Water Law: Changes in Water Permit Application After *Ricks Exploration Co. v. Oklahoma Water Resources Board* – Were Vested Rights Lost?

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torney fees. The court now has the opportunity to provide the practicing bar with the same type of clearly delineated procedure under which to handle appeals. It should exercise that opportunity by amending the rule a fourth time.

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The partnership between Oklahoma and its water resources is not unlike excerpts from a bad marriage: the state has neglected it, abused it, and—when it appeared the resource would leave—taken steps to try to preserve it. The glimpses of this union between state and water provided by legislative enactments and court cases comprise an interesting chapter in legal history. A ruling by the Oklahoma Supreme Court, Ricks Exploration Co. v. Oklahoma Water Resources Board, and the reaction to it by the Oklahoma legislature expand that chapter, and it is not yet finished.

Briefly, the Ricks court ruled that the Oklahoma Water Resources Board (OWRB) erred in denying standing to a mineral lessee that sought a non-domestic groundwater use permit under the existing water law of the state. Thereafter, the legislature amended the statute in an apparent attempt to deny mineral lessees standing for water permits, in effect overruling Ricks.

This note discusses the history of Oklahoma water law and the Ricks

41. The rule specifically provides for the trial court's jurisdiction to decide the issue and delay appeal until all issues are ruled upon.

2. Id. at 504. It should be noted that “standing” as used in Ricks differs from the usual administrative law term. Normally, it indicates that those appealing an adverse agency decision must meet certain requirements before a court will review the case. Here, it denotes prerequisites for application to the Oklahoma Water Resources Board. 82 OKLA. STAT. § 1020.1 (1981).
3. 82 OKLA. STAT. § 1020.11(D) (Supp. 1985), as amended, reads:
   Except as provided in Section 1020.21 of this title, no permits shall be issued to an applicant who is not the surface owner of the land on which the well is to be located, or does not hold a valid lease from such owner permitting withdrawal of water from such basin or subbasin.
case. It also examines the revised statute, the legislative intent behind it, and its effect on water users. Most important, however, the note will attempt to determine the statute’s constitutionality.

**Oklahoma Water Law**

Oklahoma has embraced various water philosophies since statehood. Charitably, this history has been described as “rather complicated.” By statute, Oklahoma Territory in 1890 declared that the landowner was the owner of all water flowing over or under his land, but not groundwater forming a definite stream. This absolute ownership doctrine, arising from early English common law, has vestiges in present-day Oklahoma statutes. The absolute ownership theory was changed by case law in *Canada v. City of Shawnee* to a reasonable use doctrine, a modification of the absolute ownership doctrine, under which landowners may be liable for injuries arising from their groundwater withdrawals if their use is unreasonable. Such use is unreasonable if it is wasteful or if it occurs on lands that do not overlie the area from which the water was taken. The use is also unreasonable if it prevents other users from enjoying their share of the water and they are injured as a result.

Although there were earlier laws governing water use, the legislature first regulated the use of groundwater in 1949. The statute restricted water withdrawal to the landowner. Groundwater was owned by the surface

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6. NATIONAL WATER COMM’N, A SUMMARY-DIGEST OF STATE WATER LAWS 614 (R. Dewsnup & D. Jensen eds. 1973) [hereinafter DIGEST].

7. *Id.*


10. 179 Okla. 53, 64 P.2d 694 (1937). The court appeared to use the terms "reasonable use" and "correlative rights" interchangeably; however, the better authority is that the reasonable use rule was adopted in the decision. See Rarick, *Oklahoma Water Law, Ground or Percolating in the Pre-1971 Period, supra note 7.*


12. *Id.* at 5. In *Canada v. City of Shawnee*, 179 Okla. 53, 64 P.2d 694, 695 (1937), the court stated that a landowner has the right to use as much groundwater as he needs if the use bears some reasonable relationship to the natural use of his land even though the use is industrial and not agricultural.


owner,\(^{14}\) whose right to use the water was expressly limited to beneficial use,\(^{16}\) or use not in excess of the annual natural recharge rate.\(^{17}\)

The 1972 Act, the present law,\(^{18}\) completely replaced the 1949 Act. Under the new Act, legislative policy shifted the focus from conservation to utilization. Essentially, the 1972 Act ordered that groundwater basins be identified; that the maximum yield from each water basin be determined by hydrological studies; and that the amount of water in the basin be divided among owners of land above the basin in proportion to the surface area owned.\(^{19}\) The Act provided for a maximum annual yield from each basin based on the rate of taking that will exhaust the basin in twenty years from the date of the Act.\(^{20}\)

The purpose of the 1972 groundwater law was expressed in the Act:

It is hereby declared to be the public policy of this state, in the interest of the agricultural stability, domestic, municipal, industrial and other beneficial uses, general economy, health and welfare of the state and its citizens, to utilize groundwater resources of the state, and for that purpose to provide reasonable regulations for the allocation for reasonable use based on hydrologic surveys of fresh groundwater basins or subbasins to determine a restriction on the production, based upon the acres overlying the groundwater basin or subbasin.\(^{21}\)

Under the Act, the key to controlling water use is the permit system. Any person intending to use groundwater must apply to the OWRB for an appropriate permit.\(^{22}\) After filing the application an applicant must publish a notice in a newspaper located in the county of the proposed well and in any additional adjacent counties the OWRB deems appropriate. The publication should contain essential facts about the well, including the places of taking and use, amounts to be taken, purpose for which the water is to be used, the applicant's name, and the time and place of the hearing by the OWRB. The prospective user must also give notice by certified mail to immediately adjacent landowners.\(^{23}\)

15. Id.
16. Id. § 1002.
17. Id. § 1013. Natural recharge rate is defined as "all flow of water into a ground water basin or subbasin by natural processes including percolation from irrigation." OKLAHOMA WATER RESOURCES BOARD, RULES, REGULATIONS AND MODES OF PROCEDURE 8 (1982) [hereinafter OWRB RULES]. The Act was amended in 1961, 1965, and 1967. See Rarick, Oklahoma Water Law, Ground or Percolating in the Pre-1971 Period, supra note 7, at 421-24.
19. See Jensen, supra note 7, at 459-60.
21. Id. § 1020.2. The section further provides that the Act does not apply to taking, using, or disposing of saltwater connected with exploration, production, or recovery of oil and gas or taking, using, or disposing of water trapped in producing mines.
22. Id. § 1020.7.
23. Id. § 1020.8.
The Act gives any interested party the right to protest the application and present evidence in support of his protest.24 If the OWRB approves the application, it issues a permit allocating to the applicant a proportionate part of the maximum annual yield of the basin, equal to the applicant's percentage of the land overlying the basin.25

