative reasonableness analysis, *id.* at 745-47) and *United States v. Gerlach Livestock Co.*, 339 U.S. 725 (1950) (holding that under California law, riparian landowners were entitled to be compensated for the loss of benefits accruing to their grasslands from the seasonal overflows from the streams passing through their land even though this method of receiving water was extremely wasteful, *id.* at 729, 730, 742-55). *Franco-American*, No. C-81-23, at 9-11. From these cases and his misreading of *Ellis*, Judge Fishel held that Ada could not appropriate water in a manner that deprived downstream riparian landowners of their rights to a reasonable minimum flow without condemning these rights. *Id*. at 11.

the 1963 water rights reforms to be declared unconstitutional or for a complete restoration of the Riparian Rights Doctrine. [23]

Ada's attempt to appropriate more water from Byrds Mill Spring was threatened by the district court's holding that riparian landowners have the right to have a minimum flow of water pass through or by their land.[24] So, in its appeal to the Oklahoma Supreme Court, Ada argued that riparian rights in Oklahoma consist of the right to the reasonable use of the stream rather than to a minimum flow,[25] the 1963 water reforms limited this right of reasonable use to domestic uses,[26] and it was constitutional for the 1963 water reforms to cut-off the right of riparian landowners to initiate new or expanded non-domestic uses, including those that would be supported by a minimum stream flow, without securing an appropriation permit.[27] Ada

---

23. In his conclusion of law with respect to the minimum flow issue, Judge Fishel noted that:

> The Protestants have not made a general challenge to the constitutionality of Oklahoma's stream water appropriations statutes, but do however assert that whatever power the State may have under its inherent police power to protect the general public . . . the exercise of such power cannot extend so far as to completely dry up what has historically been a substantial stream which flowed in dry weather, as well as in wet weather.
>
> . . .
>
> This Court at this time is not required to determine how much stream flow is enough. The Protestants have merely asserted that a trickle or zero stream flow is certainly not enough. With this assertion, this Court agrees.

Franco-American, No. C-81-23, at 8.

24. *See* Brief for Appellant at 8-9, Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd., 855 P.2d 568 (Okla. 1990) (No. 59,310).

25. Key elements of this argument included the Appellant's contentions that:

(1) There was never a time under Oklahoma law when the Appellee riparian landowners land had a "clear unquestioned riparian right." Brief for Appellant, *supra* note 24, at 2-3; Reply Brief for Appellant at 10-23, *Franco-American*, 855 P.2d 568 (No. 59,310).

(2) Riparian rights cases in Oklahoma emphasize the right of use, not flow. Brief for Appellant, *supra* note 24, at 3-5, *Franco-American*, 855 P.2d 568 (No. 59,310); Reply Brief for Appellant at 33, *Franco-American*, 855 P.2d 568 (No. 59,310) (debunking the notion that *Baker v. Ellis* established that riparian landowners have flow rights as well as the right of reasonable use).

26. Brief for Appellant, *supra* note 24, at 5-6; Reply Brief for Appellant, *supra* note 25, at 33.

27. To this end, the Appellant argued that:

(1) The 1963 water reforms ended any riparian right to a minimum flow because it added language to the provision prohibiting landowners from preventing the natural flow of the stream to declare that the water within that natural flow becomes public water and is "subject to appropriation." Brief for Appellant, *supra* note 24, at 5-6.

(2) The 1963 water reforms protected vested rights based on existing riparian reasonable uses still in existence at the time the reforms became effective through a process for

closed by asserting that its riparian challengers had no vested right to a minimum stream flow and they would have to secure an appropriation permit to secure the minimum stream flow needed to support the non-consumptive beneficial uses they sought to advance.[28] It is to be noted that in its Reply Brief, Ada also asserted that its landowner challengers had waived any rights they may have had by virtue of owning riparian land by previously obtaining appropriation rights.[29]

Having begun their opposition to Ada's quest to appropriate more water from Byrds Mill Spring in defense of their appropriation rights,[30] the landowners responded to Ada's supreme court appeal as Riparian Landowners.[31] They first contended that prior to statehood only the riparian rights system operated in the Indian Territory and therefore their predecessors acquired vested riparian rights that in some form were passed on to them.[32] Next, the landowners traced the codification of various water

converting those uses into appropriation rights. *Id.* at 12; Reply Brief for Appellant, *supra* note 25, at 24.

(3) States have the right to change their water law as long as they protect vested rights. Brief for Appellant, *supra* note 24, at 5-6; Reply Brief for Appellant, *supra* note 25, at 25-33 (detailing the successful efforts of other states to extinguish unused riparian rights and distinguishing the circumstances in California and Nebraska where riparian landowners still have limited rights to initiate new or expanded reasonable non-domestic uses).

(4) Past Oklahoma laws conferring condemnation rights on riparian landowners did not impose constitutional barriers to extinguishing unused riparian rights, Reply Brief for Appellant, *supra* note 25, at 36-51.

(a) The only Oklahoma condemnation statute that expressly referred to the condemnation of riparian rights was taken verbatim from Texas, and the Texas Supreme Court held that it was no barrier to Texas extinguishing unused riparian rights. *Id.* at 37-41, 48-49.

(b) After 1909, Oklahoma statutes concerning the condemnation of water rights did not expressly mention riparian rights and applied only to water rights perfected by use. *Id.* at 41-49.

(c) Seven of the nine states that once had dual water rights regimes managed to abolish the unused riparian right without compensation (Kansas, Nebraska, North Dakota, Oregon, South Dakota, Texas and Washington), leaving only California which did not attempt to abolish riparian rights. *Id.* at 48-51.

28. *Id.* at 61-63.

29. *Id.* at 2-4. In support of this assertion, Ada cited a century-old Oregon case for the proposition that the exercise of the one is the waiver of the other. *Id.* at 3 (citing North Powder Mill Co. v. Coughanour, 54 P. 223, 227 (1898)).

30. Protest Hearing on City of Ada Stream Water Application No. 80-107, *supra* note 13, at 120-26 (closing argument of George Braly).

31. Answer Brief for Appellees, *Franco-American*, 855 P.2d 568 (No. 59,310).

32. *Id.* at 77-81.

rights condemnation statutes from pre-statehood through 1972,[33] and asserted that these statutes "declared the constitutional right of the riparian to be compensated for any loss of this right to use water in a stream on his property."[34] The landowners closed by arguing that the 1963 water reforms took from them without compensation vested flow rights they obtained by owning riparian land[35] and that the minimum flow they sought to protect was supporting several beneficial uses.[36]

In its first attempt to resolve the dispute between Ada and the landowners, the Oklahoma Supreme Court decided in favor of the landowners on all of the non-riparian issues,[37] but it held that in Oklahoma the only vested riparian rights were the non-domestic riparian uses that had been converted into vested rights through the vested rights proceedings established by the 1963 water reforms.[38] This opinion was soon withdrawn pursuant to petitions for rehearing.[39]

On April 24, 1990, the Oklahoma Supreme Court issued what became its final *Franco-American* opinion.[40] Leaving nothing to suspense, Justice Opala, writing for a Five-Justice Majority, followed his statement of the

---

33. *Id.* at 82-86.

34. *Id.* at 86.

35. In support of this argument, the landowners interpreted *United States v. Gerlach Livestock Co.*, 339 U.S. 725 (1950), and *Herminghaus v. Southern California Edison*, 252 P. 607 (Cal. 1926), as establishing that historic riparian rights cannot be infringed by appropriators in absence of compensation. Answer Brief for Appellees at 92-94, 103-105, *Franco-American,* 855 P.2d 568 (No. 59,310). Then the landowners argued that they had actually used the flow rights they were defending because they derived non-consumptive benefits from them and were therefore entitled either to the flow necessary to preserve these benefits or compensation for their loss. *Id.* at 95-96. They closed this argument by asserting that accounts of how the 1963 water reforms were drafted demonstrated that the drafters knew they were attempting to take without compensation the non-consumptive benefits of riparian rights. *Id.* at 96-99.

36. The landowners characterized the minimum flow that they sought to protect as the "dry weather base flow, or 'ordinary flow' . . . ." Answer Brief for Appellees, *supra* note 35, at 104. They equated the dry weather base flow with the water provided to the Mill Creek-Clear Boggy Stream System by Byrds Mill Spring during times when there is no rainfall runoff flowing into the stream. *Id.* at 101-02, 111-14.

37. Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd., 58 OKLA. B.J. 1406, 1408-14 (Okla. May 19, 1987).

38. *Id*. at 1407, 1411, 1414 nn. 30-32.

39. Allison, *supra* note 12, at 45.

40. Franco-American Charolaise, Ltd v. Okla. Water Res. Bd., 61 OKLA. B.J. 1114 (Okla. Apr. 24, 1990). As was its first opinion, the court's 1990 opinion was also withdrawn pursuant to a petition for rehearing, and nearly three years later (April 13, 1993) it was finally released without change. *See* Allison, *supra* note 12, at 47.

questions by promptly announcing the rival of the Riparian Rights Doctrine:

> We hold that the Oklahoma riparian owner enjoys a vested common-law right to the reasonable use of the stream. This right is a valuable part of the property owner's 'bundle of sticks' and may not be taken for public use without compensation. We further hold that, inasmuch as *60 O.S. 1981 § 60*, as amended in 1963, limits the riparian owner to domestic use and declares that all other water in the stream becomes public water subject to appropriation without any provision for compensating the riparian owner, the statute violates Art. 2 § 24, Okl. Const.
>
> In addition, we declare that the California Doctrine . . . , which recognizes riparian and appropriative rights as coexistent, is the prevailing law in Oklahoma; . . . that a perfected appropriative right is a vested right which may not be permanently divested except for nonuse . . . but is subject to senior appropriative rights and reasonable riparian uses during shortages; and that in the future a riparian owner seeking an appropriation of stream water must be deemed to have voluntarily relinquished his riparian rights in that stream except . . . for domestic uses.[41]

B. A Critical Analysis

The Court justified its revival of the common-law riparian right through a rather simplistic takings analysis.[42] This analysis began with the Court piecing together a working description of the common-law riparian right it had just revived.[43] The Court's fragmented descriptions of the common-law riparian right can be summarized as a vested property right of landowners to initiate or expand at any time the non-domestic use of water from streams abutting their land, to maintain these uses as long as they are reasonable as compared to other riparian uses, to assume the risk that their existing uses will someday be destroyed by a court finding them to be

41. Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd., 855 P.2d 568, 571 (Okla. 1990).

42. *Id.* at 576-77.

