

Oklahoma Law Review

Volume 61 | Number 4

2008

Clear as Mud: How *Helderman v. Wright* Missed an Opportunity to Clarify Oklahoma's Murky Water Law

H. Cole Marshall

Follow this and additional works at: <https://digitalcommons.law.ou.edu/olr>



Part of the [Natural Resources Law Commons](#), and the [Water Law Commons](#)

Recommended Citation

H. C. Marshall, *Clear as Mud: How Helderman v. Wright Missed an Opportunity to Clarify Oklahoma's Murky Water Law*, 61 OKLA. L. REV. 843 (2008),
<https://digitalcommons.law.ou.edu/olr/vol61/iss4/5>

This Note is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact Law-LibraryDigitalCommons@ou.edu.

NOTES

Clear as Mud: How *Helderman v. Wright* Missed an Opportunity to Clarify Oklahoma's Murky Water Law

I. Introduction

Perhaps long ago Mark Twain put it best when he said: “[w]hiskey is for drinking, water is for fighting over.”¹ Twain’s words remain true today as *rights* to water are becoming a contentious issue all over the United States,² with Oklahoma being no exception. Further complicating matters is Oklahoma’s murky water law, currently encumbered by perceived constitutional infirmities of the statutory system of appropriative rights, which was implemented to replace an outdated common law regime.

Historically, Oklahoma has employed two different systems for managing the use of natural flowing water: common law riparianism and prior appropriations.³ The riparian doctrine operates to “confer[] upon the owner of land contiguous to a watercourse the right to the *reasonable* and beneficial use of water on his land.”⁴ In contrast, the prior appropriations doctrine does not require a water user to own riparian land and determines rights by appropriation permits acquired on a “first in time, first in right” basis.⁵ Evident inconsistencies between the two systems led the Oklahoma legislature to attempt to limit common law riparian rights in promotion of an appropriations system.⁶ Nevertheless, the legislature’s efforts to abrogate riparian rights have been hindered by the Oklahoma Supreme Court’s decision in *Franco-American Charolaise Ltd. v. Oklahoma Water Resources Board*,⁷ which identified perceived constitutional infirmities within the appropriations statutes. The perceived infirmities, as defined by *Franco-American*, are rooted in the idea that limiting common law riparian rights may constitute a taking of personal property without just compensation.⁸ In contrast, the dissent in

1. Thomas L. Sansonetti & Sylvia Quast, Address, *Not Just a Western Issue Anymore: Water Disputes in the Eastern United States*, 34 CUMB. L. REV. 185, 185 (2004).

2. Bill Swichtenberg, *From Dams to Beans*, WATER ENG’G & MGMT., July 31, 2001, at 5, available at 2001 WLNR 4478819.

3. Gary D. Allison, *Franco-American Charolaise: The Never Ending Story*, 30 TULSA L.J. 1, 5 (1994).

4. *People v. Shirokow*, 605 P.2d 859, 864 (Cal. 1980) (emphasis added).

5. *Franco-Am. Charolaise, Ltd. v. Okla. Water Res. Bd.*, 1990 OK 44, ¶ 34, 855 P.2d 568, 585.

6. Allison, *supra* note 3, at 17.

7. *Franco-Am.*, ¶ 17, 855 P.2d at 577.

8. *Id.* ¶ 2, 855 P.2d at 571.

Franco-American argued that the legislative limitation imposed on riparian rights is constitutionally within the state's police power.⁹ The legislature, siding with the *Franco-American* dissent, responded in 1993 by enacting legislative amendments allowing the appropriations system to stay the course.¹⁰ Nonetheless, for the last thirteen years, *Franco-American* has remained unchallenged by subsequent litigation, resulting in the muddying of Oklahoma water law.

In *Helderman v. Wright*,¹¹ the Oklahoma Supreme Court had an opportunity to rule on the constitutionality of the 1993 amendments, potentially clarifying Oklahoma water law. Unfortunately, the court elected to sidestep the issue by reading into existing statutory language an implied requirement that notice of a water rights adjudication be given to the Oklahoma Water Resources Board (OWRB) in all water rights adjudications.¹² As a result of the parties' failure to give the previously unspecified notice, the court left the constitutional question for another day.¹³ Given that the Court of Civil Appeals' ruling below expressly brought into question the constitutionality of the 1993 amendments,¹⁴ the course of action by the Oklahoma Supreme Court represents a squandered opportunity to provide clarity and stability to Oklahoma water law.

This note will analyze the *Helderman* decision in four pertinent parts. Part II will provide a review of Oklahoma law on water use. Part III will discuss the facts, issue, holding, and decision in *Helderman*. Part IV will conduct an in-depth analysis of the Oklahoma Supreme Court's decision in *Helderman*, discussing the court's missed opportunity, how the court's holding may indicate future decisions on the issue, and the consequences—both pragmatic and economic—that will follow from the court's "non-holding." Part V will briefly look at how other states have handled the constitutional arguments against the appropriations system and will propose that the Oklahoma Supreme Court should abandon its ruling in *Franco-American* because the legislature's restriction of common law riparian rights constituted a valid exercise of the state's police power. This note concludes with Part VI.

9. *Id.* ¶ 5, 855 P.2d at 583 (Lavender, J., dissenting).

10. 82 OKLA. STAT. § 105.1A (2001) (expressly stating the intent of the Oklahoma Legislature to replace the dual systems of riparian and appropriative water rights with a first in time, first in right system of appropriations, to limit riparian water rights to domestic use, and to extinguish future claims of water based solely on riparian status).

11. 2006 OK 86, 152 P.3d 855.

12. *Id.* ¶ 16, 152 P.3d at 860 (82 OKLA. STAT. § 105.5).

13. *Id.*

14. *Helderman v. Wright*, No. 100709, 2006 OK CIV APP, ¶ 13 (Mar. 9, 2006), *vacated*, 2006 OK 86, 152 P.3d 855.

II. Water Law Preceding Heldermon—A Cry for Constitutional Clarity

Historically, the United States has employed “two great systems . . . that govern the acquisition, enjoyment, and transfer of property rights to use water.”¹⁵ The eastern states, possessing a more “humid” environment, follow the common law riparian system, while the “arid” western states have necessarily created and employed the prior appropriations system.¹⁶ However, semiarid states such as Oklahoma¹⁷ have occasionally used a dual system employing aspects of both riparianism and appropriations.¹⁸

A. In with Riparianism

As it is commonly used, “[t]he term ‘riparian rights’ indicates a bundle of rights that turn on the physical relationship of a body of water to the land abutting it.”¹⁹ More specifically, riparianism establishes that an abutting landowner enjoys a “usufructuary right in the water rather than . . . ownership of the water as such.”²⁰ Originally a common law doctrine, riparianism was first introduced in Oklahoma by the Organic Act of 1890 when Congress extended English common law to Indian Territory.²¹ Thus, a “landowner [was permitted to] use water running in a definite natural stream over or under the surface of his land, but . . . he [could] not prevent the natural flow of the stream”²² This form of riparianism still remains today with some qualifying provisions.²³

Although riparianism was an established doctrine in Oklahoma, the state “quickly found that while riparianism worked well in [some areas of the] United States . . . the arid [regions] needed more access to water than riparianism allowed.”²⁴ Consequently, in 1897, only seven years after the introduction of riparianism in Oklahoma, the first signs of an appropriations system began to appear.²⁵ The legislature, concerned about the arid sections

15. DAN A. TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 1:1 (2007).

16. *Id.*

17. Todd S. Hageman, Note, *Water Law: Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board: The Oklahoma Supreme Court's Resurrection of Riparian Rights Leaves Municipal Water Supplies High and Dry*, 47 OKLA. L. REV. 183, 184 (1994).