The Act provides for three types of permits. A regular permit authorizes water use for beneficial uses other than domestic use, which is exempt,26 and is granted only after a hydrologic survey determines the maximum yield of the basin from which water is to be used.27 A temporary permit authorizes use for the same purposes as a regular permit but is granted before completion of the survey. It generally allocates two acre-feet of water for each acre of land owned or leased by the applicant.28 If the applicant can present clear and convincing evidence that use of more than two acre-feet will not exhaust the groundwater supply in less than twenty years, the OWRB may allocate more water. If a majority of the surface owners request, the permit may allow less than the standard two acre-feet. A temporary permit must be revalidated every year, and protests can be heard before renewal.29

A special permit authorizes a beneficial use that requires quantities in excess of those permitted under regular or temporary permits. This permit can be issued instead of or in addition to a regular or a temporary permit,30 but water use is limited to the purpose designated in the permit. Special permits cannot exceed six months. They can be renewed three times, but successive special permits cannot be granted for the same purpose.31

The procedure for obtaining all permits is the same. However, a provisional temporary permit effective for sixty days or less can be immediately granted by the OWRB.32 All permits may be revoked if required water use reports are not filed,33 or if waste occurs.34

Two sections of the Act determine who can apply for a permit. Section 1020.9 requires the OWRB to find that the lands owned or leased by the applicant overlie the fresh groundwater basin; that the water will be put to beneficial use; and that waste will not occur.35 Section 1020.11 adds a fourth requirement: ownership.36 As originally passed, the statute stated:

24. Id.
25. Id. § 1020.9.
27. Id. § 1020.11(A).
28. An acre-foot of water is the amount of water that will cover one acre one foot in depth, i.e., 325,850 gallons. BLACK'S LAW DICTIONARY 23 (5th ed. 1979).
29. 82 OKLA. STAT. § 1020.11(B) (1981).
30. Id. § 1020.11(C).
31. Id.
32. Id. § 1020.10.
33. Id. § 1020.12.
34. Id. § 1020.15.
35. Id. § 1020.9
36. Id. § 1020.11(D).
Except as provided in Section 1020.21 of this title, no permits shall be issued to an applicant who does not own the land on which the well is to be located, or hold a valid lease from the owner of such land permitting withdrawal of water from such basin or subbasin.37

It is worthwhile at this point to note that the analogous rule in the OWRB regulations differs slightly but significantly from the above pre-Ricks statutory version. It reads:

[N]o permit shall be issued to an applicant who is not the surface owner of the land on which the well is to be located, or hold a valid right from such surface owner permitting withdrawal of water. A copy of the written permission shall be attached to the application.38

It is the difference in this language that generated the Ricks case and the subsequent change conforming the statute to the language of the OWRB regulation.

**The Ricks Case and Subsequent Statutory Changes**

Ricks Exploration Company held a mineral lease in Grady County from an owner of a severed mineral estate. Without first obtaining a permit, Ricks went upon the land and drilled a fresh-water well to use in its drilling operations. The surface owners successfully obtained a temporary restraining order prohibiting use of the groundwater. Ricks then twice applied for groundwater use permits.39 The Oklahoma Water Resources Board refused to grant the permits because Ricks did not own the surface estate; it did not have a valid lease from the owner of the land (which the Board interpreted as meaning "surface owner"40); and it did not have the landowner's written consent to withdraw the groundwater.41 The district court of Oklahoma County affirmed OWRB's decision.42 Ricks appealed to the Oklahoma Supreme Court.43

The court overruled the trial court. In his opinion, Justice Opala considered three points to determine whether Ricks had standing to apply for a permit: (1) whether a mineral lessee has a common law right to the use of

37. *Id.* § 1020.11(D). Section 1020.21 provides that municipalities can regulate or permit drilling within their corporate limits.

38. OWRB *RULES*, *supra* note 20, at 58. See *infra* text accompanying note 68 for the legislative version.


40. *Ricks*, 695 P.2d at 501. See also *supra* note 38 and accompanying text.


42. *Id.* at 500.

43. *Id.* at 501.
groundwater; (2) if so, to what extent that right may have been affected by the groundwater statute; and (3) whether Ricks met the "ownership" requirement of section 1020.11(D).\(^4\)

The court noted that since 1940, case law has held that the mineral estate is dominant,\(^4^5\) and its owner has the implicit right to enter upon and make reasonable use of the surface in exploring for and extracting the mineral deposits.\(^4^6\) While recognizing that the surface owner clearly owns the underlying fresh groundwater,\(^4^7\) the opinion added that the interest is limited by the mineral owner's right to use reasonable amounts in the enjoyment of his estate.\(^4^8\) Furthermore, the rights created by an oil and gas lease include the common law interests.\(^4^9\)

After a review of the apparent purposes of the Act,\(^5^0\) the court addressed the ownership requirements of section 1020.11(D).\(^5^1\) The ruling rejected OWRB's interpretation of ownership, concluding that it altered private common law rights of a mineral owner, then added:

A mineral owner's claim to groundwater use is a "vested right" created by common law. Once created, it becomes absolute, and is protected from legislative invasion by Art. 5 §§ 52 and 54, Okl. Const. A vested interest will not be deemed abrogated or impaired except by explicit legislative extinguishment effective prospectively.\(^5^1\)

The court perceived no manifest legislative intent to alter a mineral owner's private interest in groundwater use. The court reasoned that if the legislature intended to alter the mineral owner's claim to groundwater, the statute would expressly subject the right to the sole discretion of the surface owner or establish a method of compensating the surface owner for the use of the water.\(^5^3\) Citing the 1982 Surface Damages Act,\(^5^4\) the court noted that when the legislature sought to affect the mineral owner's common law right of free access and reasonable use of the surface for oil and gas purposes, it explicitly manifested that intention in the Act.\(^5^5\)