43. The court did not in one place provide this working definition; however, a working definition nevertheless emerges by piecing together the court's various descriptions of the riparian right, *id.* at 572, 573, 575 & n. 40, and discussions of how it was impaired by the 1963 water reforms. *See id.* at 576-77.

unreasonable in light of another landowner initiating a new use deemed to be more valuable, and to have all reasonable riparian uses accorded equal priority superior to all appropriative uses.[44]

Then the Court provided a disjointed discussion defining the term vested right and distinguishing between government action that regulates it from that which takes it.[45] To this end, the Court declared that "[a] vested right is the power to do certain actions . . . lawfully, . . . is substantially a property right, [and once] created, . . . becomes absolute, and is protected from legislative invasion . . . ."[46] As a result of its definition of a vested right, the Court implied that the common-law right to make reasonable use of stream water "has been long recognized . . . as a private property right."[47] After citing cases distinguishing between an example of the State regulating the use of private property (i.e., regulating the manner in which hydrocarbons are extracted) in a manner that did not require it to pay compensation,[48] and an example of a City taking private property (i.e., extracting and selling hydrocarbons from under a person's land after prohibiting him from

---

44. This summary is derived from the court's fragmented descriptions of the common-law riparian right. Thus, the court declared that "[r]iparian rights arise from land ownership, attaching only to those lands which touch the stream. A riparian interest, though one in real property, is not absolute or exclusive; it is usufructuary in character and subject to the rights of other riparian owners. A riparian right is neither constant nor judicially quantifiable *in futuro*." *Id.* at 573. "The common-law riparian right extends to the reasonable use of the stream . . . [and t]he last riparian use asserted has as much priority as the first." *Id.* at 572. "[A] riparian owner may use the stream water as long as the use is *reasonable* and does not tend to injure or damage other riparian owners." *Id.* at 575. Riparian landowners have a

> vested interest in the prospective reasonable use of the stream . . . [for the] heart of the riparian right is the right to assert a use at *any time* as long as it does not harm another riparian who has a corresponding right. Further, yesterday's reasonable use by one riparian may become unreasonable tomorrow when a fellow riparian owner asserts a new or expanded use.

Id. at 577. So, "the common-law riparian right . . . places no stock in the fact of past use, present use, or even non-use." *Id.* "[A] perfected appropriative right is a vested right which may not be permanently divested except for nonuse . . . *but is subject to* senior appropriative rights and *reasonable riparian uses* during times of shortage." *Id.* at 571 (emphasis added).

> Should a riparian owner assert [his or her] vested right to initiate a *reasonable* use of the stream, *and* should the water in the stream be insufficient to supply that owner's reasonable use, we hold that the appropriator with the last priority must either release water into the stream . . . or stop diverting an amount sufficient to supply the riparian owner's reasonable use . . . .

Id. at 582.

45. *Id.* at 576.

46. *Id.*

47. *Id.*

48. *Id.* (citing C. C. Julian Oil & Royalties Co. v. Capshaw, 292 P. 841 (Okla. 1930)).

extracting them) in a manner that obligated it to pay compensation,[49] the Court jumped to the conclusion that the 1963 water reforms unconstitutionally "abolish[ed] the right of the riparian owner to assert [his or her] vested interest in the prospective reasonable use of the stream" [50]

The jump to the conclusion that the 1963 water reforms unconstitutionally took a vested property right away from riparian landowners without compensation was a large and abrupt leap of logic. So the Court proceeded with a discussion designed to demonstrate that the 1963 water reforms no longer permitted riparian landowners to do all of things they were permitted to do under the common-law riparian rights system.[51]

Thus, the Court complained that under the 1963 water reforms "[t]he riparian owner[] stands on equal footing with [the appropriator, and his] ownership of riparian land affords [him] *no right* to the stream water except for limited domestic use."[52] The Court was also distressed that after the 1963 water reforms riparian landowners could initiate new or expanded non-domestic uses only as an appropriator, which meant that their uses are "not judged by [their] reasonableness but only by [their] priority in time."[53] Finally, the Court was displeased that the appropriation process conditioned the riparian landowner's ability to get a water right on whether water was available and provided him with water rights that were lower in priority than all previous uses and subject to a quantified maximum use limitation.[54]

From its discussion of how the 1963 water reforms changed the means by which riparian landowners could acquire stream water for non-domestic uses, it is clear that the reforms did not deny riparian landowners all access to water from the streams abutting their land. Riparian landowners retained the right to take, at any time, water from the streams abutting their property to support domestic uses,[55] and those domestic uses retained priority over all other stream water uses.[56] Riparian landowners also had the opportunity

---

49. *Id.* (citing Frost v. Ponca City, 541 P.2d 1321, 1324 (1975)).

50. *Id.* at 577.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. 60 OKLA. STAT. § 60 (2011); 82 OKLA. STAT. §§ 105.1 (2), 105.1(A), 105.2(A) (2011).

56. To that end, the 1963 water reform exempted domestic uses from the appropriation priority system. Act of June 10, 1963, ch. 205, § 2(a), 1963 Okla. Sess. Laws 268 (codified as 82 OKLA. STAT. § 105.2(A)). In 1993, after the *Franco-American* decision was finalized, Oklahoma enacted a new provision declaring that the enactment of the 1963 water reforms

to convert their existing non-domestic uses into vested water rights with highly favorable priority dates.[57] Most importantly, riparian landowners shared with other Oklahomans in need of water the right to initiate new non-domestic uses of stream water under prior appropriation rules designed to protect the integrity of existing water uses and insure that Oklahoma stream water supports only beneficial uses.[58]

Given that riparian landowners continued to have ample means for obtaining stream water for non-domestic uses, it is hard to understand how the case of a city taking and selling hydrocarbons located beneath the land of private persons furnishes support for the conclusion that the 1963 water reforms took a vested property interest from riparian landowners. In fact, the effects the 1963 water reforms had upon riparian landowners' right to use stream water for non-domestic uses is much more analogous to the case involving the regulation of the means of extracting hydrocarbons. The regulation of the means of extracting hydrocarbons merely changed the way mineral owners could extract hydrocarbons, just as the 1963 water reforms merely changed the way riparian landowners could obtain stream water for non-domestic uses from streams abutting their land. The Court wrote

---

made sure that the appropriation system does not interfere with riparian domestic uses. Act of June 7, 1993, ch. 310, § 1, 1993 Okla. Sess. Laws 1625 (codified as 82 OKLA. STAT. § 105.1(A)).

57. Act of June 10, 1963, § 2(b) (priority determinations), *modified by* Act of Apr. 7, 1972, ch. 256, § 2(B), 1972 Okla. Sess. Laws 593-94 (codified with modifications as 82 OKLA. STAT. § 105.2(B) (2001)); Act of June 10, 1963, § 10 (vested rights determination process).

58. For purposes of determining who gets to appropriate stream water, the 1963 water reforms declared that "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water . . . ." Act of June 10, 1963, § 2(a) (codified as 82 OKLA. STAT. § 105.2(A)). To protect existing beneficial uses, the 1963 water reforms stated that "[p]riority in time shall give the better right." *Id.* § 2(b) (codified as 82 OKLA. STAT. § 105.2(B)). In 1972, Oklahoma enacted a provision governing the process for deciding whether a person should receive a permit to appropriate water from a stream that requires the OWRB to determine whether "[t]here is unappropriated water available . . . [t]he applicant has a present or future need for the water . . . the use to which the applicant intends to put the water is a beneficial use; [and the] proposed use does not interfere with domestic or existing appropriative uses." Act of Apr. 7, 1972 § 12(1)-(3) (codified as 82 OKLA. STAT. § 105.12(A)(1)-(3) (Supp. 2010)). In 1993, after *Franco-American* was finalized, Oklahoma enacted a new provision declaring that the purpose of the 1963 water reforms was "to provide for stability and certainty in water rights by replacing the incompatible dual systems of riparian and appropriative water rights . . . with an appropriation system of regulation requiring the beneficial use of water and providing that priority in time shall give the better right." Act of June 7, 1993, ch. 310, § 1, 1993 Okla. Sess. Laws 1625 (codified as 82 OKLA. STAT. § 105(1)(A)).

approvingly of its decision that regulating the means of extracting hydrocarbons does not take a mineral owner's property without just compensation[59] and it should have used that decision as precedent for upholding the validity of the 1963 water reforms.[60]

Not only is the Court's taking decision not supported by its own rationale, as will be shown below it is greatly at variance with the normative taking analysis used to decide whether government regulatory action has taken a person's property without compensation. Prohibitions against taking private property for a government purpose without compensation "'bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public at large.'"[61] Not surprisingly then, the tests developed by the United States Supreme Court for determining when government regulation or action takes private property focus "directly upon the severity of the burden that government imposes upon private property rights."[62]

Government regulation constitutes a taking per se if it results the "owner . . . suffer[ing] a permanent physical invasion of her property,"[63] either by the government itself or some third party.[64] Government regulation that deprives the owner of all economic use of his property also constitutes a taking per se.[65] Less extreme forms of government regulation are assessed to see if they constitute a taking through "ad hoc factual inquiries" employing such factors as the degree of economic impact on the owner's property, "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the government action."[66]

The 1963 water reforms did not affect the property of riparian landowners in ways that constitute takings per se. Neither government nor private parties were authorized to occupy physically anyone's riparian land. Riparian landowners were not restricted in the uses to which they could put their land, and they retained the ability to secure water for domestic and non-domestic uses on their riparian land. So, the 1963 water reforms did not

59. *Franco American*, 855 P.2d at 576.

60. *See id.* at 582-83, 593-94 (Lavender, J., dissenting).

61. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

62. *Id.* at 539.

63. *Id.* at 538.

64. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426-31, 435-38 (1982).

65. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015-19 (1992).

66. Penn Cent. Trans. Co. v. New York, 438 U.S. 104, 124 (1978).

deprive riparian landowners of all economic use of their riparian land. Moreover, it is difficult to make the case that riparian landowners suffered a significant loss in the value of their riparian land because they were forced to seek water for new or expanded non-domestic uses through the prior appropriation system.

Under the appropriation system, riparian landowners can appropriate stream water for new or expanded uses by showing the OWRB that their proposed uses are beneficial (i.e., they have social and/or economic value),[67] there is enough unappropriated water to meet their needs,[68] and the proposed uses will not interfere with existing domestic and appropriative uses.[69] Once riparian landowners have successfully appropriated water for a beneficial use, they may maintain their uses unless during times of water shortage all the remaining water must be devoted to satisfying the needs of domestic users and senior appropriators.[70] Should circumstances other than water shortage force the riparian landowner to discontinue using all or part of his appropriative entitlement, he may resume using his full entitlement again unless his entitlement has been forfeited in whole or in part due seven continuous years of non-use.[71]

In contrast, under the dual rights system riparian landowners can initiate new or expanded uses at any time they choose, without having to seek

---

67. 82 OKLA. STAT. § 105.12(A)(2) (Supp. 2010). Oklahoma has identified particular uses that are deemed to be beneficial, and the nature of the uses so-identified confirms that beneficial uses are those that support uses that generate economic or social value. Beneficial use is defined by the OWRB as

> the use of such quantity of stream or groundwater when reasonable intelligence and reasonable diligence are exercised in its application for a lawful purpose and as is economically necessary for that purpose. Beneficial uses include but are not limited to municipal, industrial, agricultural, irrigation, recreation, fish and wildlife, etc.