18. TARLOCK, *supra* note 15.

19. ROBERT E. BECK, WATER AND WATER RIGHTS § 6.01(a), at 6-7 (1991).

20. *Id.* § 8.03(a), at 8-49.

21. *Franco-Am. Charolaise, Ltd. v. Okla. Water Res. Bd.*, 1990 OK 44, ¶ 5, 855 P.2d 568, 572; WELLS A. HUTCHINS, THE OKLAHOMA LAW OF WATER RIGHTS 17 (1955).

22. HUTCHINS, *supra* note 21, at 45.

23. 60 OKLA. STAT. § 60 (2001).

24. Hageman, *supra* note 17, at 184.

25. HUTCHINS, *supra* note 21, at 17 n.61; *see also Franco-Am.*, ¶ 6, 855 P.2d at 572

of the state, chose to provide “for the appropriation . . . of stream water for the irrigation of [arid regions].”²⁶ Initially though, water could not be appropriated without the consent of riparian landowners.²⁷ As a result, it appeared that the systems would coexist harmoniously. Beneath the surface, however, the lack of conflict between the two systems may have been a product of the judiciary.²⁸ Few water use cases came before the courts, and those presented to the courts were usually resolved by refining the riparian system to make it more useful or interpreting the appropriations statutes in a manner discouraging their use.²⁹ The “reasonable use” standard first evolved from these cases and established that “[a]s between different riparian owners each one is limited to a reasonable use, with due regard to the rights and necessities of others interested.”³⁰ The Oklahoma Supreme Court held it was “the right of all to have the stream substantially preserved in its natural size, flow and purity, and protected against material diversion or pollution.”³¹ Therefore, riparian landowners enjoyed a substantial and, in some situations almost unlimited, right to the use of water from a definite stream. At this time, the Oklahoma Supreme Court had recognized such use as a private property right, protected by any and all instrumentalities that may be employed to effectuate such a right.³² Although “protected against material diversion” sounds in direct conflict with any appropriation of water, this dual system appeared to adequately address the water rights issues in Oklahoma. Nevertheless, as Professor Allison aptly stated, “[c]ontradictions in dual rights systems do not create desire for change until conflicts between riparian and appropriators emerge.”³³

In 1955, Wells A. Hutchins introduced the book *The Oklahoma Law of Water Rights*, “which graphically identified flaws in Oklahoma’s dual water rights system” and sparked a “movement . . . to amend the Water Code so it could better facilitate economic development.”³⁴ Hutchins’s idea was to adopt a system to “encourage, among other things, urban growth . . . by giving local governments predictability when planning for their water supply.”³⁵

(explaining the development of common law riparianism in Oklahoma).

26. *Franco-Am.*, ¶ 6, 855 P.2d at 572

27. *Id.*

28. Allison, *supra* note 3, at 13.

29. *Id.* at 12-13.

30. *Smith v. Stanolind Oil & Gas Co.*, 1946 OK 252, ¶ 12, 172 P.2d 1002, 1005 (quoting *Martin v. British Am. Oil Producing Co.*, 1940 OK 218, ¶ 17, 102 P.2d 124, 126).

31. *Id.*

32. *Atchison, T. & S.F. Ry. Co. v. Hadley*, 1934 OK 336, ¶ 15, 35 P.2d 463, 465.

33. Allison, *supra* note 3, at 12.

34. *Id.* at 13.

35. Hageman, *supra* note 17, at 185.

“Predictability” could benefit the local government by allowing them “to appropriate water for municipal use[s] without fearing that a riparian [would] later claim the [use of that water].”³⁶ Thus, while the Oklahoma judiciary favored riparianism as its first born, the legislature was primed for implementing the appropriations system to combat these economic concerns.

B. In With Prior Appropriations . . . For Now

Faced with the significant economic deficiencies of the dual system,³⁷ the legislature took action. Joseph F. Rarick, Professor of Law at the University of Oklahoma, was one of the most notable individuals in the push for water law reform in Oklahoma.³⁸ Professor Rarick’s most influential endeavor may have been his work with two legislative drafting committees to shape the substance of Oklahoma’s solution to these economic problems.³⁹ In 1963, heeding the advice of these Rarick-led drafting committees, the legislature enacted the following statute:

The owner of the land owns the water standing thereon, or flowing over or under its surface but not forming a definite stream . . . Water running in a definite stream, formed by nature over or under the surface, may be used by him for domestic purposes . . . 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 or pollute the same, *as such water then becomes public water and is subject to appropriation for the benefit and welfare of the people of the State, as provided by law . . .*⁴⁰

The statute further defined “domestic use” as “the use of water by a natural individual or by a family or household for household purposes, for farm and domestic animals up to the normal grazing capacity . . .”⁴¹; thus, it was clear this new law could be a restriction on “reasonable use” riparian rights. Nevertheless, to allow the riparian system to continue with its broad scope of reasonable use would be to “subvert the goal of creating a unitary system” to encourage economic growth.⁴² To transition into the new system, the

36. *Id.*

37. *See infra* Part IV.B.

38. Allison, *supra* note 3, at 13-14.

39. *See id.* at 14.

40. 1963 Okla. Sess. Laws 268 (emphasis added) (codified at 60 OKLA. STAT. § 60(a) (2001)).

41. 82 OKLA. STAT. § 105.1(2) (2001).