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44. Id. at 503.
45. Id. (citing Hinds v. Phillips Pet. Co., 591 P.2d 697 (Okla. 1979); Wilcox Oil Co. v. Lawson, 341 P.2d 591 (Okla. 1959); Melton v. Sneed, 188 Okla. 388, 109 P.2d 509 (1940); 1 E. Kuntz, Oil and Gas § 3.2 (1962)).
46. Ricks, 695 P.2d at 503 (citing Wilcox Oil, 341 P.2d 591 Okla. 1959); Cities Serv. Oil Co. v. Dacus, 325 F.2d 1035 (Okla. 1963); Melton v. Sneed, 188 Okla. 388, 109 P.2d 509 (1940); Sanders v. Davis, 79 Okla. 253, 192 P. 694 (1920); 1 E. Kuntz, supra note 45).
47. Ricks, 695 P.2d at 503 (citing 60 Okla. Stat. § 60 (1981)).
48. Id. at 503.
49. Id. (citing Hinds, 591 P.2d at 698-99).
50. Id. See also supra note 21 and accompanying text.
51. Ricks, 695 P.2d at 503-04. See supra note 38 and accompanying text.
52. Ricks, 695 P.2d. at 504 (citations omitted).
53. Id.
55. Ricks, 695 P.2d at 504 n.27.
The court further stated that once vested rights were acquired under existing laws, those rights could not be taken away without due process of law or just compensation. The court cited Wolfenbarger v. Hennessee, which held that the act of an administrative body constituted state action within the due process clause. It reasoned that to accept OWRB's interpretation of section 1020.11(D) would be to strip mineral owners of standing to apply for a permit. That would allow surface owners to invoke state power to destroy private rights, a violation of the Oklahoma constitution, article 2, sections 23 and 24.

The supreme court's decision did not represent the final word. Ricks was decided on October 16, 1984. By the time a rehearing was denied on February 26, 1985, a proposal to change the language had been introduced in the legislature.

It is most interesting to note that the proposed changes introduced on February 21, 1985, did not involve section 1020.11(D), dealing with standing to apply for a permit. Subsection D was modified in senate committee. As reported from the senate committee, adopted by the senate, the house, and approved by the governor, it now provides:

D. Except as provided in Section 1020.21 of this title, no permits shall be issued to an applicant who is not the surface owner of the land on which the well is to be located, or does not hold a valid lease from such owner permitting withdrawal of water from such basin or subbasin.

This language is virtually the same as that in the OWBR rules and regulations.

56. Id. at 505; Okla. Const. art. II, § 7.
57. 520 P.2d 809 (Okla. 1974). See also Ricks, 695 P.2d at 505 (citing Shelley v. Kraemer, 334 U.S. 1 (1948)).
58. Ricks, 695 P.2d at 505.
59. Id. at 498.
60. Id.
63. Senate Journal, supra note 61, at 268.
68. 82 Okla. Stat. § 1020.11(D) (Supp. 1986).
69. See supra note 38 and accompanying text. In the Oklahoma Legislative Reporter, the following article was published under the headline "Water Permit Bill Falls":

SB 266 by Sen. Ray Giles, D-Pocaset, would allow the water board to simply revalidate the temporary permits it issues. That was the board's practice in the
Effect of the Statutory Change

There is no change for the surface owner, who by statute owns the groundwater and explicitly has standing. Presumably, the agricultural lessee, holding a valid lease from the surface owner, also remains unaffected by the change. Such a lessee does not need a permit for domestic use. He would rarely seek a permit for irrigation; the cost of an irrigation system is impossible to justify under all but exceptionally long leases. Municipalities are unaffected, as the statute gives them authority to regulate or permit domestic and industrial water wells within their corporate limits. Any lease concerning wells outside the corporate limits ordinarily has a clause granting the lessee the right to drill and take water, thus meeting the requirement of having written permission from the surface owner.

Similarly, there will be no difficulty for a mineral lessee who obtains his lease from the owner of an unsevered surface and mineral estate. The standard lease form invariably contains provisions similar to the following: "Lessee shall have the right to use, free of cost, gas, oil and water produced on said land for its operations thereon, except water from wells of lessor."

There should be no dispute that a lessee of a mineral estate severed after this Act took effect would have no standing to apply for a permit. No rights could become vested after the Act took effect. As a result, those obtaining mineral estates in the future would be well advised to have in their deed a water use clause similar to that in a standard oil and gas lease.

The persons most affected are owners and lessees of the vast number of mineral estates severed before the 1985 statutory change, who either have not drilled and have no need for the water or have a different need than before, for example, secondary recovery operations. Did those persons have an interest in the water before the Act took effect, and if so, did they lose it upon enactment of the 1985 legislation?

past, but a State Supreme Court ruling last December said that was not how it should be done.

Giles said the law had never intended for permit holders to appear before the board for a hearing each time a permit was renewed. He said SB 266 would simply put into law what had been in practice for years.

Sen. Norman Lamb, R-Enid, said the measure could seriously impact rural water districts, especially in western Oklahoma. He added the problem lies not with the court's decision, but with the board's practices.

The bill failed by a 27-20 vote, but Giles held it on the calendar to reconsider the vote.

70. 60 OKLA. STAT. § 60 (1981).
71. 82 OKLA. STAT. § 1020.3 (Supp. 1986).
72. Id. § 1020.21. See also supra note 37.
74. 82 OKLA. STAT. § 1020.11 (Supp. 1986) shows the Act took effect on May 28, 1985, as a result of the emergency provision.
Constitutionality of the Revised Act

The Oklahoma court has ruled that a mineral interest is not possessory in nature,① but rather a profit a prendre,② or an incorporeal hereditament.③ At other times it has been described as an easement.④ Regardless of terminology, Ricks strongly indicates that an owner of a mineral interest gets more than simply the minerals.