OKLA. ADMIN. CODE § 785:20-1-2 (2011). Consistent with this definition, the OWRB has declared that the

> purposes for which the public waters of this State may be appropriated are agriculture, irrigation, mining, drilling of oil and gas wells, recovery of oil and gas, milling, manufacturing, power production, industrial purposes, the construction and operation of water works for cities and towns, stock raising, public parks, game management areas, propagation and utilization of fishery resources, recreation, housing developments, pleasure resorts, artificial recharge of a groundwater basin or subbasin or any other beneficial uses.

Id. § 785:20-1-5(a).

68. 82 OKLA. STAT. § 105.12(A)(1).

69. *Id.* § 105.12(A)(3).

70. *Id.* § 105.2(A)-(B).

71. *Id.* § 105.17(B).

permission from the OWRB, by diverting water from streams abutting their land.[72] These uses can be initiated successfully and maintained indefinitely as long as there is enough water available to satisfy the needs of all persons taking water from the stream.[73] If water is in short supply, water will be denied only to those whose uses are determined in district court not to be reasonable after comparing the relative merits of all existing uses.[74] If there is still not enough water after unreasonable uses are curtailed, appropriators will be curtailed in accordance with the seniority of the their appropriation rights,[75] and then the remaining shortage, if any, will be borne proportionately by all reasonable riparian uses.[76]

When water is available to cover all existing and prospective uses, the only economic disadvantage imposed on riparian landowners by the appropriation system is the expense associated with the necessity to seek OWRB permission to initiate a new or expanded use. Given the expansiveness of Oklahoma's definition of beneficial use,[77] riparian landowners' uses will rarely be deemed not to be beneficial. Given the volume of water usually available in Oklahoma streams, their proposed uses should rarely be found to interfere with existing uses. Riparian landowners will be subject to having their appropriative rights extinguished for non-use, but it should be rare that they would be unable to use all or part of their appropriative entitlement for seven continuous years. In the event that they did lose their appropriative right for non-use, they will be obligated to seek permission from the OWRB to commence the use again.

---

72. Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd., 855 P.2d 568, 577 (Okla. 1990).

73. *Id.* at 575, 577 (emphasizing that riparian uses can be maintained as long as they do not injure or interfere with the uses of other riparian landowners; it is mainly during times of water shortage that one riparian use will interfere with another).

74. *Id.* at 578 (adopting what the court characterizes as the Nebraska approach of determining the "rights of the riparian owner and the appropriator . . . by relative reasonableness").

75. *Id.* at 571 (stating that appropriative rights are "subject to senior appropriative rights and reasonable riparian uses during shortages"). Also, the court emphasized that junior appropriators must make way for new or expanded reasonable uses if there is not enough water to accommodate them. *Id.* at 582.

76. The court did not address this contingency, but support for the idea that reasonable riparian uses share the burdens of water shortage comes from the tendency of courts in western states to resolve disputes among riparian irrigators during times of shortage by "ordering the sharing of the shortage in proportion to some common measure of use . . . ." 1 WATERS AND WATER RIGHTS § 7.03(c)(1) at 7-92, 7-93 (Amy K. Kelly ed., LexisNexis 3d ed. 2007) [hereinafter WATERS AND WATER RIGHTS 2007 ED.].

77. 82 Okla. Stat. § 105.17(B) (2011).

It is difficult to assess in the abstract whether the appropriation system imposes economic disadvantages on riparian landowners during time when water is in short supply. Their domestic uses have the highest priority and therefore receive water before all other uses, just as they do under the dual rights system. Their non-domestic uses receive water in accordance to their seniority, which means that during times of water shortage only the most junior non-domestic water uses will be subject to curtailment in whole or in part.

Given the difficulty in assessing the relative risks that a riparian landowner would have his non-domestic use curtailed during times of water shortage, it is unlikely that the value of his riparian land would be diminished significantly or at all simply because his right to initiate new or expanded non-domestic uses was made subject to the rules of the appropriation system. The appropriation system's first-in-time, first-in-right principle would impose an economic loss on a riparian landowner with a junior water right only if that use would have been deemed by a court to be reasonable relative to the value of all other existing uses competing for scarce water supplies and if there would have been enough water to satisfy all reasonable riparian uses. Otherwise, the junior water use that would be curtailed under the appropriation system's first-in-time, first-in-right rationing principle would also have been curtailed in whole or in part under the dual rights system revived by Franco-American because it either would be deemed to be unreasonable or it would have to share the water shortage with all other reasonable riparian uses.

In fact, when there is not enough water to satisfy all reasonable riparian uses, the dual rights system's method of rationing water during times of shortage will cause partial curtailment of reasonable riparian water uses with enough seniority to receive their full entitlement under the appropriation system's first-in-time, first-in-right rationing principle. Under the appropriation system, a use deemed to be beneficial at the time it was approved by the OWRB will not be subject to a reconsideration of its beneficial use designation during times of shortage. However, under the dual rights system this same beneficial use could be curtailed despite its seniority because its reasonableness, which is measured against the relative value of other competing uses, is subject to reconsideration when conditions on the stream change.

In sum, the Court erred in holding that the 1963 water reforms unconstitutionally took property from riparian landowners. Its rationale does not support that holding. The reforms did not impose burdens on the ability of riparian landowners to derive value from the use of their riparian

land that are severe enough to constitute an unconstitutional taking as measured by normative takings standards established by the United States Supreme Court. Not surprisingly, then, the *Franco-American* decision is also at odds with case law from six former dual rights states—Kansas, North Dakota, Oregon, South Dakota, Texas, and Washington—that upheld the constitutionality of legislation designed to transform a dual rights steam water system into one dominated by the appropriation doctrine in the wake of assertions that the transformation unconstitutionally took property from riparian landowners.[78]

C. The Dual Rights System's Operational Characteristics

Having revived Oklahoma's dual rights regime, the Court then felt compelled to offer a means of reconciling what it acknowledged was a regime consisting of two "theoretically irreconcilable" water rights systems.[79] To that end, the Court announced that "the modified common-law riparian right is the controlling norm of law in Oklahoma" and "the statutory right to appropriate stream water coexists with, but does not preempt or abrogate, the riparian owner's common-law right."[80] Accordingly, reasonable non-domestic riparian uses were given priority

78. Specifically, the legislation approved by the supreme courts of these states created mechanisms for providing riparian landowners with vested rights comparable to appropriative rights for their current riparian uses and required them to seek appropriation rights for new or expanded uses after a certain date specified in the legislation. The Kansas cases are *F. Arthur Stone & Sons v. Gibson*, 630 P.2d 1164, 1169-70 (Kan. 1981) (upholding the abolishment of the overlying landowner entitlement to use groundwater beneath his land comparable to the entitlement of landowners to use water from streams abutting their land), *Williams v. City of Wichita*, 374 P.2d 578, 594-95 (Kan. 1962) (also an overlying landowner case), and *Kansas ex rel. Emery v. Knapp*, 207 P.2d 440, 447-48 (Kan. 1949) (a riparian rights case). The North Dakota case is *Baeth v. Hoisveen*, 157 P.2d 728, 732-33 (N.D. 1968). The Oregon case is *In re Determination of Water Rights of Hood River*, 227 P. 1065, 1086-87 (Or. 1924). The South Dakota cases are *Belle Fourche Irrigation District v. Smiley*, 204 N.W.2d 105, 107-08 (S.D. 1973), and *Belle Fourche Irrigation District v. Smiley*, 176 N.W.2d 239, 243-46 (S.D. 1973). The Texas cases are *In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 P.2d 438, 444-46 (Tex. 1982), and *In re Adjudication of Water Rights in the Llano River Watershed of the Colorado River*, 642 S.W.2d 446, 448 (Tex. 1982). The Washington case is *In re Determination of Rights to the Use of Surface Waters of the Deadman Creek Drainage Basin in Spokane County*, 694 P.2d 1071, 1075-77 (Wash. 1985).

79. *Franco-American*, 855 P.2d at 572, 572 n.15 (acknowledging that all but two of the nine dual rights states had "since adopted the appropriation doctrine as controlling all rights to stream water").

80. *Id.* at 575-76.

over all appropriative uses.[81] Riparian landowners may at any time initiate new or expanded non-domestic uses.[82] With respect to initiating and maintaining non-domestic uses, riparian landowner's are exempt from being subject to a fixed quantification of their riparian entitlement,[83] having their right to continue their uses in times of shortage decided by the appropriation system's first-in-right, first-in-time priority principle,[84] and having their entitlement to use stream water extinguished for non-use.[85] When riparian uses conflict with appropriative uses, "the rights of the riparian owner and the appropriator are to be determined by relative reasonableness."[86] If a riparian landowner seeks an appropriation permit, he will be deemed to have relinquished his common-law riparian rights.[87]

D. The Instability & Uncertainty of Oklahoma Water Rights

Prior to the adoption of the 1963 water reforms, Oklahoma was not making adequate progress in developing beneficial water uses.[88] Many observers believed this was attributable to Oklahoma's system of maintaining two incompatible water law systems coupled with Court opinions that negated the usefulness of the appropriation system.[89] Little wonder then that the dual rights system revived by *Franco-American* has been treated with hostility by the legislature and applied with uncertainty and error by courts. Its operating characteristics make the effective administration of Oklahoma water rights exceedingly difficult, and they contain the seeds of immense water rights dysfunction in the form of the normative standards for assessing the relative reasonableness of conflicting water uses.

In response to the *Franco-American* decision, late in the 1993 legislative session the Oklahoma legislature enacted a statute, which the Governor signed into law, repudiating it. This statute states that:

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

81. *Id.* at 571, 582.
82. *Id.* at 577.
83. *Id.* at 573, 577.
84. *Id.* at 577.
85. *Id.*
86. *Id.* at 579.
87. *Id.* at 571.
88. *See* Rarick, *Pre-1963 Period*, *supra* note 6, at 1-3.
89. *Id.*

> incompatible dual systems of riparian and appropriative water rights which governed the use of water from definite streams in Oklahoma prior to June 10, 1963, with an appropriation system of regulation requiring the beneficial use of water and providing that priority in time shall give the better right. These sections are intended to provide that riparian landowners may use water for domestic uses and store water in definite streams and that appropriations shall not interfere with such domestic uses, to recognize through administrative adjudications all uses, riparian and appropriative, existing prior to June 10, 1963, and to extinguish future claims to use water, except for domestic use, based only on ownership of riparian lands.[90]

Despite being a legislative attempt to overturn a constitutional holding of the Oklahoma State Supreme Court,[91] this statute is still on the books. What is not in the official Oklahoma Statutes is any mention of *Franco-American*, so readers of the notes following the current versions of sections comprising the 1963 water reforms would never know that these sections had been declared unconstitutional.[92]

The Oklahoma Supreme Court remanded the *Franco-American* case back to the trial court for a determination of the reasonableness of all the riparian uses that were asserted by the riparian landowners who opposed Ada's attempt to appropriate more water from Byrds Mill Spring.[93] Unfortunately, the trial judge clearly was not comfortable making this determination, and so he remanded the proceedings to the OWRB for purposes of taking evidence and formulating findings of fact and conclusions of law with respect to the reasonableness of the riparian uses.[94] The remand was in vain, because the OWRB Hearing Examiner concluded that that under Oklahoma Law he had to honor the legislative statement

---

90. Act of June 7, 1993, ch. 310, § 1, 1993 Okla. Sess. Laws 1625 (codified as 82 OKLA. STAT. § 105(1)(A)).

91. *See* Heldermon v. Wright, 152 P.3d 855, 858, 859, 859 n.21 (Okla. 2006).