42. Allison, *supra* note 3, at 16.

committees found it best to subject all existing water uses, riparian or appropriative, to judicial determinations as to whether or not the use was a vested right.⁴³ If the court deemed the use “beneficial,” the use was considered “vested” and the user would receive an appropriation permit with a specific priority date associated with it.⁴⁴ The only non-domestic uses regarded as lawful were those carried out under a permit obtained through this process.⁴⁵ The downfall of this system was that the OWRB was only required to provide mail notice of the judicial determinations to persons who had previously attempted to affect an appropriation permit before 1963.⁴⁶ Thus, riparian owners who had not sought a permit prior to 1963 likely did not receive notice and, consequently, did not know to petition for a vested right. Likewise, the standards for assigning priorities to the new permits did not favor the riparian.⁴⁷ These standards contained forfeiture limitations where there had been a period of non-use for two successive years prior to the 1963 amendments.⁴⁸ Riparianism has no associated non-use limitations, thus riparian rights owners were more likely to forfeit their rights because of non-use.⁴⁹

Oklahoma was not alone in these developments, as most dual system states were faced with reforming their inherently divergent water law regimes.⁵⁰ “[T]he problem with abolishing or limiting riparian rights is that it must be done in a manner that does not result in an unconstitutional taking of the riparian interest.”⁵¹ Several states have tackled this issue, the first being Oregon in *California Oregon Power Co. v. Beaver Portland Cement Co.*⁵² The ultimate result in Oregon was that the only riparian rights that survived were those that “‘vested’ before the effective date of the state appropriation act, with only claims to water acquired by appropriation recognized after the effective date of the act.”⁵³ The Oregon Supreme Court obviously understood the new appropriations system to be constitutional and acknowledged that its mode of practice was not a taking without just compensation. Other dual

43. *Id.*

44. Allison, *supra* note 3, at 16; see also Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface Under the 1963 Amendments*, 23 OKLA. L. REV. 19, 24, 39 (1970).

45. Allison, *supra* note 3, at 16.

46. *Id.* at 19-20.

47. *Id.* at 20.

48. *Id.*

49. *Id.*

50. Hageman, *supra* note 17, at 185.

51. *Id.*

52. 295 U.S. 142 (1935).

53. Joseph W. Dellapenna, *Riparian Rights in the West*, 43 OKLA. L. REV. 51, 58 (1990).

system states followed suit in nearly identical fashion, including Kansas,⁵⁴ South Dakota,⁵⁵ and Texas,⁵⁶ all of which upheld statutes comparable to the 1963 Oklahoma statute.⁵⁷ Despite the dramatic changes and restrictions imposed on common law riparian rights, Oklahoma did not immediately face the constitutional challenges that other dual system states had addressed. Then, after nearly thirty years of being unchallenged, the Oklahoma Supreme Court changed everything.

C. Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board—Against the Current

In 1980, the City of Ada sent Oklahoma's water use system into a constitutional tailspin. Following an area drought in 1980, the City of Ada applied for a near threefold increase of its appropriated water from Byrd's Mill Spring.⁵⁸ Such a dramatic increase in appropriative permits to the City inevitably caused riparian owners to object.⁵⁹ After an administrative decision by the OWRB to scale back the requested amount, then to grant the appropriations permit, certain riparian owners appealed to the District Court of Coal County.⁶⁰ Eventually the case appeared before the Oklahoma Supreme Court, finally putting the court in a position to rule on the 1963 amendments. Going against the precedential current of most other western states, the court steered the opposite direction of economic development. Finding that the "Oklahoma riparian owner enjoys a vested common-law right to the reasonable use of the stream," the court held that this right was "part of [a] property owner's 'bundle of sticks' and may not be taken for public use without compensation."⁶¹ More specifically, the court held that the 1963 amendments were "fraught with a constitutional infirmity [because] they abolish the right of riparian owners to assert their . . . reasonable use of the stream [and] because [the amendments] fall short of an express abrogation of

54. *F. Arthur Stone & Sons v. Gibson*, 630 P.2d 1164 (Kan. 1981).

55. *Knight v. Grimes*, 127 N.W.2d 708 (S.D. 1964).

56. *In re Adjudication of Water Rights (Medina)*, 670 S.W.2d 250, 252, 254-55 (Tex. 1984).

57. Each challenged state statute provides that no water shall be appropriated without obtaining the proper permit from the state's water regulatory board, excepting from the permit process water used for domestic purposes. See KAN. STAT. ANN. § 82a-728 (2006); S.D. CODIFIED LAWS § 46-1-5 (2007); TEX. WATER CODE ANN. §§ 11.121, 11.142(a) (Vernon 2007).

58. *Franco-Am. Charolaise, Ltd. v. Okla. Water Res. Bd.*, 1990 OK 44, ¶ 4, 855 P.2d 568, 571.

59. *Id.*

60. *Id.*

61. *Id.* ¶ 2, 855 P.2d at 571 (emphasis added).

a riparian owner's common-law right."⁶² As a result, the court sent Oklahoma's water law swirling back into the murky waters of the dual rights regime, stating that "the statutory right to appropriate stream water coexists with, but does not preempt or abrogate, the riparian owner's common-law right."⁶³

Aware of what was taking place in the courts, the legislature was already in action. Although the *Franco-American* opinion was readopted and reissued in its final form in 1993, the legislature had already amended title 60, section 60 of the Oklahoma Statutes to expressly abrogate common law riparianism.⁶⁴ In further response to the court's holding in *Franco-American*, the legislature disclaimed common law riparian rights in 1993 by enacting title 82, section 105.1A stating:

It is the intent of the Oklahoma Legislature that the purpose of Section 105.1 through Section 105.32 of this title is to provide for stability and certainty in water rights *by replacing the incompatible dual systems of riparian and appropriative water rights which governed the use of water from definite streams in Oklahoma prior to June 10, 1963, with an appropriation system* of regulation requiring the beneficial use of water and providing that priority in time shall give the better right. These sections are intended to provide that *riparian landowners may use water for domestic uses and store water in definite streams and that appropriations shall not interfere with such domestic uses, to recognize through administrative adjudications all uses, riparian and appropriative, existing prior to June 10, 1963, and to extinguish future claims to use water, except for domestic use, based only on ownership of riparian lands.*⁶⁵

In addition to this vigorous rejection of the *Franco-American* holding, the legislature also enacted another statute⁶⁶ referencing the domestic use limitations imposed by title 60, section 60 and title 82, section 105.1A. These developments all but ensured that the Oklahoma Supreme Court would have another opportunity to provide certainty in Oklahoma's water management

62. *Id.* ¶¶ 17, 22, 855 P.2d at 577 (emphasis added); *see also* OKLA. CONST. art. 2, § 24 (amended 1990).

63. *Franco-Am.*, ¶ 14, 855 P.2d at 576.

64. 1988 Okla. Sess. Law Serv. 203 (West) (codified at amended at 60 OKLA. STAT. § 60(b) (2001)).

65. 82 OKLA. STAT. § 105.1A (2001) (emphasis added).