Whether a property interest is created by reservation⑤ or grant,⑥ Melton v. Sneed ruled that unless expressly stated to the contrary, "a grant of such incidental rights as are essential to the full enjoyment of the property conveyed will be implied."⑦ Oklahoma courts apply this same rule to an oil and gas lease from the surface owner.⑧ In particular, courts have held that such rights include the right to drill a water well.⑨ The Oklahoma court has adopted the philosophy that the reservation of minerals in the grant of a surface estate retained in the grantor the right to use reasonable amounts of groundwater to develop the mineral estate.⑩

An easement thus burdens the surface estate, unless specifically excluded in the conveying instrument.⑪ In other words, the mineral estate is dominant.⑫ But the extent of the mineral owner's right is limited to what is reasonably necessary for the use and enjoyment of the estate, including the use of reasonable amounts of groundwater.⑬ The nature of these rights and how they vest is the subject of the following discussion.

Constitutional Prohibitions Against Interference with Interests of Mineral Owners

There is little question that it is within the legislature's power to deprive

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① See Rich v. Doneghey, 71 Okla. 204, 177 P. 86 (1918). See also Wright v. Carter Oil Co., 97 Okla. 46, 223 P. 835 (1923).

② "Profit a prendre" is defined as "A right to take a part of the soil or produce of the land. A right to take from the soil, such as by logging, mining, drilling, etc. The taking (profit) is the distinguishing characteristic from an easement." BLACK'S LAW DICTIONARY 1090 (5th ed. 1979).

③ "Incorporeal hereditament" is defined as "Anything, the subject of property, which is inheritable and not tangible or visible. . . . A right growing out of, or concerning, or annexed to, a corporeal thing, but not the substance of the thing itself." BLACK'S LAW DICTIONARY 653 (5th ed. 1979).


⑧ Pulaski Oil Co. v. Conner, 62 Okla. 211, 162 P. 464 (1916).


⑩ See Mack Oil Co. v. Laurence, 389 P.2d 955 (Okla. 1964).


⑬ See supra notes 45-58 and accompanying text (discussion of Ricks).
one of an interest before it comes into existence. Constitutional questions arise, however, when the legislature attempts to divest existing rights.

The Ricks court expressly assumed that a mineral owner's claim to groundwater use was a "vested right," citing Oklahoma Water Resources Board v. Central Oklahoma Master Conservancy District and Crump v. Guyer. These cases support the court's conclusion by analogy; neither case decided the question of whether a claim to groundwater was a vested right. However, the principle underlying both Crump and Central Oklahoma Master Conservancy District is the same: the right being claimed by a particular party is determined by the law in effect at the time the right vests, before any legislative amendments are made.

The principle of respecting vested rights is strong and deep. Protection of such rights in the Oklahoma constitution is inherent in article 2, sections 7, 24, 95

89. Ricks, 695 P.2d at 504.
90. 464 P.2d 748 (Okla. 1969).
91. 60 Okla. 222, 157 P. 321 (1916).
In Crump, the court defined and characterized "vested right" as the power to perform certain actions or to possess certain things lawfully, and is substantially a property right; and when it has been once conferred or becomes absolute by contract or existing laws, it is protected from invasion by the Legislature, by those provisions in the Constitution which apply to such rights.

Id., 157 P. at 323.
92. Central Oklahoma Master Conservancy District dealt with surface water, not groundwater; Crump dealt with a minor's right to convey real estate after marriage.
93. The court, in One Chicago Coin's Play Boy Marble Board, No. 19771 v. State ex rel. Adams, 202 Okla. 246, 212 P.2d 129, 133 (1949), said it makes no difference whether the change is by amending a statute or repealing it and replacing it with a new one. "Although an amendment is not the same as repeal, to a certain degree it operates as a repeal." See Walker v. Nix, 196 Okla. 365, 165 P.2d 378 (1946); Baker v. Tulsa Bldg. & Loan Ass'n, 179 Okla. 432, 66 P.2d 45 (1937).
95. Okla. Const. art. II, § 24 provides:

Private property shall not be taken or damaged for public use without just compensation. Such compensation, irrespective of any benefit from any improvements proposed, shall be ascertained by a board of commissioners of not less than three freeholders, in such manner as may be prescribed by law. The commissioners shall not be appointed by any judge or court without reasonable notice having been served upon all parties in interest. The commissioners shall be selected from the regular jury list of names prepared and made as the Legislature shall provide. Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into the court for the owner, the property shall not be disturbed or the proprietary rights of the owner divested. When possession is taken of property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of such compensation. The fee of land taken by common carriers for right of way, without the consent of the owner, shall remain in such owner subject only to the use for which it is taken. In all cases of condemnation of private property for
and 23,\textsuperscript{96} as well as article 5, sections 52\textsuperscript{97} and 54.\textsuperscript{98} As the \textit{Crump} court noted:

[W]here rights of property are admitted to exist, the Legislature cannot say they shall exist no longer; that if it were otherwise, the Constitution would then mean that no person shall be deprived of his property or rights unless the Legislature shall pass a law to effectuate the wrong; and this would be throwing the restraint entirely away.\textsuperscript{99}

The mineral owner obtains as part of his easement, or \textit{profit},\textsuperscript{100} the right to reasonable use of the surface owner's estate in the enjoyment of his interests.\textsuperscript{101} A mineral lease includes a grant of these interests.\textsuperscript{102} In many instances, this right to groundwater may not have been exercised before the amendment to the statute was adopted. Arguably, however, this should have no effect because it has been held that failure to exercise a vested right before the passage of a subsequent statute seeking to divest it does not affect or lessen the right.\textsuperscript{103} Perhaps as applicable here, the court in \textit{Cowart v. Piper Aircraft Corp.}\textsuperscript{104} held that article 5, section 54 of the state constitution prohibited the repeal of an accrued right to bring an action—here, an application for a water permit.\textsuperscript{105}

\textbf{Police Power: Constitutional Justification for Interference with Interests of Mineral Owners}

Nothing is absolute. The route through which the state terminates or limits

\begin{itemize}
  \item public or private use, the determination of the character of the use shall be a judicial question.
\end{itemize}

\textsuperscript{96} Article 2, section 23 provides:
No private property shall be taken or damaged for private use, with or without compensation, unless by consent of the owner, except for private ways of necessity, or for drains and ditches across lands of others for agricultural, mining or sanitary purposes, in such manner as may be prescribed by law.