92. For the following sections, *Franco-American* is cited in the construction notes on Lexis but not in Oklahoma Statutes. See notes following title 60, section 60 at 4 OKLA. STAT. §§ 7194, 7195 (2001); title 82, sections 105.1, 105.2, 105.11, 105.15, 105.17, 105.18 at 6 OKLA. STAT. 10263, 10265, 10267-10269 (2001); title 82, sections 105.5, 105.12 at 4 OKLA. STAT. 1274, 1275 (Supp. 2010).

93. Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd., 855 P.2d 568, 577-78 (Okla. 1990).

94. Letter from Jerry Barnett, OWRB Staff Attorney and Hearing Examiner, to the Honorable Doug Gabbard, II, District Judge for Coal County (Aug. 2, 1994).

expressed in title 82, section 105.1A of the Oklahoma Statutes that the 1963 water reforms were still valid.[95] Accordingly, he refused to make the reasonableness determinations requested by the district court.[96]

In 2005, a case arose between two riparian landowners who did not have appropriative rights that had the potential for providing the Oklahoma Supreme Court with the opportunity to reconsider its *Franco-American* decision.[97] Unfortunately, the case, *Heldermon v. Wright*,[98] was dismissed by the Oklahoma Supreme Court due to a fatal procedural error, and so the constitutional issues were not resolved.[99] However, as discussed below, the case illustrates both the continuing hostility toward Franco-American and the difficulty courts have in correctly following Franco-American's water rights management rules and the chaos those rules impose on Oklahoma water users.

The downstream riparian landowner (Heldermon) was using water from an unnamed stream to support livestock operations.[100] These uses were deemed to require water beyond what would be needed to support domestic needs, so the downstream riparian's use was for non-domestic purposes.[101] The upstream riparian (Wright) sought to dam the stream for purposes of creating a lake to support recreation, fish and wildlife.[102]

Concerned that the upstream riparian's lake project would harm his livestock operations, the downstream riparian sued for injunctive relief and a declaration that he was entitled to have the upstream riparian release all of the water needed to support his current livestock operations.[103] He did so after the OWRB had granted the upstream riparian a permit to construct a dam sufficient to store water in the volume necessary to support two years of domestic water needs (estimated to be 23 AF) and required the upstream riparian to release all water in excess of that amount downstream for the

95. Hearing Examiner's Pre-hearing Conference Findings of Fact, Conclusions of Law, and Report to District Court at 4, 5, *In re* Remand of Franco-American Charolaise, Ltd. v. OWRB, No. C-81-23, Okla. Water Res. Bd. (Aug. 2, 1994).

96. *Id.* at 5.

97. Heldermon v. Wright, 152 P.3d 855, 859 (Okla. 2006) (validity of Franco-American challenged by the legislature and the Oklahoma Attorney General but defended by Heldermon).

98. 152 P.3d 855.

99. *Id.* at 859, 860.

100. Heldermon v. Wright, No. 100,709, at 3 (Okla. Civ. App., Apr. 9, 2006).

101. *Heldermon*, 152 P.3d at 858; *Heldermon*, No. 100,709, at 11, 12.

102. *Heldermon*, 152 P.3d at 857.

103. *Heldermon*, No. 100,709, at 6, 7, 13-15.

benefit of downstream water users.[104] Included in the calculation of the water Heldermon desired was a 500 to 750 gallons per minute flow he asserted was necessary to perform "the vital functions of 'sweeping' or 'scouring' the banks and stream bed, making the stream's deep pools, and 'charging' or saturating the banks with water . . ."[105]

Given the nature of the parties' uses, the case could be considered one pitting a new upstream riparian domestic use against an existing downstream riparian non-domestic use. Alternatively, if one focused on the recreational, fish and wildlife purposes of the upstream riparian's use, the case could be considered one pitting a new upstream riparian non-domestic use against an existing downstream riparian non-domestic use. The second alternative may be the most fitting, because despite the OWRB order the lake the upstream riparian sought to create had a 700 AF storage capacity.[106]

Invoking the mandate of title 82, section 105.1(A) of the Oklahoma Statutes, the provision expressing the State of Oklahoma's hostility to the *Franco-American* decision,[107] the district court ordered the upstream riparian to release enough water to support all of the downstream riparian's uses, including the flow needed to "scour" and "charge" the stream, which the court deemed to be domestic uses.[108] Not wishing to release this much water, the upstream riparian appealed to the Oklahoma Court of Civil Appeals.[109]

The civil appeals court found that the downstream riparian's uses were beyond the scope of Oklahoma's definition of domestic use, and therefore it treated these uses as non-domestic uses.[110] It also held that, under *Franco-American*, the downstream riparian was entitled to make reasonable non-domestic use of stream water without obtaining an appropriative right, and therefore title 82, sections 105.1A, 105.2 A of the Oklahoma Statutes were unconstitutional.[111] Then, the civil appeals court upheld the district court's holding as to the amount of water the upstream riparian had to release on grounds that this amount was necessary to support the downstream

104. *Heldermon*, 152 P.3d at 857-58.
105. *Heldermon*, No. 100,709, at 14-15.
106. *Id.* at 4 n.1.
107. *Supra* note 90 & accompanying text.
108. *Heldermon*, No. 100,709, at 9, 10.
109. *Id.* at 3.
110. *Id.* at 10-11.
111. *Id.* at 11-12.

riparian's reasonable non-domestic use.[112] In doing so, the civil appeals court simply treated the downstream riparian use as reasonable without employing the factors the Oklahoma Supreme Court said in *Franco-American* should be used in determining the reasonableness of a water use.[113] Moreover, it stated that as between riparian owners the test of reasonableness is whether one owner's water use would materially injure the other owner's water use.[114] As a consequence, it seemed to infer that the upstream riparian's water use would be unreasonable if he released less water than he was ordered to release by the district court.[115]

On appeal to the Oklahoma Supreme Court, the upstream riparian asserted that under *Franco-American* his use would be reasonable as long as he released enough water so that downstream riparian uses would not be materially injured, that the downstream riparian's were limited by statutes to using water only for domestic uses, and that those domestic uses would be fully supported by much smaller releases than those ordered by the district court and affirmed by the Court of Civil Appeals.[116] Invoking *Franco-American*, the downstream riparian asserted that he had the right to receive water in volumes sufficient to support his reasonable non-domestic uses or, in the alternative, the amount of water he needed was within the scope of Oklahoma's definition of domestic use.[117] The Oklahoma Attorney General, several amici curiae, and the upstream riparian filed briefs arguing that despite *Franco-American* the current Oklahoma Stream Water Use Law is constitutional, and the downstream riparian filed a brief arguing that this body of law is unconstitutional under *Franco-American*.[118] After characterizing the relevant provisions of the current Oklahoma Steam Water Use Laws as a legislative expression of hostility toward *Franco-American*,[119] and noting that the parties had put the constitutionality of these provisions and the continuing vitality of *Franco-American* into question,[120] the Oklahoma Supreme Court dismissed the case after finding that the district court had committed a fatal procedural error by not

112. *Id.* at 13-16.
113. *Id.*
114. *Id.* at 11.
115. *Id.* at 13-16.
116. Heldermon v. Wright, 152 P.3d 855, 857-58 (Okla. 2006).
117. *Id.*
118. *Id.* at 859.
119. *Id.* at 859 & n.20.
120. *Id.* at 857-59.

notifying the OWRB that it was entertaining a lawsuit to adjudicate stream water rights.[121]

At all levels, the *Heldermon* case was handled in ways inconsistent with the water rights management principles handed down in *Franco-American*. The district court either believed it was bound by the anti-*Franco-American* statutory provision that required riparian owners to get appropriation permits for their non-domestic uses, and therefore treated all of the downstream riparian's uses as domestic uses, or it just could not apply correctly Oklahoma's domestic use definition. Having correctly found that the anti-*Franco-American* statutory provisions were unconstitutional attempts to defy *Franco-American*'s mandates, the Court of Civil Appeals mischaracterized *Franco-American*'s standard for assessing the reasonableness of water uses and thus failed utterly to apply any of the reasonableness factors *Franco-American* mandated.

Both courts in essence gave the downstream riparian the benefit of the appropriation doctrine's first-in-time, first-in-right priority principle by summarily subjecting the upstream riparian's new use to limitations designed to protect fully the downstream riparian's use. By doing so, the courts failed to assess first the relative reasonableness of both uses before determining which use should be adjusted or prohibited. As a consequence, they failed to comply with *Franco-American's* mandate that all riparian uses are co-equal and should be judged on the basis of their relative reasonableness rather than by a time-based priority principle.

Having set the stage for a possibly decisive decision as to the continuing vitality of *Franco-American*, the Oklahoma Supreme Court concocted a flimsy procedural excuse for ducking the opportunity to rectify the chaos caused by its Franco-American decision. It found that a statute requiring the Oklahoma Attorney General to intervene in lawsuits asserting the impairment of water rights if the OWRB notifies him that the public interest would be best served by his intervention to implicitly require parties to notify the OWRB of such lawsuits. It then dismissed the *Heldermon* case despite the active participation of the Oklahoma Attorney General.

To fully appreciate the chaos caused by *Franco-American*, it is important to understand why all the uncertainty created by the simple conflict presented in *Heldermon* would have been avoided under the prior appropriation doctrine. Without *Franco-American*, it is quite likely Heldermon would have sought and received a permit to appropriate water from the unnamed creek to support a beneficial use—his cattle operations.

121. *Id.* at 859-60.

If so, his permit would have specified exactly how much water Heldermon needed to support his beneficial use. Wright also would have sought a permit to appropriate water from the unnamed creek to support a beneficial use—the lake dedicated to recreation, wildlife and fish. When he did, he would be entitled only to the water still available from the unnamed creek after Heldermon fully exercised his senior appropriative right.