66. *Id.* § 105.2(A).

system by addressing the legislature's insistent intentions to depart from riparianism. This opportunity materialized in *Heldermon v. Wright*.⁶⁷

III. Heldermon v. Wright

A. Facts

Landowners Danny Wright and Teddy Neal Heldermon both own land along an unnamed stream in Caddo County, Oklahoma.⁶⁸ The unnamed stream flows northward in Caddo County, through Heldermon's property and into the Canadian River.⁶⁹ The dispute arose when Wright, an upstream land owner, began building a dam without first applying for a water appropriations permit or seeking the OWRB's approval of the dam.⁷⁰ Heldermon, a downstream owner, filed a petition in the Caddo County District Court seeking to enjoin further construction of the dam.⁷¹ Wright then applied for and obtained a permit from the OWRB to build the dam, but not a permit to appropriate the water.⁷² In response, Heldermon "recast the issue as one to determine [his] and Wright's competing rights to the unnamed stream's water."⁷³ Heldermon presented three alternative theories for determining the extent of his rights: first, he was entitled to the natural stream flow; second, he was entitled to the reasonable use of the stream under the *Franco-American* application; or third, he was entitled to domestic use as defined and used in title 82 of the Oklahoma Statutes.⁷⁴ Wright argued that, according to the *Franco-American* rule, his use was reasonable so long as the plaintiffs could not show that they were substantially harmed by his use, that the plaintiff's rights were limited to domestic use as defined by title 82, and that he was only accountable for releasing water sufficient for the plaintiff's domestic needs.⁷⁵ The *Heldermon* parties' arguments demonstrate the lack of clarity in Oklahoma water law, as both plaintiff and defendant asserted arguments rooted in both riparian rights and appropriations statutes. Ironically, neither plaintiff nor defendant argued that any statute governing water law in Oklahoma was unconstitutional.

67. 2006 OK 86, 152 P.3d 855.

68. *Id.* ¶ 2, 152 P.3d at 856-57.

69. *Id.*

70. *Id.* ¶ 2, 152 P.3d at 856.

71. *Id.* ¶ 3, 152 P.3d at 857.

72. *Id.* ¶ 4, 152 P.3d at 857.

73. *Id.*

74. *Id.* ¶ 5, 152 P.3d at 857.

75. *Id.* ¶ 5, 152 P.3d at 858.

B. Procedural Posture

Applying title 82, sections 105.1 and 105.1A as the controlling law, the trial court held the appropriations system to be the governing system, ultimately finding that Heldermon was entitled to only his domestic use of the stream water.⁷⁶ Upon this basis and with the aid of expert testimony, the court then held that Wright must release a minimum of 515 gallons of water per minute for Heldermon and other downstream riparian owners to have sufficient water to satisfy their domestic uses.⁷⁷ Wright appealed to the Oklahoma Court of Civil Appeals and, at that time, the first issues of constitutionality arose in the case. The Oklahoma Court of Civil Appeals held that the trial court had erroneously calculated the plaintiff's domestic needs and that title 82, sections 105.1A and 105.2(A)⁷⁸ were unconstitutional under the *Franco-American* rule. Although neither party had argued this position, the court ruled that: "As § 60's companion statutes, §§ 105.1A and 105.2(A) of the Act similarly limit the riparian owner to 'domestic use.' Accordingly, this same holding that § 60 violates Art. 2, § 24 of the Oklahoma Constitution, to which we are bound, also applies to those statutes."⁷⁹ Although the court of appeals held that the statutes are unconstitutional and, consequently, that the trial court improperly labeled the uses as "domestic uses," they affirmed because the trial court considered uses that were nonetheless considered "'reasonable use[s]' . . . protected from statutory limitation in *Franco-American*."⁸⁰

C. Decision of the Court

After granting certiorari, the Oklahoma Supreme Court avoided all issues of constitutionality. Upon determining the dispositive issue to be whether or not the OWRB should have received notice of the pending action, the court vacated the Oklahoma Court of Appeals' opinion and remanded the case to the trial court.⁸¹ Focusing on the procedures articulated in title 82, section 105.5 of the Oklahoma Statutes, the court held that section 105.5 required that the OWRB receive notice of any suit for the adjudication of rights to the use of

76. *Heldermon v. Wright*, No. CJ-2003-53 (Caddo Co. Dist. Ct. filed Apr. 21, 2004).

77. *Id.*

78. Although not specifically at issue in *Heldermon*, title 82, section 105.2(A) of the Oklahoma Statutes specifically references the domestic use limitations represented in the statutes at issue.

79. *Heldermon v. Wright*, No. 100709, 2006 OK CIV APP, ¶ 13 (Mar. 9, 2006), *vacated*, 2006 OK 86, 152 P.3d 855.

80. *Id.* ¶ 16.

81. *Heldermon v. Wright*, 2006 OK 86, ¶ 16, 152 P.3d 855, 860.

water.⁸² Title 82, section 105.5 provides in pertinent part that “the Attorney General shall intervene on behalf of the state in any suit for the adjudication of rights to the use of water if notified by the [OWRB] that the public interests would be best served by such action.”⁸³ The court held that the trigger for this notification requirement is the adjudication of water rights as defined by title 60, section 60 of the Oklahoma Statutes.⁸⁴ In support of their holding, the court stated that the

[l]egislature clearly anticipated and intended that the OWRB will have notice of such a suit even though the requirement and method for giving notice is omitted [because the] statewide comprehensive plan to oversee the use and protection of the public’s interest in stream water . . . has provided for the OWRB’s involvement in all aspects of stream water use⁸⁵

The court then outlined the actual process by which this notice would be administered. Upon receiving notice of a water rights adjudication from the plaintiff, the OWRB must determine if the public’s interest would be best served by intervention in the suit, and if so, the OWRB would instruct the Attorney General to intervene.⁸⁶ This is rather significant because the court goes on to note that “[f]ew public interests are more obvious . . . than the interest of the public . . . to maintain the rivers that are wholly within it *substantially undiminished*, except by such drafts upon them *as the guardian of the public welfare may permit* for the purpose of turning them to a more

82. *Id.* ¶ 11, 152 P.3d at 859.

83. 82 OKLA. STAT. § 105.5 (2001).

84. *Helderman*, ¶ 11, 152 P.3d at 859. Title 60, section 60 of the Oklahoma Statutes affords riparian landowners rights to the domestic uses of stream water, and rights to the remaining water are permitted through a system of appropriations for the benefit and welfare of the people of the state. According to the *Helderman* court, when any such rights are adjudicated pursuant to this statute, the OWRB must be notified. However, this leaves open the question whether or not the OWRB would be afforded notice when a party brings an action to adjudicate their rights to reasonable use pursuant to *Franco-American*, a case that has yet to be overruled. An answer to this question may be provided by title 82, section 105.5 of the Oklahoma Statutes, stating in pertinent part: “nothing herein contained shall be construed to empower district courts to recognize rights to use the water of a stream unless such rights have heretofore been established pursuant to this act or are claimed under Section 60 in Title 60 of the Oklahoma Statutes.” If, however, the OWRB is not afforded notice in such cases it would appear that “[a]nytime a water source does not contain enough water to satisfy all prospective and existing water uses, at least when riparian non-domestic use is involved, expensive judicial proceedings will be triggered to determine whether prospective and existing uses are reasonable” Allison, *supra* note 3, at 51.

85. *Helderman*, ¶ 13, 152 P.3d at 860.