\textbf{OKLA. CONST. art. II, § 23.}

\textsuperscript{97} Article 5, section 52 provides:
The Legislature shall have no power to revive any right or remedy which may have become barred by lapse of time, or by any statute of this State. After suit has been commenced on any cause of action, the Legislature shall have no power to take away such cause of action, or destroy any existing defense to such suit.

\textbf{OKLA. CONST. art. V, § 52.}

\textsuperscript{98} "The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute." \textbf{OKLA. CONST. art. V, § 54.}

\textsuperscript{99} \textit{Crump}, 157 P. at 323.

\textsuperscript{100} See \textit{supra} notes 77-78 and accompanying text.

\textsuperscript{101} See cases cited \textit{supra} note 45.

\textsuperscript{102} \textit{Hinds}, 591 P.2d 697.

\textsuperscript{103} \textit{Barnett v. Sanders}, 121 Okla. 14, 247 P. 55 (1926); \textit{Crump}, 157 P. at 323.

\textsuperscript{104} 665 P.2d 315 (Okla. 1983).

\textsuperscript{105} \textit{Id.} at 317-18. The court noted, however, that the subject of the inquiry was a right of action, not simply procedural provision. \textit{Id.} at 318 n.4.
private rights lies in its police power.\textsuperscript{106} There are no cases in Oklahoma dealing with use of police powers to enforce groundwater distribution. On the other hand, almost every exercise of authority to regulate oil and gas interests has experienced a constitutional challenge. Some of those cases will necessarily be examined. Those, combined with constitutional challenges to water statutes in other states, may suggest the outcome of a challenge to the Oklahoma water statute.

Historically, eastern states have seldom needed to enact water law legislation because of the general abundance of water.\textsuperscript{107} Virtually every western state has some kind of legislation restraining water use,\textsuperscript{108} but not all those states have had litigation challenging the validity of their statutes. And while no state's policy is exactly like Oklahoma's, the underlying principles governing the right of the state to regulate water are the same. As the following discussion will show, the vast majority of courts have upheld water statutes as valid exercises of police powers.\textsuperscript{109}

An important case deciding the validity of the Kansas water statute is \textit{Williams v. City of Wichita}.\textsuperscript{110} In \textit{Williams}, the city appealed an adverse judgment that declared the state act unconstitutional on both state\textsuperscript{111} and federal\textsuperscript{112} constitutional grounds and enjoined the city from obtaining groundwater outside its city limits.\textsuperscript{113} The act declared that all water in the state was dedicated to public use and subject to state control. This control, however, was limited by the vested rights of any person, except in the case of nonuse.\textsuperscript{114} The court seized upon the "nonuse" language that was present in four of the seven general purposes of the act,\textsuperscript{115} declaring that "vested right," as used in the act, presumed the beneficial use of water.\textsuperscript{116}

\textsuperscript{106} Police power is defined as:
The power of the State to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public conveyance and general prosperity. The police power is subject to limitations of the federal and state constitutions, and especially to the requirement of due process.


\textsuperscript{107} \textit{DigEst}, supra note 6, at 16.

\textsuperscript{108} \textit{Id.} at 14.

\textsuperscript{109} The discussion is primarily restricted to state supreme courts due to the nature of the statutes and the issues involved. The United States Supreme Court has held that the construction of state statutory provisions is left to the states in the first instance if the state has the authority to enact such laws. \textit{Williams v. Oklahoma}, 358 U.S. 576 (1959), \textit{reh'g denied}, 359 U.S. 956 (1959).

\textsuperscript{110} 190 Kan. 317, 374 P.2d 578 (1962).

\textsuperscript{111} \textit{KAN. Const.}, Bill of Rights, §§ 1, 18, and 20 (dealing respectively with equality of citizens, justice without delay, and powers retained by the people) and \textit{KAN. Const.} art. II, § 16 (dealing with completeness of title on the bill). See also \textit{infra} note 172.

\textsuperscript{112} \textit{U.S. Const.} amend. XIV, § 1 (due process clause).

\textsuperscript{113} 190 Kan. 317, 374 P.2d at 580.

\textsuperscript{114} \textit{Id.}, 374 P.2d at 591.

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} \textit{Id.}, 374 P.2d at 591.
that any modification of the law must respect existing vested rights, the court refused to recognize a vested right in underground waters that the landowner had not appropriated and applied to beneficial uses.\(^{117}\) The owner’s right, the court said, lay in the right to use the water as it passes through the owner’s soil,\(^{118}\) and the act recognized a superior vested right of water users to continue use in the same amounts. Therefore, the act applied only to water not being beneficially used at the time the act took effect.\(^{119}\) By taking a view finding no interference with a vested right, the court was able to avoid a constitutional invalidity.

The court further stated that the law was a proper exercise of police power. Citing Village of Euclid v. Ambler Realty,\(^{120}\) the court noted that legislation limiting a right of use is in itself no more objectionable than legislation forbidding the use of property for certain purposes.\(^{121}\) Requiring a user to make application and furnish information for a permit to use the water on his own land did not deny due process; the act did not confiscate rights by legislative fiat. “Rather, it is a proper and reasonable exercise of the police power of the state in controlling water use for the purpose of preventing waste and to conserve a valuable natural resource.”\(^{122}\)

The Kansas act withstood a constitutional challenge in the federal courts in Baumann v. Smrha.\(^{123}\) In that case, a three-judge panel was asked to determine whether the water act violated the due process clause of the fourteenth amendment to the United States Constitution. The court upheld the act, saying it was valid as long as it protected the rights of landowners who had acquired those rights by prior use by the time the statute went into effect.\(^{124}\)

The change in the Oklahoma statute does not parallel the Kansas statute. The Kansas act specifically makes reference to and protects amounts of water previously used, defining those as “vested rights.”\(^{125}\) The wording in the Oklahoma change makes no reference to prior use and appears to deny mineral owners, who formerly had some sort of property interest, any right to apply for a permit at all.