Alternatively, if Heldermon erroneously believed his cattle operations constituted only domestic uses, he would not have sought an appropriative permit. Then, if Wright did seek an appropriative permit, he would be entitled to receive a senior water right to all the water necessary to support his lake less any water Heldermon actually needed for legitimate domestic uses. All of Heldermon's non-domestic uses would be invalid until he obtained an appropriation permit, and then they would junior and subordinate to Wright's permitted uses.

Under either of the scenarios discussed above, the appropriative water rights obtained by the parties would fail to provide them with the water they desired only when there was not enough water to support both uses or they ran afoul of the use-it-or-lose it rule. If stream conditions changed, neither party would face the risk of losing all or part of his right to use water as a result of the other party being allowed to question the continued reasonableness of his use. Both of their uses would have been deemed beneficial during the appropriation permitting process, and those findings would not be subject to latter day attacks. Under the appropriation doctrine's first-in-time, first-in-right system, both parties would know where they stood relative to each other in times of water shortage. As a consequence, the junior appropriator's investor expectations would be tempered by the knowledge that in times of shortage he could face partial or total loss of his right to use water from the stream. Faced with this risk, the junior appropriator would seek to buy all or part of the senior appropriator's entitlement or seek water from another source or conform his use of water to the anticipated fluctuations in water availability.

Unfortunately, as a result of *Franco-American*, the appropriation permit cannot be a source of certainty or stability. All water uses supported by an appropriation permit are subject to a judicial assessment of their continued reasonableness relative to a conflicting riparian use. Worse yet, the appropriation permit is a badge of inferiority. Any riparian landowner who obtains one loses his riparian rights, and all reasonable appropriative uses are subordinate to all reasonable riparian uses.

As documented above, Oklahoma courts have had difficulty dealing with *Franco-American*'s command to judge the merits of water uses conflicting

with any riparian water use on the basis of their relative reasonableness. This may be due to the complexity of the factors the *Franco-American* court mandated to be used to judge the reasonableness of conflicting water uses. The mandate states that:

> Reasonableness is a question of fact to be determined by the court on a case-by-case basis. Factors courts consider in determining reasonableness include the size of the stream, custom, climate, season of the year, size of the diversion, place and method of the diversion, type of use and its importance to society (beneficial use), needs of other riparians, location of the diversion on the stream, the suitability of the use to the stream, and the fairness of requiring the user causing the harm to bear the loss. See Restatement (Second) Torts § 850A [1979].[122]

Perhaps the Oklahoma lower courts' difficulty in acknowledging and using the *Franco-American* reasonableness factors is that the *Franco-American* court stuck them in a footnote. The more likely problem is that the *Franco-American* court did not provide any clues as to how a lower court should apply the factors it mandated. State trial courts are not expert agencies charged with managing the State's water supplies, and the more logistical factors mandated by the *Franco-American* court—size of stream, size of the diversion, place and method of the diversion, type of use, its importance to society (beneficial use), location of the diversion on the stream, and the suitability of the use to the stream—are the type of factors weighed by the OWRB, Oklahoma's expert water management agency, in determining whether to grant an applicant's request for an appropriation permit.[123] It is therefore understandable why the trial judge who received the *Franco-American* court's mandate to judge the reasonableness of the competing uses in the *Franco-American* case asked the OWRB to provide him with findings of fact and conclusions of law with respect to the reasonableness of those uses.[124]

In addition, the *Franco-American* court's concern about shielding from loss riparian landowners whose riparian water uses have been disrupted by another water user conflicts with its obsession with having riparian uses judged not by any time of initial use priority system but rather by the

122. Franco-American Charolaise Ltd., v. Okla. Water Res. Bd., 855 P.2d 568, 576 n.40 (Okla. 1990).

123. *See* Application for Permit to Use Surface or Stream Water, http://www.owrb.ok.gov/supply/watuse/pdf_wat/app_sw.pdf (last visited Mar. 30, 2012).

124. *See supra* notes 93-96 and accompanying text.

relative reasonableness of all conflicting uses. As noted previously, the *Franco-American* court insisted that

- "the last riparian use asserted has as much priority as the first . . . ,[125]
- "yesterday's reasonable use by one riparian owner may become unreasonable tomorrow when a fellow riparian owner asserts a new or expanded use,"[126] and
- the riparian landowner should not be denied the right to initiate a new or expanded use because there is not enough water to satisfy all existing uses, because "the very nature of the common-law riparian right . . . places no stock in the fact of past use, present use, or even non-use."[127]

It is difficult to escape the conclusion that a riparian landowner who initiates a new use or expands an existing one that interferes with an existing riparian use is a harm doer who should either not be allowed to continue his new or expanded use or expand a use to the extent that it impedes an existing use or be required to compensate the person whose existing use was compromised.[128] Acceptance of this conclusion virtually ratifies the Appropriation Doctrine's first-in-time, first-in-right principle in contradiction to the *Franco-American* court's insistence that riparian uses should not be accorded any preference on the basis of their seniority. In effect, this is precisely what the Oklahoma Court of Civil Appeals did in *Heldermon* by protecting Heldermon's existing riparian use against Wright's attempt to initiate a new riparian use.[129]

Oklahoma water users would suffer even greater instability and uncertainty if the *Franco-American* court's insistence that the last riparian use has the same priority as the first and that yesterday's reasonable use could tomorrow be declared unreasonable became the norms for handling conflicting water uses. As was stated in the comments to section 850A of the Restatement (Second) of Torts, which specifies factors to be applied in determining the reasonableness of the use of water, "the law of resource use generally follows a strong policy of encouraging enterprise and development and implements the policy with a system of property rights

125. *Franco-American*, 855 P.2d at 572.

126. *Id.* at 577.

127. *Id.*

128. In fact, the *Franco-American* court also opined that "[t]he heart of the riparian right is the right to assert a use at any time *as long as it does not harm another riparian who has a corresponding right.*" *Id.* (emphasis added).

129. See *supra* notes 112-15 and accompanying text.

that give some reasonable assurance that the activity *will not be subject to premature termination without compensation*."[130] The *Franco-American* court's reasonableness mandates do not follow this policy. They require courts to consider whether a current water user should be prohibited from continuing his once reasonable water use because it has become unreasonable after the initiation of a new or expanded uses. Such an outcome would inflict on the unfortunate water user uncompensated losses of investments he made in reliance on the now extinguished water use.[131]

---

130. RESTATEMENT (SECOND) OF TORTS § 850A cmt. k (1979).

131. For examples of cases that produced such distressing results, see *Joslin v. Marin Municipal Water District*, 429 P.2d 889 (Cal. 1967), and *Harris v. Brooks*, 283 S.W.2d 129 (Ark. 1955).

Joslin had operated a rock and gravel business on his riparian land for seven years. *Joslin*, 429 P.2d at 891. This business was made possible by the flow of Nicasio Creek depositing rock, sand, and gravel on Joslin's land, and it contributed about $250,000 in value to Joslin's land. *Id.* Then, in the spring of 1962, the Marin Municipal Water District dammed the Creek above Joslin's property in order to store water for municipal water supply purposes in accordance with an appropriation permit it had received from the California Water Rights Board. *Id.* at 891. As a result, the flow of the Creek was so diminished that rocks and gravel were no longer deposited on Joslin's land. *Id.* Joslin sued the District, contending its new use interfered with his rightful riparian rights and therefore it should pay him for the lost value of his land. *Id.* at 891, 896-97. The trial court, however, granted summary judgment in favor of the District on grounds that the District had not violated any of Joslin's substantive rights. *Id.* at 891. The California Supreme Court upheld the trial court's summary judgment on the basis that it was not "'reasonable' . . . that the riches of our streams . . . are to be dissipated in the amassing of mere sand and gravel which for aught that appears subserves no public policy." *Id.* at 895.

Brooks had leased land riparian to Horseshoe Lake (the Lake) on which he had intermittently irrigated crops with water pumped from the Lake for over twenty years. Harris v. Brooks, 283 S.W.2d 129, 131 (Ark. 1955); *see* 1 WATERS AND WATER RIGHTS 2007 ED., *supra* note 75, § 7.02(d)(2) at 7-60. Prior to the 1954 growing season, Harris's lessee began a fishing and boat rental business using a small camp site that was on land riparian to the Lake. *Harris*, 283 S.W.2d at 131. Within two months, Brooks began irrigating a rice crop by pumping water from the Lake in the same amount that he had pumped in recent growing seasons. *Id.* at 130-31. About forty-five days later, Harris and his lessee sued Brooks seeking to enjoin him from pumping water from the Lake because the water levels in the Lake were diminished to the point that the Lake was no longer suitable for fishing and boating. *Id.* Despite the lawsuit, Brooks continued to irrigate his rice crop for another forty days and quit only after being informed by the Arkansas Game and Fish Commission that the Lake's water levels were now so low that fish life was endangered. *Id.* at 131. The Chancellor refused to issue the injunction and did not issue findings of fact or law. *Id.* On appeal, the Arkansas Supreme Court reversed the Chancellor, finding that Brook's pumping water from the Lake became unreasonable when the water levels reached its normal level of 189.67 feet because at that level his continued pumping unreasonably interfered with the fishing and boating operation. *Id.* at 135-36. In doing so, the court cited the precedent of a

Another potential source of confusion is the *Franco-American* court's very puzzling citation to section 850A of the Restatement (Second) of Torts as support for its mandated reasonableness factors. At minimum, this citation is inapt because the reasonableness factors set forth in section 850A are significantly different than the Franco-American factors. The Restatement factors are:

> (a) The purpose of the use;
> (b) the suitability of the use to the watercourse or lake;
> (c) the economic value of the use;
> (d) the social value of the use;
> (e) the extent and amount of harm that it does;
> (f) the practicality of avoiding the harm by adjusting the use or method of one proprietor or the other;
> (g) the practicality of adjusting the quantity of water used by each proprietor;
> (h) the protection of existing values of water uses, land, investments and enterprises; and
> (i) the justice of requiring the user causing the harm to bear the loss.[132]

Facially, there are loose similarities between the *Franco-American* court's logistical factors and section 850A(a)-(d). Similarly, the *Franco-American* court's concern for protecting riparian users from harm caused by other users mirrors loosely section 850A(e)-(i). However, the purpose and intended effects of section 850A's reasonableness formulation refutes much of the *Franco-American* court's ideas about riparian rights. Specifically, section 850A does not really make the test of reasonableness turn on the relative values and merits of competing uses,[133] it contemplates courts

---

Florida case, *Taylor v. Tampa Coal Co.*, that was similar in all circumstances except for one very important difference—the irrigator in *Taylor* was the new user and his irrigation interfered with existing riparian uses. *Id.* (citing Taylor v. Tampa Coal Co., 46 So. 2d 392, 392-94 (Fla. 1950)); *see* RESTATEMENT (SECOND) OF TORTS app. § 850A cmt. k, at 32 (1982).