86. *Id.* ¶ 14, 152 P.3d at 860.

perfect use.”⁸⁷ Although the court felt it was necessary that “the State be allowed to intervene in a suit to protect its interest in preserving the waters within its borders,” they “save[d] for another day the issue of the constitutionality of the Oklahoma Stream Water Use Law.”⁸⁸

IV. Analysis

A. A Squandered Opportunity to Provide Certainty and Stability

Historically, Oklahoma courts have disfavored the appropriations system.⁸⁹ Prior to the 1963 amendments, “the lack of conflict between riparian landowners and appropriators . . . may have been a function of the appropriation system being rendered moribund by judicial interpretations that made its use difficult, if not impossible”⁹⁰ Thus, in light of the *Franco-American* decision in 1990, the Oklahoma Supreme Court’s decision in *Heldermon* to rule procedurally and save the issue of constitutionality “for another day” may have been its attempt to sustain judicial disfavor for prior appropriations. In other words, it may be interpreted as the court’s unwillingness to reconsider its holding in *Franco-American*. This may foreshadow future court decisions favoring the dual system of old. The court’s support for its procedural ruling in *Heldermon*, however, may also imply a contrary result. The court, by requiring notice to the state, albeit through the OWRB, appeared to take a significant stand for ensuring that all water rights adjudications represent the public’s interest in water use. Prior to *Heldermon*, title 82, sections 105.1 and 105.1A—both largely at issue in regards to the constitutionality of the appropriations system—were judicially unchallenged. Thus, at the time of *Heldermon*, the appropriations system as administered by the OWRB represented the status quo for water use regulation in Oklahoma.⁹¹ The court’s avoidance of the substantive issues presented in *Heldermon* could be interpreted as an attempt to maintain the status quo of the state’s current water use system until the court faces an ultimate decision to rule one way or the other. But even then, the *Heldermon* court’s logic and language may imply that courts will continue to employ the appropriations system in Oklahoma.

The court’s logic in *Heldermon* appears to intertwine itself with the statutes at the heart of the riparian-appropriations debate. As ruled by the court in *Heldermon*, the “rights” to be adjudicated, requiring notice to the OWRB, are

87. *Id.* ¶ 15, 152 P.3d at 860 (emphasis added) (quoting *Hudson Co. Water Co. v. McCarter*, 209 U.S. 349, 356 (1908)).

88. *Id.* ¶ 16, 152 P.3d at 860.

89. See Allison, *supra* note 3, at 12-13.

90. *Id.* at 13.

91. 82 OKLA. STAT. § 105.9 (2001).

derived from title 60, section 60⁹²—the very statute ruled unconstitutional in *Franco-American* and by the Oklahoma Court of Appeals in its review of *Heldermon*. Likewise, the court found the necessity for giving the OWRB notice in such cases was to afford the OWRB the opportunity to “oversee the use and protection of the public’s interest in stream water.”⁹³ The court calls this responsibility of the OWRB part of a comprehensive plan to represent the public’s interest in the use of stream water derived in part from title 60, section 60 and specifically title 82, section 105.1A⁹⁴—both statutes ruled unconstitutional by the Oklahoma Court of Civil Appeals in its review of *Heldermon*.⁹⁵ The Oklahoma Supreme Court’s language in *Heldermon* may also imply a result favoring the constitutionality of the statutes. The court largely supported its procedural holding with a concern for the public’s interest in stream water use.⁹⁶ Further, the court stated:

Generally, the *public interests* will best be served by the Attorney General’s intervention [on behalf of the OWRB] in suits over rights to *stream water*. ‘Few public interests are more obvious . . . than the interest of the public . . . to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them *as the guardian of the public welfare may permit* for the purpose of turning them to a more perfect use.’⁹⁷

Finally, the Oklahoma Supreme Court concluded “that the State [should] be allowed to intervene in a suit to protect its *interest in preserving the waters* within its borders.”⁹⁸ The heart of the argument for appropriations as opposed to riparian water use regulation is to promote the “benefit and welfare of the people of the state.”⁹⁹ Affording notice to the government body representing the state’s public interest in stream water use (in this case, the OWRB) implies

92. *Heldermon*, ¶ 11, 152 P.3d at 859.

93. *Id.* ¶ 13, 152 P.3d at 860.

94. *Id.* ¶ 13 n.26, 152 P.3d at 860 n.26.

95. *Heldermon v. Wright*, No. 100709, 2006 OK CIV APP, ¶ 13 (Mar. 9, 2006), *vacated*, 2006 OK 86, 152 P.3d 855.

96. *Heldermon*, ¶ 13, 152 P.3d at 860.

97. *Id.* ¶ 15, 152 P.3d at 860 (emphasis added) (quoting *Hudson Co. Water Co. v. McCarter*, 209 U.S. 349, 356 (1908)). Title 82, section 105.5 of the Oklahoma Statutes states in pertinent part that “the Attorney General shall intervene on behalf of the state in any suit for the adjudication of rights to the use of water if notified by the [OWRB] that the public interests would be best served by such action.” Thus, it appears that once the OWRB is given notice, the agency determines if the public’s interest is best served by intervening in the case, and if so the Attorney General intervenes on its behalf.

98. *Id.* ¶ 16, 152 P.3d at 860 (emphasis added).

99. 60 OKLA. STAT. § 60 (2001).

that in the future the court may consider the public's water needs paramount to the riparian landowner's water needs. It would logically follow that the court would not rule the appropriations statutes unconstitutional, but would rather uphold them as the sole process of regulating water use in Oklahoma. However, the court chose not to rule on these substantive issues, leaving legal minds to ponder the different interpretations. Thus, the *Heldermon* court squandered an opportunity to provide certainty and stability—perhaps further muddying Oklahoma water law.

B. Implications of the Heldermon “Non-holding”

The Oklahoma Supreme Court's holding in *Heldermon* will certainly impact water use law in Oklahoma, both pragmatically and economically. Pragmatically speaking, now that the court has afforded the OWRB that opportunity to intervene in all water rights actions, water rights holders will almost necessarily have to account for the public's interest when asserting their own rights. However, *Heldermon*'s non-holding may pose significant implications for the administration of water rights moving forward. Currently, water rights are administered through the appropriations system, as facilitated by the OWRB.¹⁰⁰ However, according to *Franco-American*, a holding that the Oklahoma Supreme Court has yet to reconsider, the legislature did not constitutionally abrogate riparian rights.¹⁰¹ Under *Franco-American*, not only are common law riparian rights preserved, but a riparian landowner is entitled to reasonable use,¹⁰² which can be substantially greater than domestic use.

The 1993 legislative response to *Franco-American*, however, afforded the appropriations system the chance to move forward but may not have completely overruled *Franco-American*.¹⁰³ Under the 1993 statutes, riparian rights are essentially limited to domestic use “as such water then becomes public water and is subject to appropriation for the benefit and welfare of the people of the state.”¹⁰⁴ Thus, when the OWRB issues appropriative permits to applicants seeking beneficial use, they will consider only the domestic needs

100. 82 OKLA. STAT. § 105.9 (2001).