In the Arizona case of Southwest Engineering Co. v. Ernst,\(^{126}\) the challenged act provided a method for determining “critical groundwater areas” within a state that did not have sufficient groundwater to maintain irrigation use at current levels. Within these areas, wells other than domestic and

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117. Id., 374 P.2d at 593.
118. Id., 374 P.2d at 584.
119. Id., 374 P.2d at 591.
120. 272 U.S. 365 (1926).
121. Williams, 374 P.2d at 595.
122. Id., 374 P.2d at 595. Preventing waste is a common reason given for upholding water statutes in most challenges to water laws. That may not be as compelling a reason with regard to mineral owners in Oklahoma, however. See infra notes 203-206 and accompanying text.
124. 145 F. Supp. at 625.
125. Williams, 190 Kan. 317, 374 P.2d at 595.
replacement wells were prohibited. However, the act did allow wells pumping at the time to continue operating at their full capacity. 127 The plaintiff claimed that it owned the water underlying its land and that the due process clause of the state and federal constitutions protected the water from confiscation. 128

The court upheld the statute. It noted that the act had a valid purpose, to conserve and protect the water resources of the state in the interest of agricultural stability, general economy, and welfare of the state. 129 In the court's view, the case presented an "unavoidable choice" between one class of property and another. 130 Having earlier noted the arid climatic conditions of much of the state, the court stated:

We are of the opinion that there is a preponderant public concern in the preservation of the lands presently reclaimable, and that where as here the choice is unavoidable because a supply of water is not available for both, we cannot say that the exercise of such choice, controlled by considerations of social policy which are not unreasonable, involves a denial of due process. 131

The Oklahoma Act is different. There is no provision, as there is in the Arizona statute, for prohibiting use in some areas of the state, for example, the northwest and panhandle regions of Oklahoma where water is scarce and limiting use would be justifiable. Additionally, the nature of the mineral estate differs from the surface estate. It may be considered prudent to allow a mineral estate to lie dormant for a substantial period of time, perhaps until prices are more favorable. It is not practical to do so with irrigated farmland, the interest covered by the Arizona statute.

North Dakota has upheld an act that changed ownership of groundwater from the landowner to the public. 132 In Baeth v. Hoisveen, 133 the plaintiffs claimed that the act was unconstitutional because it deprived landowners of vested rights contrary to the due process clauses of both the state and federal constitutions. In reasoning similar to the Kansas court in Williams, 134 the court focused on whether a landowner had a vested right in waters underlying his land if he was making no use of the water before the state appropriated it. 135 The court stated that the landowner acquired a vested right, commonly referred to as a usufructuary right, after he withdrew and applied the groundwater to a beneficial use. The court held that a landowner did not have a vested right to groundwater underlying his land that he had not been

127. Id., 291 P.2d at 767.
128. Id., 291 P.2d at 768.
129. Id., 291 P.2d at 767.
130. Id., 291 P.2d at 768.
131. Id., 291 P.2d at 769
132. Digest, supra note 6, at 579.
133. 157 N.W.2d 728 (N.D. 1968).
134. See supra notes 110-122 and accompanying text.
135. 157 N.W.2d at 731.

https://digitalcommons.law.ou.edu/olr/vol40/iss1/9
using.\textsuperscript{136} He, therefore, lost nothing because he could not lose something he never had.

The \textit{Baeth} court noted that North Dakota was a semiarid state and was, therefore, justified in limiting its water resources for the general welfare of the people. The court stated that requiring water resources to be put to their most beneficial uses was a valid purpose of a water act, as was preventing waste and unreasonable uses of the water.\textsuperscript{137}

South Dakota struck down an early water regulation bill in \textit{St. Germain Irrigating Co. v. Hawthorne Ditch Co.}\textsuperscript{138} The challenged act declared that all waters were public property and subject to appropriation for beneficial use. The owner could not utilize water without purchasing a permit.\textsuperscript{139} With very little discussion and no mention of whether prior water use was a factor, the court held that the act, by requiring the purchase of a permit, destroyed vested property rights in violation of the state constitution’s due process clause.\textsuperscript{140}

The South Dakota court later used police power and a provision protecting vested rights to uphold a similar statute in \textit{Knight v. Grimes}.\textsuperscript{141} The court noted that there had been an invasion of the preexisting interest of absolute ownership. However, it refused to equate the right to take and use water with actual ownership.\textsuperscript{142} The court, quoting \textit{Southwest Engineering Co. v. Ernst},\textsuperscript{143} stated that the preference of public interest over individual property interests is a proper exercise of police power, even if the police power destroys that individual right.\textsuperscript{144}

In summary, the courts were willing to uphold laws restricting water use if prior rights were protected and if the restriction was for the good of the general public. But there is an important difference between the circumstances of those cases and the circumstances that would arise under the Oklahoma statutory change. As the following discussion indicates, Oklahoma has used police power to restrict petroleum production for the public good, but has refused to uphold its use when it has only benefited another private entity.

\textbf{Exercise of Police Power in Oklahoma}

As petroleum recovery became important in Oklahoma, the state recognized that a substantial amount of oil could be lost forever by irresponsible drilling. Consequently, regulations were enacted to protect both the rights of the mineral owner and the lessee. Predictably, the regulations were chal-

\textsuperscript{136} \textit{Id.} at 732.
\textsuperscript{137} \textit{Id.} at 733.
\textsuperscript{138} 32 S.D. 260, 143 N.W. 124 (1913).
\textsuperscript{139} \textit{Id.}, 143 N.W. at 126.
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} 80 S.D. 517, 127 N.W.2d 708 (1964).
\textsuperscript{142} \textit{Id.}, 127 N.W.2d at 711.
\textsuperscript{143} 79 Ariz. 403, 291 P.2d 764 (1955).
\textsuperscript{144} \textit{Knight}, 127 N.W.2d at 711.
lenged as unconstitutional. The challengers claimed that the acts interfered with their right to take what was rightfully theirs. Since the purpose of this note is not to examine statutes governing oil and gas, the following discussion will limit its focus to the court's justification of regulatory statutes.