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

133. To that end, section 850A's commentator advocated a more objective determination of reasonableness by applying factors (a)-(d) to the plaintiff's use first and then to the defendant's without making relative comparisons of one use's reasonableness to the other. *See id.* § 850A cmts. a-f, at 221, 223-26 (stating that each use is subjected independently of the other to an assessment of whether it meets section 850A's factors a-d). Thus, the commentator states that

> [t]he typical case involves two riparians who are each making a beneficial use by suitable means and are each producing desirable values" under conditions

quantifying the amount of water riparians need to meet their needs in contradiction to the *Franco-American* court's proclamation that that riparian rights cannot be "quantified in futuro,"[134] and it promotes the appropriation doctrine's first-in-time, first-in-right priority principles.[135] Even though the Oklahoma Court of Civil Appeals did not cite section 850A of the Restatement (Second) of Torts in its *Heldermon* decision, it produced an opinion and an outcome that was much more consistent with

---

> where "both cannot be enjoyed . . . [because] one interferes with the other by reduction the availability of water in the source or the opportunities for its enjoyment.

Id. § 850A cmt. a, at 221. Under these circumstances, section 850A deems the interfering use as unreasonable only if it causes serious harm to other users. *Id.* § 850A cmts. a, g, at 222, 226-27.

Regardless of the extent of harm, section 850A calls for attempts to reduce or eliminate it by determining whether each user's method of use is reasonable or is wasteful and inefficient, and whether each user is using more water than is needed to support his use. *Id.* § 850A cmts. a, h-i, at 222, 227-31. Even if no adjustments of method or quantity of use can reduce harm to a negligible level, section 850A still does not advocate determining who should prevail by comparing the relative value of the conflicting uses. The commentary states that "[w]hen this is the case, the controversy cannot be solved by a simple balancing of the interests of the parties or by determining the relative values of the uses and awarding the water to the user with the paramount interest or the better use." *Id.* § 850A cmt. a, at 222. Instead, it encourages exploration of sharing the shortages on a proportionate basis either in-kind or with payments to the users who suffer an inordinate reduction in water. *Id.* § 850A cmt. j, at 231-33. If sharing cannot solve the problem, then section 850A encourages courts to protect existing values, *id.* § 850A cmts j, k at 232-35, and, in appropriate cases, do so by allowing the interfering use to continue upon payment of reasonable compensation to those whose uses were seriously compromised. *Id.* § 850A cmts. j, l, at 232, 235-37.

134. *Compare id.* § 850A cmt. i, at 230 ("In the interest of promoting certainty of property rights, a court may quantify the riparian rights being litigated by allowing each riparian proprietor to take a specific portion of the stream or a specific quantity of water."), *with* Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd., 855 P.2d 568, 573 (Okla. 1990) ("A riparian right is neither constant nor judicially quantifiable *in futuro*.").

135. Thus, the commentator noted,

> In the relatively rare cases in which demand has exceeded the supply to the extent that the initiation of a new use has taken water from or caused substantial harm to an existing use, most courts have applied the reasonable use rule so as to give legal protection to the prior use.

RESTATEMENT (SECOND) OF TORTS § 850A cmt. k, at 233-34. "Only a few courts have made specific mention of the relative priority of uses, but it may be deduced from the results of the cases that priority of use is an important factor in determining the reasonableness or unreasonableness of a use of water . . . ." *Id.* at 234.

section 850A's approach to resolving conflicts among riparian water users than it was with the approach called for by the *Franco-American* court.[136]

Finally, the Franco-American court's insistence that riparian landowners can initiate new or expanded riparian water uses without obtaining an appropriation permit creates potential logistical problems for the OWRB as it attempts to determine whether to grant appropriation permits to non-riparian landowners. The OWRB is required not to issue a permit if there is not unappropriated water available or the proposed use will interfere with domestic or existing appropriative uses.[137] To the extent that riparian landowners are maintaining non-domestic uses without appropriation permits the OWRB will lack all the data it needs to determine accurately the availability of water and the potential for a new appropriation use to interfere with existing uses.

E. Solutions to the Dual/Riparian Rights Problem

The obvious solution to the instability and uncertainty created by *Franco-American* is to set up a test case before the Oklahoma Supreme Court through the application of a statute designed to conflict with *Franco-American's* revival of riparian rights. Using normative factors about when a court should reconsider a prior precedent, *Franco-American* is ripe for being overruled. As enunciated most famously in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[138] factors for supporting the overruling of a precedent are:

- has the rule of the case proven to be unworkable;[139]
- has the rule of the case created such reliance that its overruling would create significant hardship and inequity;[140]
- has the rule of the case been undermined by developments in related principles of law;[141]
- have facts or perceptions of the facts changed so as to "rob[] the old rule of significant application or justification.[142]

136. The opinion did not compare the relative values of each use, but rather focused like a laser beam on establishing what limits needed to be placed on Wright's use of the stream water for fish, wildlife, and recreation purposes in order to preserve Heldermon's pre-existing cattle operations. Heldermon v. Wright, No. 100,709, at 3, 4, 13-16 (Okla. Civ. App. 2006).

137. 82 OKLA. STAT. 105.12(A)(1), (3) (2011).

138. 505 U.S. 833 (1992).

139. *Id.* at 854.

140. *Id.*

141. *Id.* at 855.

It is clear from the previous discussion about the hostility of Oklahoma's elective branches toward *Franco-American* and the lower courts' difficulty in, or resistance to, following its mandates that *Franco-American*'s mandates have defied practical workability.[143] The elected branches created law to repudiate *Franco-American's* mandates,[144] and the courts have not applied its mandates.[145]

It is also clear that on the day *Franco-American* was decided its mandates were already undermined by developments in related law, and nothing has occurred to reverse this undermining. *Franco-American* was an aberration because it condemned Oklahoma to be practically the only dual rights state to suffer the judicial nullification of its attempt to cut-off the right of riparian landowners to initiate new or expanded non-domestic uses without an appropriation permit.[146] The *Franco-American* court relied heavily on the Nebraska case of *Wasserburger v. Coffee*[147] as precedent for nullifying Oklahoma's water law reforms, but that case held that riparian landowners possess riparian rights only if their riparian land

- passed into private ownership prior to April 4, 1895, the date Nebraska statutorily dedicated the use of unappropriated stream water to the people subject to appropriation; and
- retained its riparian status by continuing to abut a stream through a unified chain of title dating back before April 4, 1895.[148]

As a result of these two requirements, it has been observed that "[r]iparian rights created before April 4, 1895 still are . . . constitutionally protected . . . but due to the limited number of riparian rights, they are primarily of historical significance."[149]

---

142. *Id.*

143. *See supra* Part I.D.

144. Act of June 7, 1993, ch. 310, § 1, 1993 Okla. Sess. Laws 1625 (codified as 82 OKLA. STAT. § 105(1)(A) (2011)).

145. Heldermon v. Wright, 152 P.3d 855 (Okla. 2006); Heldermon v. Wright, No. 100,709 (Okla. Civ. App. 2006); Letter from OWRB Staff Attorney and Hearing Examiner, to the Honorable Doug Gabbard II, District Judge for Coal County (Aug. 2, 1994).

146. See discussion *supra* note 78 and accompanying text, citing cases from six former dual rights states (Kansas, North Dakota, Oregon, South Dakota, Texas and Washington) that upheld their transition from a dual rights state to a unified right state under the Appropriation Doctrine.

147. 141 N.W.2d 738 (Neb. 1966).

148. *Id.* at 745.

149. Donald Blanenau, *Nebraska*, *in* 6 WATERS AND WATER RIGHTS 771 (Robert E. Beck ed., 2005) [hereinafter WATERS AND WATER RIGHTS 2005 ED.].

Even California, the western state most protective of common-law riparian rights,[150] has in the context of general stream adjudications authorized subjecting any new and expanded riparian use occurring in the future to a lower priority than all appropriation rights that preceded them in time.[151] It is also to be noted that even in many traditionally pure riparian rights states, the uncertainty created by common-law riparian rights in the wake of increasing pressures on water supplies have led to the adoption of regulated riparianism,[152] which requires riparian landowners to get permits before initiating a new or expanded use,[153] subjects the uses to quantification,[154] and in some states puts riparian uses on the same standing as non-riparian uses.[155]

Events, or more properly the lack thereof, in the aftermath of the elected branches creating law to repudiate *Franco-American* provide support for asserting that *Franco-American*'s mandates have been reduced in significance by changed facts and have not engendered significant reliance among Oklahoma riparian landowners. As discussed previously, the Oklahoma Legislature's reaction and solution to *Franco-American* was repudiate *Franco-American* by requiring riparian landowners to get appropriation permits for their non-domestic uses.[156] Since this anti-*Franco-American* provision went into effect on June 7, 1993,[157] the OWRB has not received any complaints that a water user is suffering interference with his water use because of an unpermitted water use by a riparian landowner.[158] The OWRB has granted numerous applications for appropriation permits to secure water for irrigation projects since that time.[159] It is quite possible that a significant portion of those permits were issued to riparian landowners.[160] If so, under the *Franco-American*

150. Harrison C. Dunning, *California*, *in* 6 WATERS AND WATER RIGHTS 2005 ED., *supra* note 149, at 409.

151. *In re* Long Valley Creek, 599 P.2d 656 (Cal. 1979).

152. 1 WATERS AND WATER RIGHTS 2007 ED., *supra* note 76, § 903 at 9-52.

153. *Id.* § 903(a), at 9-62 to 9-64.

154. *Id.* § 903(a)(5)(A), at 9-102 to 9-104.

155. *Id.* § 903(a)(2), at 9-69 to 9-72.

156. 82 OKLA. STAT. § 105.1(A) (2011). *See supra* notes 90-92 and accompanying text.

157. Act of June 7, 1993, ch. 310, § 1, 1993 Okla. Sess. Laws 1625.

158. Phone Conversation with Dean Couch, General Counsel of the Oklahoma Water Resources Board (Apr. 1, 2012).

159. *Id.*

160. *Id.*

mandate these riparian landowners have relinquished their riparian rights.[161] So, it is quite likely that a significant percent of riparian landowners using stream water for non-domestic uses have already relinquished their riparian water rights,[162] and there may not be many riparian landowners left who have made water use decisions in reliance on *Franco-American*'s mandates.

However, the lack of complaints about unpermitted riparian uses interfering with other uses may simply be a function that enough water has been available to prevent water use conflicts rather than proof there are presently no riparian landowners using water for non-domestic purposes without an appropriation permit.[163] The *Heldermon* case shows that there probably are some riparian landowners who are using stream water for non-domestic uses in reliance on *Franco-American* or may need to rely on *Franco-American* because they erroneously believed that their uses are domestic only.[164]

Given that there are probably some riparian landowners who have relied or *Franco-American* in relation to current unpermitted water uses, or wish to rely on *Franco-American* to validate making new and expanded water uses, without an appropriation permit, the 1993 anti-*Franco-American* act is not a good vehicle for creating a test case. It is just a barebones repudiation of *Franco-American* and so it does not provide riparian landowners with a safe harbor.