101. *Franco-Am. Charolaise, Ltd. v. Okla. Water Res. Bd.*, 1990 OK 44, ¶ 17, 855 P.2d 568, 577.

102. *Id.* ¶ 2, 855 P.2d at 571.

103. The court in *Franco-American* found the 1963 amendments unconstitutional on two grounds: first, the failure to expressly abrogate common law riparian rights, and second, that the statute is an unconstitutional taking of personal property without just compensation. *Franco-Am.*, ¶¶ 17, 22, 855 P.2d at 577. The 1993 statutes enacted by the legislature in response to *Franco-American* expressly abrogated common law riparian rights, but left open the question of unconstitutional taking of personal property. 82 OKLA. STAT. § 105.1A; *see also* 60 OKLA. STAT. § 60.

104. 60 OKLA. STAT. § 60.

of surrounding riparian landowners. Anything above domestic needs will be subject to appropriations by non-riparian water users. This is even more of an issue now that the OWRB must receive notice of any adjudication of water rights. If a riparian landowner attempts to assert his rights to reasonable use pursuant to the holding of *Franco-American*, the OWRB, under legislative mandate,¹⁰⁵ will likely intervene in the action, representing the appropriations system as the controlling law and limiting riparian rights to domestic uses.¹⁰⁶ The outcome of such an action is unknown, which is the reason Oklahoma's water law is so murky. Knowing *Franco-American* to still be judicially intact, the Oklahoma Supreme Court further muddled Oklahoma water law by rendering a procedural decision supported by the very statute *Franco-American* ruled unconstitutional, without addressing questions of the constitutionality of that statute.

The Oklahoma Supreme Court's non-holding in *Helderman* poses significant economic implications in addition to pragmatic consequences. The non-holding leaves current appropriators, including local municipalities, utility providers, and certain state industries, uncertain as to whether they must account for riparian water rights when planning for their own water needs. "The instability created for all appropriators is particularly troublesome for municipal water supplies due to the long-term planning and the enormous capital investment necessary to construct and maintain the municipal supply."¹⁰⁷ Take the largest municipality in Oklahoma as an example: "Oklahoma City . . . holds appropriative [water] rights in several Oklahoma rivers and streams pursuant to permits issued by the State of Oklahoma through the OWRB."¹⁰⁸ Pursuant to these rights "Oklahoma City . . . provide[s] water to over 500,000 people for the protection of their health, safety, and welfare."¹⁰⁹ Given the current validity of the *Franco-American* holding and the legislative mandate of title 60, section 60 and title 82, sections 105.1 and 105.1A, the City of Oklahoma City cannot ensure that their appropriative water rights are secure. This could potentially put the water needs of half a million people into the hands of a small number of riparians—a dangerous outcome. The worst case scenario is that the *Franco-American* decision, which was perpetuated by *Helderman*, "created a right for riparians to unreasonably speculate in water at the expense of reliable municipal water

105. 82 OKLA. STAT. § 105.5; *see also* 82 OKLA. STAT. § 1085.2(1).

106. 60 OKLA. STAT. § 60; *see also* 82 OKLA. STAT. §§ 105.1, 105.1A.

107. Hageman, *supra* note 17, at 194.

108. Joint Brief of Amici The City of Oklahoma City and Oklahoma City Water Utilities Trust at 2, *Helderman v. Wright*, 2006 OK 86, 152 P.3d 855, No. 100709 [hereinafter Joint Brief of Oklahoma City].

109. *Id.*

supplies.”¹¹⁰ The City of Oklahoma City strongly agrees that this is “especially critical to the general welfare of the State in times of drought . . . where people are faced with water shortages and investment in additional water reservoirs and facilities are essential for survival and growth.”¹¹¹ The danger and instability of riparianism stems from the idea that riparians would be placed in a position to assert “bargaining leverage to gain a favorable settlement from a potentially affected municipality”¹¹² like Oklahoma City and others not built along a large water source.

Public utility providers are also dramatically affected by the instability created by the questionable validity floating along with riparian rights. Oklahoma Gas & Electric (OG&E) is a wholly owned subsidiary of OGE Energy Corp. and has been providing dependable electric service to Oklahomans since 1902, currently serving approximately 750,000 customers.¹¹³ A reliable water supply is indispensable to providers such as OG&E, especially given that most of their water supply comes from appropriative rights secured through permits.¹¹⁴ “Four of OG&E’s six electric generating facilities rely either partially or entirely on stream water provided by eleven . . . stream water permits totaling 297,746 acre-feet per year.”¹¹⁵ Accounting for individual riparian rights jeopardizes the state’s largest utility providing energy to the people, creating a direct impact on the welfare of the state. The “[e]nergy generated and delivered by OG&E is Oklahoma’s life-blood,” and to deliver energy, OG&E needs an “appropriative water rights system [that] provides water supply reliability, as opposed to the instability and uncertainty associated with riparian systems.”¹¹⁶

Some of the state’s largest industries—agriculture and the oil and gas industry—may experience even greater impacts. The state’s agricultural sector, represented by The Oklahoma Farm Bureau, strongly criticized the *Franco-American* decision¹¹⁷ and to this day opposes the instability of common law riparian rights.¹¹⁸ The Oklahoma Farm Bureau (OFB) is “[an organization] of farm and ranch families united for the purpose of analyzing

110. Hageman, *supra* note 17, at 194.

111. Joint Brief of Oklahoma City, *supra* note 108, at 4.

112. Hageman, *supra* note 17, at 194.

113. Brief of Amicus Curiae Oklahoma Gas & Electric Co. (OG&E) at 4, *Helderman v. Wright*, 2006 OK 86, 152 P.3d 855 (No. 100709).

114. *Id.*

115. *Id.*

116. *Id.* at 5.

117. Hageman, *supra* note 17, at 195.

118. The Oklahoma Farm Bureau Legal Foundation’s Amicus Curiae Brief at 4, *Helderman v. Wright*, 2006 OK 86, 152 P.3d 855 (No. 100709) [hereinafter Brief of Oklahoma Farm Bureau].

their problems, and formulating action to achieve educational improvement, economic opportunity, and social advancement [and serves as] the voice of agricultural producers at all levels.”¹¹⁹ Although many of the 162,000 OFB member families are themselves riparian landowners, the OFB firmly supports the appropriations system of water use management.¹²⁰ OFB members “utilize their riparian rights in various ways including domestic uses and as authorized appropriators, [therefore, declaring the appropriations statutes] unconstitutional is particularly significant . . . because it leaves riparian owners in a state of uncertainty and their property interests will be adversely affected by this uncertainty.”¹²¹ The OFB, representing a large contingent of riparian owners, is arguing that a dual system of riparian rights and appropriative rights would in fact be detrimental to *riparian landowners*. Even further, the OFB advocates that it should be exclusively a system of appropriations,¹²² a far cry from the “unconstitutional taking without just compensation” argument that opponents of the appropriations system build it up to be.