A statute limiting a person's oil production to a proportionate share of the total potential production of a pool was upheld against both state\textsuperscript{145} and federal\textsuperscript{146} constitutional challenges in \textit{C. C. Julian Oil & Royalties Co. v. Capshaw}.\textsuperscript{147} The purpose of the statute was to provide a comprehensive plan for preventing economic waste, underground waste, surface waste, and waste incidental to production of oil in excess of transportation or market facilities or reasonable market demand.\textsuperscript{148} Regarding police powers, the court stated that the concept is somewhat elusive and difficult to define, largely because it is "plastic in its nature and accommodates itself to every change of conditions which call for its application."\textsuperscript{149}

The court compared the statute with another state's statute that had been upheld by the United States Supreme Court. In that discussion, the Court noted that police powers were being used to protect correlative rights of all mineral owners in the area:

Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the state . . . which is here attacked because it is asserted that it divested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of others.\textsuperscript{150}

In the court's view, to hold otherwise would result in greater losses. An irresponsible mineral developer who claimed that drilling regulations were taking away his rights could, without violating the Constitution of the United States, deprive him of all other mineral owners of the same rights.\textsuperscript{151}

In \textit{Patterson v. Stanolind Oil & Gas Co.},\textsuperscript{152} the court upheld the constitutionality of a well-spacing statute by reasoning that the regulation was designed to prevent unnecessary loss, destruction, or waste of the minerals.\textsuperscript{153} Without the regulation, the court noted, it would be possible for one producer to obtain an undue proportion of the oil to the detriment of others. It could also result in waste by one or more producers to the annihilation of the rights of the remainder.\textsuperscript{154} The court refrained from likening the regulation

\begin{itemize}
\item \textsuperscript{145} \textit{Okla. Const.} art. II, \S\ 7. See \textit{supra} note 94 for text.
\item \textsuperscript{146} \textit{U.S. Const.} amend. XIV, \S\ 1.
\item \textsuperscript{147} \textsuperscript{145} \textit{Okla.} 237, 292 P. 841 (1930).
\item \textsuperscript{148} \textsuperscript{147} \textit{Id.}, 292 P. at 842.
\item \textsuperscript{149} \textsuperscript{148} \textit{Id.}, 292 P. at 843.
\item \textsuperscript{150} \textsuperscript{149} \textit{Id.}, 292 P. at 844-45 (citing \textit{Ohio Oil Co. v. Indiana}, 177 U.S. 190, 210-11 (1900)).
\item \textsuperscript{151} \textsuperscript{150} \textit{Id.}, 292 P. at 844-45.
\item \textsuperscript{152} \textsuperscript{151} \textit{Id.}, 155, 77 P.2d 83 (1938).
\item \textsuperscript{153} \textsuperscript{152} \textit{Id.}, 77 P.2d at 88.
\item \textsuperscript{154} \textsuperscript{153} \textit{Id.}, 77 P.2d at 88.
\end{itemize}
to one that took or confiscated property rights. Rather, the ruling characterized it as a regulation that merely restricted or qualified the property's use. This, the court held, did not violate the due process clause of the Constitution.155

The court in Anderson-Pritchard Oil Corp. v. Corporation Commission recognized that an estate of sorts may be vested in a mineral lessee.156 However, an estate vested by production does not create rights that transcend a regulating agency's power to take steps protecting correlative rights of all who take from a common source of supply.157 Regulations, the ruling said, are not unconstitutional merely because they limit private personal or property rights; they are a proper function of police power.158

However, a police power justification was rejected in Oklahoma Natural Gas Co. v. Choctaw Gas Co.159 The court ruled that an order requiring one natural gas producer to connect its pipeline with another company and sell that company enough gas to meet its needs is not a valid exercise of police power.160 In his opinion, Justice Corn noted that the state has a proper interest in using its police power to preserve exhaustible natural resources. But when private rights are subordinated to regulatory authority, the extent to which those rights are impaired, as well as the public benefit to be derived from the impairment, must be considered in defining a proper exercise of police power.161 "Mere pronouncement that a thing is done in the public interest of conservation is insufficient to establish its validity as a conservation measure."162

This case more closely parallels Ricks than any other discussed. Basically, the court viewed the Choctaw case as a question of adjusting rights between two private parties. While this is obviously a proper function of the courts, it is an improper function of police power. By its ruling, the court plainly indicated that use of police power would not be honored.

Vested Rights, Police Power, and the Revised Act

The cases that upheld water statutes generally have one thing in common: the courts interpreted the statutes to protect those who had established vested rights, often doing so by use. That is, the statutes contained wording indicating they would apply only prospectively, or the courts found no genuine claim to a vested right. The South Dakota statute that was declared unconstitutional also recognized a vested right of water users, but only if those

155. Id., 77 P.2d at 89.
158. Id., 241 P.2d at 372 (citing Lombardo v. City of Dallas, 124 Tex. 1, 73 S.W.2d 475 (1934)).
159. 205 Okla. 255, 236 P.2d 970 (1951).
160. Id., 236 P.2d at 977.
161. Id., 236 P.2d at 975 (citing Grison Oil Corp. v. Corporation Comm'n, 186 Okla. 548, 99 P.2d 134 (1940)).
162. 205 Okla. 255, 236 P.2d at 975.
users paid a fee for the privilege of using their water. The basic theme of the oil and gas cases was that by limiting one party’s drilling operations, the state was protecting its natural resources as well as the correlative rights of others entitled to share those resources.

Thus, the state has the power to limit or deny an owner’s right to use what is his if the limitation or denial is in the public interest and for the general welfare of the people. The question then becomes: Does this statute denying a water use permit serve those ends? As with most questions challenging the validity of a statute on constitutional grounds, predicting an outcome is speculative.

Initially, it should be noted that the court is loath to strike down any act of legislation. The court has stated that it will presume a legislative intention to conform to the provisions of the Constitution. Similarly, the court will not pronounce legislation unconstitutional in a doubtful case but will resolve every reasonable doubt in favor of its validity. In other words, “merely to doubt the constitutionality of a statute is to uphold it.” Before deciding whether the court might uphold a statute, examining the means by which it is judged would be helpful.

Both federal and state courts have followed the rule set forth in *Nebbia v. New York*: due process requires only that the law in question “shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.” This test, often called the rational basis test, was applied within a short time by the courts to statutes regulating everything from barber prices to natural resources. The Oklahoma court stated as a rationale for the rational basis test that the legislature is in a better position to judge the necessity of a statute’s enactment. Therefore, every possible presumption favors its validity, even if the court questions the wisdom of the bill.

When the legislature does act, however, its action is always open to judicial scrutiny to prevent transgression of the limits of its power. A legislature cannot prevent judicial review by any declaration or legislative finding in the act itself. Thus, stating the purpose of the bill in the title will not prevent the court from examining the act to see if it transcends its stated purposes.