A more fair way to create a test case would be build off the 1993 anti-*Franco-American* statute to enact another statute—The Joe Rarick Memorial Appropriation Restoration Act (JRMARA)—designed to revive the 1963 water reforms. This new act, which should be codified in title 60 as section 60A, should include the following elements:

- Legislative findings about how the dual rights system imposes instability and uncertainty on all Oklahoma Water Users;[165]

---

161. Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd., 855 P.2d 568, 571 (Okla. 1990).

162. The lack of complaints about unpermitted riparian uses interfering with other uses may simply be a function that enough water has been available to prevent conflicts rather than an indication that there are presently no riparian landowners using water for non-domestic purposes without an appropriation permit. Phone Conversation with Dean Couch, *supra* note 158.

163. *Id.*

164. Heldermon v. Wright, 152 P.3d 855, 857-58 (Okla. 2006).

165. Suggested language for this section is as follows:

> (a) It is the policy of this State to allocate Oklahoma stream water so as to derive maximum beneficial use from it, including maximum health, safety, social and economic benefits.

- A prohibition on all unpermitted non-domestic water uses after the effective date of the statute;[166]
- A grace period application process giving riparian landowners who since 1962 have never used stream water for a non-domestic use under the authority of an appropriation permit the opportunity, to the extent water is available and it can be done without interfering with existing uses, to secure a permit for current unpermitted domestic uses or for a new or expanded non-domestic use that will provide them with a priority date equal to the date they acquired title to or the right of possession of the riparian land that qualifies them as riparian landowners.[167]

(b) The Legislature finds that the continued co-existence of the Riparian Doctrine and the Appropriation Doctrine makes it impossible to for Oklahoma to derive maximum beneficial use from its stream water because it

(i) prevents Oklahoma from providing stable water rights with known parameters by subjecting all water rights to unpredictable curtailment under the Riparian Doctrine's ever-shifting concept of reasonable use;

(ii) imposes the risk of costly and unnecessary stream wide judicial determination of water rights whenever there is a conflict among existing water users in order to determine the relative reasonableness of all uses;

(iii) impedes economic development and investment within Oklahoma that is dependent upon securing stable supplies of water.

166. Suggested language for this provision is as follows:

(c) Therefore, after the effective date of this Act, riparian landowners may neither initiate nor maintain non-domestic uses of water in streams bordering or running through their riparian land unless they have secured an appropriation permit in compliance with the grace period application process described in Section 3 of this Act or pursuant to the appropriation laws contained in 82 Okla. Stat.

167. Suggested language for this provision is as follows:

(d) To the extent water is available, and it can be done without interfering with current domestic and permitted uses, riparian landowners who have not since 1962 used water from a stream for a non-domestic use under an appropriation permit are eligible to receive vested water rights as follows: (1) eligible riparian landowners shall be entitled to receive an appropriation permit for any current unpermitted reasonable non-domestic riparian uses of water from surface streams bordering or running through their land, (2) eligible riparian landowners not currently making a non-domestic reasonable use of water from streams bordering or running through their riparian land may initiate such a use; (3) all vested rights granted shall have apriority date equal to the date the recipient received legal title to, or valid possession of, their riparian land; (4) to receive a vested rights permit, eligible riparian landowners must apply for the permit within two years of the effective date of the Joe Rarick Memorial Appropriation Act;

- A provision directing the Oklahoma Water Resources Board give all riparian landowners actual notice of this act and the grace period application process it provides.[168]

By addressing the notice and investor expectation concerns, JRMARA should have an excellent chance of being the vehicle for overturning *Franco-American*, especially with respect to extinguishing the common-law riparian right to initiate new or expanded uses outside of the appropriation permitting system.

The recommended structure and substance of JRMARA addresses the *Franco-American* court's concerns about the 1963 water reforms not giving riparian landowners adequate notice that their common-law riparian rights were being limited and of their opportunity to convert existing riparian uses into vested uses.[169] All riparian landowners still eligible to assert common-law riparian rights will be given notice by mail of the express abrogation of their common-law riparian rights and of their opportunities either to convert existing unpermitted non-domestic riparian uses into vested rights or to initiate a non-domestic riparian use and qualify it as a vested right. All water users will be given notice of these changes through statutory provision codified strategically immediately after title 60, section 60 of the Oklahoma Statutes, the provision that conferred riparian rights on riparian landowners.

JRMARA also is respectful of riparian landowners' investor expectations. Those who have not yet initiated a non-domestic riparian use have two years to initiate a use deemed to be a vested right, and those enjoying current unpermitted non-domestic riparian uses have an opportunity to convert them into vested rights. Through the vested rights proceeding, eligible riparian landowners will receive priority dates as of the date they assumed the status of a riparian landowner through the purchase or lease of riparian land even if they did not initiate a non-domestic use

---

168. Suggested language for this provision is as follows:

> (e) The Oklahoma Water Resources Board is directed to send notice to all riparian landowners by registered mail at their last known address of this change in Riparian Water Law and of riparian landowner's rights to receive appropriation permits providing them with preferential priority dates equal to the dates on which they acquired title to or right of possession of their riparian land for current non-permitted reasonable uses or new reasonable uses from water in streams bordering or running through their land if applications for permits for said uses are filed with the Oklahoma Water Resources Board within two years of the effective date of this Act.

169. For a discussion of these concerns, see Franco-American Charolaise Ltd. v. Okla. Water Res. Bd., 855 P.2d 568, 577 (Okla. 1990).

until much later. In return for this favorable treatment, and the greater stability and certainty that will come with the extinguishing of the dual rights system, riparian landowners only give up freedom from OWRB regulation and the risk of having their water-based investments diminished by a new or expanded riparian use deemed to be more reasonable than their uses.

III. The Non-Recognition of Hydraulic Connection Problem

A. The Problem

Groundwater basins are often hydraulically connected to lakes and streams. When this occurs, groundwater pumping can affect the availability of water in a lake or stream. In absence of monitoring and controlling for these effects, groundwater pumping can seriously deplete lake levels and stream flows in ways that interfere with water uses of those who have the right to use lake and stream water, diminish aesthetic values, and diminish the capacity of the lake or stream to support wildlife, aquatic life and water recreation activities.[170]

Oklahoma property law confers on landowners ownership of groundwater located beneath their land, but specifies that the use of ground water is governed by Oklahoma's groundwater law.[171] As a consequence, landowners must obtain a permit from the OWRB before drilling a well and taking groundwater.[172]

Unfortunately, Oklahoma groundwater law is not protective of surface water sources and the water rights and values they support. This stems from Oklahoma's definition of ground water, which is "fresh water under the surface of the earth regardless of the geological structure in which it is standing or moving outside the cut bank of any definite stream."[173] Although Oklahoma statutes do not define the term cut bank, it seems clear that under Oklahoma law groundwater lies beneath the earth's surface and outside of the vertical extensions of a stream's boundaries as defined by its

170. *See* Jacobs Ranch, L.L.C. v. Smith, 148 P.3d 842, 848 (Okla. 2006) ("[I]t is undisputed that 1) aquifers in Oklahoma have suffered irreversible decline where withdrawals exceeded the aquifer's (sic) ability to recharge, such as the Ogallala Aquifer; 2) decline in the groundwater level has resulted in the loss of the natural flow of streams, such as the Beaver River in the Oklahoma panhandle; and 3) a decline in the groundwater level of the Arbuckle-Simpson Groundwater Basin could jeopardize the flow of springs and streams, such as the spring that is the source of the water for the city [sic] of Ada.").

171. 60 OKLA. STAT. § 60 (2011).

172. 82 OKLA. STAT. § 1020.7 (2011).

173. *Id.* § 1020.1(1).

banks.[174] For most groundwater sources, the cut bank rule means the OWRB will issue a permit to drill for and take groundwater if it is to be used beneficially and waste will not occur.[175] However, since June 3, 2003, the OWRB will not award a groundwater permit unless it also finds that "the proposed use will not degrade or interfere with springs or streams emanating in whole or in part from water originating in a sensitive sole source groundwater basin."[176]

Thus, Oklahoma groundwater law takes into account hydraulic connections between groundwater sources and surface sources only when the groundwater source is a sensitive sole source. The consequences of Oklahoma's incomplete recognition of hydraulic connections between groundwater sources and surface sources are illustrated by two cases involving attempts by prospective water users to take water in a manner that would diminish or eliminate the flow a natural spring that was a source of water for a stream.

In *Oklahoma Water Resources Board v. City of Lawton*,[177] the prospective water user sought to take all the flow of a natural spring that broke through the surface of his land, traveled in a diffused manner for a short distance, and then entered the channel of a stream.[178] To capture the water, the prospective water user was going to encase the spring at the point where it broke through the surface in order to tap it before the spring water reached the surface.[179] The Oklahoma Supreme Court recognized that groundwater is the source of all springs,[180] and that Oklahoma property law confers on landowners ownership of water flowing on the surface of their land outside of definite streams.[181] Nevertheless, because the flow of stream had long been a source of water for a stream,[182] the court held that the spring water was stream water rather than groundwater or diffused surface water.[183] So, the prospective water user could not take the spring water without first obtaining an appropriation permit.[184]

---

174. *See* Jensen, *supra* note 8, at 445-46.

175. 82 OKLA. STAT. § 1020.9(A)(1)(b)-(c), (2)(b)(c).

176. Act of June 3, 2003, ch. 365, § 3, 2003 Okla. Sess. Laws 1576-77 (codified as 82 OKLA. STAT. § 1020.9(A)(1)(d), 2(d)).

177. 580 P.2d 510 (Okla. 1977).

178. *Id.* at 511.

179. *Id.*

180. *Id.*

181. *Id.* at 512-13.

182. *Id.* at 511.

183. *Id.* at 513.