The uncertainty rising in the wake of the *Heldermon* decision is likely to have consequences beyond the agricultural sector. Oklahoma’s oil and gas industry will likely suffer from the uncertainty as well. Professor Drew Kershen¹²³ explains the water needs of the oil and gas industry in his lecture “Water Law for the Oil & Gas Lawyer.”¹²⁴ In his lecture, Professor Kershen states that the oil and gas industry needs water for the drilling and fracturing of wells, enhanced recovery to increase or maintain production, and, further, for the operation of industrial facilities affiliated with the oil and gas industry such as refineries.¹²⁵ Without a stable system of appropriations unencumbered by riparian rights, oil and gas companies would be forced to bargain and contract with riparian landowners for the right to appropriate the use of their

119. Oklahoma Farm Bureau—What Is Farm Bureau?, <http://www.okfarmbureau.org/about/whatIsFarmBureau.asp> (last visited June 9, 2009).

120. Brief of Oklahoma Farm Bureau, *supra* note 118, at 1.

121. *Id.*

122. *Id.*

123. Professor Drew L. Kershen is the Earl Sneed Centennial Professor of Law at the University of Oklahoma College of Law where he teaches courses on agricultural law, water law, professional responsibility, and legal history. Professor Kershen is also a member of the Oklahoma Water Law Advisory Commission and has previously served on the Board of Directors and as President of the American Agricultural Law Association, while also serving as a trustee to the Rocky Mountain Mineral Law Foundation from 1991-1995. OU College of Law—Faculty—Drew L. Kershen, <http://www.law.ou.edu/faculty/kershen.shtml> (last visited June 9, 2009).

124. Drew L. Kershen, Earl Sneed Centennial Professor, Univ. of Okla. Coll. of Law, Address at the 2006 Eugene Kuntz Conference on Natural Resources Law and Policy: Water Law for the Oil & Gas Lawyer (Oct. 26, 2006) (presentation on file with author).

125. *Id.*

water. This presents a further complication because under the archaic regime of riparianism, the oil and gas company must continually ensure that this contracted use does not interfere with the ever-moving target of reasonable use by adjacent riparian landowners. This process will inevitably lead to expensive litigation and severe operational uncertainty within Oklahoma's oil and gas industry, which provides a potential disincentive for such companies to invest in Oklahoma.¹²⁶ Professor Kershen indirectly discusses the uncertainty currently existing in Oklahoma's water law by highlighting a distinction between Oklahoma and Texas with regard to riparian rights. He notes that Texas has successfully abrogated and reaffirmed the extinguishment of riparian rights, while also noting that Oklahoma still battles with inconsistencies between *Franco-American* and persistent statutory repeals of riparian rights.¹²⁷

Unfortunately, the seriousness of the pragmatic and economic implications of the Oklahoma Supreme Court's decision did not ring loud enough in the *Heldermom* decision. The State of Oklahoma might find hope, however, because the only proper interpretation of the appropriations statutes, which has been left for another day—one inevitably soon to come—is for the Oklahoma Supreme Court to uphold them as constitutional.

V. Overruling *Franco-American*—*Clear Waters*

The unsoundness of the *Franco-American* decision has plagued Oklahoma water law long enough, and soon again the Oklahoma Supreme Court will have the opportunity to steady the course of Oklahoma water law. Whether on rehearing of the *Heldermom* case or on the next inevitable dispute over water rights, the Oklahoma Supreme Court should expressly overrule *Franco-American* because the abrogation of riparian rights falls properly within the bounds of the state constitution. Contrary to the holding of *Franco-American*, title 60, section 60 of the Oklahoma Statutes is constitutional, as well as title 82, sections 105.1A and 105.2(A). The restriction of riparian rights by these statutes constitutes a valid exercise of the state's police power. As the Oklahoma Supreme Court itself recently stated:

It is a basic principle that water is a natural resource, which the state may regulate for the health, welfare and safety of the people. The Legislature may exercise its police power to protect the state's water *irrespective of the rights of private owners of the land most immediately concerned*. For the health, welfare and safety of its

126. See generally *Smith v. Stanolind Oil & Gas Co.*, 1946 OK 252, 172 P.2d 1002.

127. Kershen, *supra* note 124.

citizens, the Legislature may regulate a landowner's use and enjoyment of water resources to prevent waste and infringement on the rights of others.¹²⁸

Riparian landowners do not own the water. To the contrary, stream water is public water, and "[t]he state may either reserve to itself or grant to others its right to utilize these streams for beneficial purposes."¹²⁹ By enacting the appropriations' statutes the legislature has simply exercised its constitutional right to provide for the welfare of the people. As the United States Supreme Court stated in *United States v. Rio Grande*, "as to every stream within its dominion a State may change this common-law rule, and permit the appropriation of the flowing waters for such purposes as it deems wise."¹³⁰ Further, "the magnitude of diminution necessary to invalidate a law on its face [as unconstitutional] is a regulatory denial of 'all economically beneficial or productive use' of the property."¹³¹

As Professor Allison aptly stated in his review of the *Franco-American* decision: "Property often comes in the form of a bundle of entitlements, but 'the destruction of one strand of the bundle is not viewed as a taking because the aggregate must be viewed in its entirety.'"¹³² Although the 1963 amendments may have somewhat diminished the breadth of riparian rights, they did not deny riparian landowners this right in its entirety, but rather merely reduced the breadth of the right from reasonable use to domestic use.

Oklahoma is not the first state to encounter the constitutional questions omnipresent with the introduction of an appropriations system. However, most states have upheld an appropriations system as within the state's constitutional police power. Kansas, North Dakota, Oregon, Texas, and Washington have all concluded riparian rights may be extinguished in favor of a unitary system of appropriations.¹³³ A Nebraska Supreme Court decision in a case remarkably similar to *Heldermom* marks the most notable recent

128. *Jacobs Ranch, L.L.C. v. Smith*, 2006 OK 34, ¶ 26, 148 P.3d 842, 849-850 (citations omitted) (emphasis added).

129. *Okla. Water Res. Bd. v. Cent. Okla. Master Conservancy Dist.*, 1968 OK 73, ¶ 14, 464 P.2d 748, 753 (citations omitted).

130. 174 U.S. 690, 702-03 (1899); *see also* *California v. United States*, 438 U.S. 645, 662-63 (1978); *Kansas v. Colorado*, 206 U.S. 46, 94 (1907).

131. Allison, *supra* note 3, at 55 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)).

132. *Id.* at 56 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987)).

133. *F. Arthur Stone & Sons v. Gibson*, 630 P.2d 1164, 1173 (Kan. 1981); *Baeth v. Hoisveen*, 157 N.W.2d 728, 731-33 (N.D. 1968); *In re Hood River*, 227 P. 1065, 1085-87 (Or. 1924); *In re Adjudication of Water Rights (Medina)*, 670 S.W.2d 250, 252, 254-55 (Tex. 1984); *In re Deadman Creek Drainage Basin*, 694 P.2d 1071, 1072, 1076-77 (Wash. 1985).

action favoring the appropriations system. In *Koch v. Aupperle*,¹³⁴ the Nebraska Supreme Court addressed a dispute between neighboring landowners involving the use of stream water flowing through two properties. Koch, a downstream landowner, filed suit against Aupperle to enjoin the construction of an upstream dam that inhibited the flow of water used in a farm pond constructed on Koch's property.¹³⁵ Neither Koch nor Aupperle had affected any kind of appropriative right to the use of water in the unnamed stream,¹³⁶ and both appeared to assert rights as riparian landowners. However, "[s]ince 1895, Nebraska law governing [the use of water] has been statutory" as opposed to the pre-1895 regime of common law riparianism.¹³⁷ Nebraska's approach to abrogating riparian rights looks strikingly similar to the approach taken by Oklahoma:

[W]hile the 1895 irrigation act abrogated the common law of riparian rights in favor of the current system of appropriation, it did not abolish existing riparian rights with respect to parcels of land severed from the public domain prior to April 4, 1895, the effective date of the act. Such rights could be established by showing that "by common law standards the land was riparian immediately prior to the effective date" of the act and that it had not subsequently lost its riparian status as a result of severance. Thus, riparian rights which had vested prior to the effective date of the 1895 act were preserved, but no new riparian rights could be acquired after that date.¹³⁸

Nebraska, like Oklahoma, afforded riparian landowners a chance to maintain their riparian rights by essentially appropriating their uses prior to the abrogation of all riparian rights. Nebraska, however, has gone a step further to abrogate even domestic riparian uses—a use that Oklahoma chose to preserve for riparian landowners. Addressing a lower court opinion that "goes on to recognize that the right of the downstream user to 'use water' from the stream 'for domestic purposes' was 'superior' to the upstream appropriator's rights," the Nebraska Supreme Court expressly held that such an opinion was "unwise" and disapproved.¹³⁹ Ultimately neither Koch nor Aupperle were entitled to the use of the water because neither affected its appropriation, and

134. 737 N.W.2d 869 (Neb. 2007).

135. *Id.* at 872.

136. *Id.* at 873-74.

137. *Id.* at 876-77.

138. *Id.* at 880 (internal quotations omitted).

139. *Id.* at 880-81 (quoting *Brummond v. Vogel*, 168 N.W.2d 24, 28 (Neb. 1969)).

the court found that neither party held title to land that was preserved as riparian prior to 1895.¹⁴⁰

While the Nebraska Supreme Court faced virtually the same dispute as the Oklahoma Supreme Court in *Helderman*, it clearly thought it perfectly constitutional to *not* recognize any riparian uses—even *domestic* uses—because neither party had affected any such rights prior to 1895. Thus, while Oklahoma struggles to find it constitutional to abrogate *any* riparian rights, at least one state has had no problem finding it constitutional to abrogate nearly *all* riparian rights.

Finally, the Oklahoma appropriations statutes are constitutional because it is logical to construe the 1963 amendments, as well as their companion statutes, as constitutional. One maxim of statutory interpretation provides that “[e]very reasonable presumption will be indulged in favor of the constitutionality of a statute, and the same will be upheld unless its conflict with the Constitution is clear and certain.”¹⁴¹ This rule of construction appears to be overwhelmingly evident in the case of the appropriations statutes. Other states’ interpretations of almost identical statutes as constitutional provides an open channel for such interpretation in Oklahoma. Further, “[t]his rule is particularly applicable and the presumption is especially strong when the statute has been long acquiesced in and has been treated as valid by the various departments of government.”¹⁴² Oklahoma has acquiesced in the appropriations statutes’ current state for nearly seventeen years. It should be noted this period of acquiescence dates back to the *Franco-American* decision, which was preceded by thirty years of acquiescence itself. This timeline effectively eliminates any future claims that riparian landowners were not placed on notice that their rights were changing, as asserted in *Franco-American*. Further, various departments and branches of government treat the statutes as valid. Clearly the legislature believes the statutes are constitutional, as evidenced mostly by their persistent action to repeal riparian rights in the face of judicial opposition. Not only does the legislature understand this, but the state executive does as well. The Oklahoma Attorney General filed a brief addressing the constitutionality of the appropriations statutes in *Helderman*, stating: “the restriction of riparian water rights set forth in 82 O.S. §§ 105.1A and 105.2(A) is a valid exercise of the state’s police power that does not rise to the level of a compensable taking.”¹⁴³ The Attorney General concluded by

140. *Id.* at 881.

141. *C.C. Julian Oil & Royalties Co. v. Capshaw*, 1930 OK 452, ¶ 27, 292 P. 841, 847.

142. *Id.* (citations omitted).

143. Brief the Attorney General Addressing the Constitutionality of 82 O.S. § 105.1A and 105.2(A) at 6, *Helderman v. Wright*, 2006 OK 86, 152 P.3d 855 (No. 100709).

squarely opposing the holding of *Franco-American*.¹⁴⁴ It appears that the Oklahoma Supreme Court is the only bottleneck keeping the appropriations system from flowing freely.

VI. Conclusion

For years the instability of riparian water rights, persistent repeals by the legislature, and consistent rejection of the legislature's statutory schemes by the judiciary have muddled Oklahoma water law. A system of sole riparian rights would provide certainty but not stability for the general welfare, for it does not provide for the water needs of the arid regions of the state. A dual rights system purportedly makes the best of both worlds but, in reality, provides only continued pragmatic and economic uncertainty. There appears to be one obvious answer to clear the water, and the Oklahoma Supreme Court is the judicial body vested with the power to clarify the law. Currently, the Oklahoma Supreme Court has remanded the *Heldermon* case to the Caddo County District Court for rehearing with instructions that the OWRB be properly notified of the action.¹⁴⁵ Whether Mr. Heldermon and Mr. Wright decide to pursue the action further with the involvement of the OWRB is immaterial in the grand picture. If not continued by Heldermon and Wright, the dispute will inevitably rise again—and rise again soon—between adjacent stream water users. Only then, because of *Heldermon*, the parties will know that they must involve the OWRB in the matter, and the Oklahoma Supreme Court must finally rule on the appropriation statutes' constitutionality. At its next opportunity, the Oklahoma Supreme Court should overrule its *Franco-American* decision with a proper constitutional interpretation turning Oklahoma back in the direction of stable economic development and water law certainty.

H. Cole Marshall

144. *Id.* at 9.

145. *Heldermon v. Wright*, 2006 OK 86, ¶ 16, 152 P.3d 855, 860.