184. *Id.*

Twenty-three years later, in *Messer-Bowers Company v. State of Oklahoma*,[185] a prospective water user seeking permits to drill wells into a groundwater basin faced opposition from other landowners who asserted that pumping this groundwater from the basin would diminish the flow of springs that either broke through the surface of their land or contributed water to streams they relied on for their water uses.[186] The opponents cited *Lawton* in support of their assertions, contending that *Lawton* stood for the proposition that taking groundwater in a manner that caused springs that feed streams to go dry constitutes the taking of stream water.[187] Unfortunately, the Oklahoma Supreme Court refused to extend the logic of *Lawton* to the groundwater sources of springs that feed streams. Instead, it held that the stream water appropriation laws apply only "when the groundwater surfaces as a spring and forms a stream."[188] The prospective water user sought to capture water directly from the groundwater basin that is the source of springs, so the court held that he needed only to receive a well permit under the rules specified by Oklahoma's groundwater laws.[189]

Taken together, the cutbank rule and the Oklahoma Supreme Court's decisions in *Lawton* and *Messer-Bowers* produced absurd physical and legal outcomes. By the logic of *Messser-Bowers*, the prospective water user in *Lawton* would have been entitled to dry out the spring and reduce the flow of the stream it fed simply by drilling a well into the groundwater basin that fed the spring. This logic also entitles overlying landowners to diminish the flow of streams by pumping groundwater through wells bottomed outside of the streams' cutbanks without having to obtain an appropriation permit. The key physical connection in both cases is hydraulically connected groundwater, and the key legal connection is the Oklahoma Supreme Court's unwillingness to protect the public's interest in stream water by regulating the private rights of overlying landowners to pump groundwater. This creates great uncertainty for water users who appropriate water from streams that depend on groundwater for a part of their water supply.

B. Solutions to the Hydraulic Connection Problem

One obvious solution to the hydraulic connection problem would be to modify the sole source protection provision as follows: the proposed use

185. 8 P.3d 877 (Okla. 2000).
186. *Id.* at 879-80.
187. *Id.* at 880.
188. *Id.*
189. *Id.*

will not degrade or interfere with springs or streams ~~emanating in whole or in part from water originating in from a sensitive sole source groundwater basin.~~ This modification would protect all springs and streams, not just those involving groundwater basins designated by the United States Environmental Protection Agency "as a sole or principal drinking water source."[190]

The protection provided by the suggested solution prevents groundwater pumpers from diminishing springs and stream flows. This protection may be more than is needed, even when drinking water is at stake, for it prevents the pumping of groundwater to support a new or expanded beneficial use that could be accommodated without negatively affecting other beneficial uses.

Groundwater pumping that diminishes springs and stream flows has the same effect on springs and stream flows as surface diversions from them by appropriators. Water flows of springs and streams are diminished by the appropriator taking water for a beneficial use. As documented previously, prospective appropriators may receive a permit to divert water from surface sources if there is enough water available to serve their newly permitted uses without interfering with other beneficial stream water uses.[191]

This points the way to a more optimal recognition of hydraulic connections between groundwater sources and surface sources. Groundwater sources hydraulically connected to springs and streams should be deemed tributary to those surface sources.[192] Persons who wish to pump water from tributary groundwater sources should be required to seek an appropriation permit. The permits should be granted if the groundwater will support a beneficial use and there is enough water available in the affected spring or stream to accommodate the resulting diminution of its

190. 82 OKLA. STAT. § 1020.9(A)-(B) (2011); Safe Drinking Water Act of 1974 § 2(a), 88 Stat. 1678 (codified as 42 U.S.C. § 300h-3(e) (2012)).

191. 82 OKLA. STAT. § 105.12.

192. This concept is borrowed from Colorado's water laws. There, groundwater aquifers are deemed to be tributary unless their hydraulic connection to a stream is so attenuated that the withdrawal of water from them "will not, within one hundred years, deplete the flow of a natural stream at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal." COLO. REV. STAT. § 37-90-103(10.5) (2011).

According to the Executive Report of the latest Oklahoma Comprehensive Water Plan, Oklahoma's 24 alluvial aquifers are hydraulically connected to streams and therefore pumping from them can deplete water flows in streams to which they are hydraulically connected. OKLA. WATER RES. BD., 2012 OKLAHOMA COMPREHENSIVE WATER PLAN: EXECUTIVE REPORT 69-70 (2011). For a list of Oklahoma's eleven major and thirteen minor alluvial aquifers, see *id.* at 51.

flows without interfering with existing spring/stream water uses. This solution will end the uncertainty imposed on appropriators by Oklahoma's current groundwater laws while making water from tributary groundwater sources more available to overlying landowners than does the sole source solution.

IV. The Groundwater Mining Problem

A. The Problem

In general, dynamic groundwater aquifers are those that can produce useful amounts of water on a sustained basis. Porosity and permeability are the key determinants of whether a groundwater aquifer can produce useful amounts of water.[193] The ability of an aquifer to produce sustained yields is largely determined by its average annual recharge rate.[194] Aquifers with favorable porosity and permeability that enjoy plentiful recharge rates can produce large sustained yields as long as groundwater pumping does not extract water from the aquifer at a rate greater than the recharge rate. When groundwater pumping rates are higher than the recharge rate, the aquifer is being mined, causing the water table to drop, pumping costs to increase, risks of impaction destroying the ability of water to flow through the aquifer to increase, and the ultimate depletion of the aquifer.[195]

Oklahoma's groundwater law essentially mandates the mining of all its aquifers. The OWRB is instructed to regulate the withdrawal of water from Oklahoma's major aquifers by establishing a Maximum Annual Yield (MAY) "based upon a minimum basin or subbasin life of twenty (20) years."[196] The OWRB has extended the 20 year minimum basin life to minor groundwater aquifers.[197] In carrying out this mandate, the OWRB sets MAY's at levels that will not deplete the aquifer totally in twenty (20)

193. LEONARD RICE & MICHAEL D. WHITE, ENGINEERING ASPECTS OF WATER LAW 118-21 (1987). Porosity is "the ratio of the volume of open spaces to the total volume of rock." *Id.* at 118. Aquifers comprised of higher porosity materials tend to yield larger quantities of water, but much depends on the size of the pores and interconnection of the voids. *Id.* at 119. Permeability is "the ability of water . . . to move through a porous formation under the action of a gradient." *Id.* at 176. Gradient is "[a] slope of the water table tending to cause the flow of groundwater." *Id.* at 172.

194. *Id.* at 122-23. The rate of recharge is determined by the permeability of overlying materials and the availability of water "from precipitation, streams or other sources." *Id.* at 124.

195. *Id.* at 125-26.

196. 82 OKLA. STAT. § 1020.5(A) (2011).

197. OKLA. ADMIN. CODE § 785:30-9-2(d) (2011).

years but will deplete the reservoir to the level where beneath half of the overlying acreage there is only enough water left to meet domestic needs.[198] Still, as is illustrated below, this is a serious depletion that ultimately causes the aquifer to be unable to sustain many non-domestic uses.

According the United State Geological Survey, in 2005 the United States withdrew from all water sources about 460 million acre-feet of water for all its water uses.[199] The population of the United States was about 301 million,[200] so each person's share of the nation's 2005 total water withdrawals was about 1.53 AF/y.

When the OWRB calculated the MAY for the Elk City Aquifer, it found that the Aquifer had an annual recharge rate of 36,458 AF/y, but it set the MAY at 79,493 AF, which over a twenty year period of time would have substantially depleted the aquifer.[201] If this aquifer was not mined, it could produce a sustained yield capable of meeting the water needs of 23,829 persons. Yet Oklahoma Groundwater Law mandates that this and other renewable water sources be subject to mining largely so each overlying landowner may have the opportunity to receive a per acre production quota large enough to be useful.[202]

B. Solutions to the Groundwater Mining Problem

Oklahoma needs only to look to its past to solve the groundwater mining problem. The 1949 Oklahoma Ground Water Law prohibited the issuance of permits "for the extraction of water from a basin if such use would result in the depletion above the average annual ratio of recharge."[203] Furthermore, users could be required to curtail pumping from an aquifer if it was found that the withdrawal of water exceeded the safe annual yield set for the aquifer.[204] Setting a safe yield that does not exceed the aquifers recharge rate would preserve the sustainable production capacities of aquifers with generous recharge rates.

---

198. Telephone Interview with Dean Couch, *supra* note 10.

199. JOAN F. KENNEY ET AL., U.S. GEOLOGICAL SURVEY, ESTIMATED USE OF WATER IN THE UNITED STATES IN 2005, at 6 (circular 1344, 2009), *available at* http://pubs.usgs, gov/circ/1344/pdf/c1344.pdf.

200. *Id.*

201. DOUGLAS C. KENT, TIM LYONS & FRED E. WITZ, OKLA. WATER RESEARCH INST., EVALUATION OF AQUIFER PERFORMANCE AND WATER SUPPLY CAPABILITIES OF THE ELK CITY AQUIFER IN WASHITA, BECKHAM, CUSTER AND ROGERS MILLS COUNTIES IN OKLAHOMA 60 (1982).

202. Jensen, *supra* note 8, at 465; Telephone Interview with Dean Couch, *supra* note 10.

203. Okla. Ground Water Law, ch. 11, § 13, 1949 Okla. Sess. Laws 645.

204. *Id.* § 15.

For aquifers that do not have sustainable recharge rates, the only choices are to mine them or not use them at all. If the choice is to mine the aquifer, it must be made with the clear understanding that the uses the mining will support are also unsustainable.[205] Sooner or later the pumping costs will get too high or the aquifer's supply will get too low or the aquifer will suffer impaction in a way that reduces its ability to deliver adequate volumes of water.[206] Moreover, any plant or other life that had been sustained by the aquifer prior to its water table level being lowered through mining will no longer be viable.[207] Mining of tributary aquifers definitely should not be allowed in order to protect the sustainablity of the streams to which they are hydraulically connected.

V. Conclusion

Oklahoma has been blessed with bountiful water supplies.[208] But it is presently afflicted with water laws that subject Oklahoma's water users to great uncertainty about the value of their water rights. Water users with rights to use stream water are especially at risk, for their appropriative uses have been subordinated to the rights of riparian and overlying landowners to initiate conflicting uses. Groundwater users are authorized to race to the bottom, a race for which there can be no winner.

For now, Oklahoma's plentiful water supplies may be masking the risks and uncertainties created by a dysfunctional dual rights system, the failure of Oklahoma's water laws to require the co-management of most hydraulically connected streams and groundwater aquifers, and groundwater laws that encourage groundwater mining. This good fortune cannot continue. Nearly fifty years after they were adopted, it is time to restore the 1963 water reforms' vision of a water rights system unified around the Appropriation Doctrine. Having recognized the necessity of co-managing hydraulically connected springs, streams, and sole source aquifers, it is time to extend the benefits of this co-management to users of every stream that is hydraulically connected to a groundwater source. Having survived the ravages of the Dust Bowl Days, Oklahoma must discontinue its groundwater mining policies that have the potential to turn renewable water sources into dust.

---

205. *See* 3 WATERS AND WATER RIGHTS § 18.04, at 18-45 to 18-50 (Robert E. Beck ed., 2003) [hereinafter WATERS AND WATER RIGHTS 2003 ED.]; Gleick, *supra* note 11.

206. 3 WATERS AND WATER RIGHTS 2003 ED., *supra* note 205, § 18.04, at 18-45 to 18-50.

207. Gleick, *supra* note 11.

208. OKLA. WATER RES. BD., *supra* note 192, at 3.