165. *Id.*, 248 P.2d at 577 (citing *In re Lee*, 64 Okla. 310, 168 P. 53 (1917)).
166. 291 U.S. 502 (1934).
167. *Id.* at 525.
170. *Herrin*, 82 P.2d at 980.
172. It would be possible, but probably futile, to advance an argument that the water statute is invalid under *OKLA. CONST. art. V, § 57*, requiring that every act embrace one subject, which should be clearly expressed in its title. The title of the bill amending the statute makes no mention of the changes made in subsection D, giving only the surface owner the right to apply for a permit. However, the court has ruled that it is enough that all elements in the measure be related
The court will also strike down a measure if the act purports to have a uniform operation throughout a particular class in the state but in reality favors a special area or class. For that reason, the court declared unconstitutional a measure allowing Tulsa to enact special zoning regulations when Tulsa was the only city in the state that met the requirements of the statute. In *Elias v. City of Tulsa*, the court stated that a statute was acceptable if it had a uniform operation. Similarly, a general law having local application would also pass constitutional muster if it operated equally on all subjects in the class for which it was adopted.

But, the court added, "where a statute operates upon a class, the classification must not be capricious or arbitrary and must be reasonable and pertain to some peculiarity in the subject-matter calling for the legislation." Concerning the people or places included and those omitted, the court said there must be "some distinctive characteristic upon which a different treatment may be reasonably founded and that furnishes a practical and real basis for discrimination." The court held that the act was arbitrary and a subterfuge. By not embracing all that should have been embraced in the class, it violated article 5, section 59 of the Oklahoma constitution.

A similar, though not parallel, criticism may be applied to the revised water statute. The point is advanced here to suggest that both mineral owners and surface owners have real, and incorporeal property interests and that this statute operates unfairly to favor one class—the surface owner—over the other class—the mineral owner. Perhaps a better argument is whether the revised statute operates in an arbitrary and capricious manner to deny these rights. This should be examined in light of the stated legislative purpose of the water law, i.e., whether the denial of rights serves the purpose for which the statute was enacted.

The *Ricks* court made a strong statement: A mineral lessee's claim to groundwater use as part of his estate is a vested right created by common law. Once created, that right becomes absolute and is protected from

173. 408 P.2d 517 (Okla. 1965).
174. *Id.* at 520 (citing Roberts v. Ledgerwood, 134 Okla. 152, 272 P. 448, 450-51 (1928)).
175. 408 P.2d at 520.
176. *Id.*
177. *Id.*
178. *Id.* at 521.
179. Article 5, section 59 provides: "Laws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted." *Okla. Const.* art. V, § 59. *See also* Oklahoma County Util. Serv. Auth. v. Corporation Comm'n, 519 P.2d 919 (Okla. 1974), where the court used the same constitutional provision to strike down a statute giving the Corporation Commission the power to operate a public trust in counties with more than 500,000 population, when only one county fit the necessary criteria.
180. *See supra* note 21 and accompanying text.
The cases examined show that right can be "invaded," however, if the state can justify its action as necessary for the public good. Thus, an examination of the consequences of the act may be helpful.

It is questionable to assert that denying a mineral owner the right to apply for a water permit has any rational basis, if one uses as a foundation the aims of the Act. The ability of a surface owner to deny a mineral lessee the right to a reasonable use of water does not further these same aims: agricultural stability, beneficial uses, or the general economy, health, and welfare of the state.

That the aims of the Act must be taken into consideration are made clear when one examines the problems that arise when the mineral owner is denied the right to take water. The mechanics of oil and gas drilling dictate that a mineral owner or lessee must use water. If he cannot get it free as part of the benefits of his estate, he will pay for it, and only the most truculent of surface owners would refuse to sell it to him at a price the owner feels is worth its loss. The Act, while benefitting the surface owner, is a detriment to the mineral owner. But if the surface owner sells fresh water to the mineral owner to use in secondary and tertiary recovery operations, the water is lost and the public is harmed, even though the surface owner is benefited. But in neither of the above situations is the Act likely to noticeably change the depletion rate of the state's groundwater supply. Therefore, one cannot truly say that the regulation benefits the general public. The only beneficiaries of the statute are other private parties, the surface owners, who will realize added income from the sale of their water. The general public could also be hurt in other ways if, in the instance of a field deemed speculative at best, the added cost of water could be a determining factor in a decision not to drill.

In many of the water cases and almost all of the oil and gas cases, the rationale for a proper exercise of police power is prevention of waste. However, for good or ill, the supreme court in Texas County Irrigation & Water Resources Association, Inc. v. Cities Service Oil Co. noted that the use of fresh groundwater for secondary oil recovery projects was not waste per se. In a case decided two months after Ricks, Oklahoma Water Resources Board v. Texas County Irrigation & Water Resources Association

181. Ricks, 695 P.2d at 504.
182. See supra note 21 and accompanying text.
183. 82 OKLA. STAT. § 1020.2 (1981). See also supra note 21 and accompanying text.
184. If conservation of water is a reason for the act, a more logical but highly unpopular conservation method would be to limit groundwater use for irrigation, especially in the Ogallala Aquifer region of the Oklahoma panhandle. For example, it is estimated that a 10 percent reduction in water used for irrigation in the seventeen western states would accommodate a 100 percent increase in all other uses. K. MEYER, D. PEDERSEN, N. THORSON & J. DAVIDSON, JR., AGRICULTURAL LAW, CASES AND MATERIALS 825 (1985).
185. 570 P.2d 49 (Okla. 1977).
(Mobil Oil Corp.), the court cited Cities Service and by analogy to secondary oil recovery, indicated that tertiary oil recovery may or may not be waste per se. The court referred the case back to the Board for determination. Thus waste would generally not be a factor to consider in this case.

It is obvious that the most important factor is not whether the state can exercise its police powers to limit or deny the interests of one party, but who will be the recipient of those interests. As noted above, when the recipient is not the public but a private party, both the state and federal supreme courts have frowned upon such an exercise of police power.

The United States Supreme Court addressed a situation where the effect of an order by a Texas regulatory agency would compel natural gas producers with adequate transportation facilities to restrict their own production and buy gas from producers who were without markets, thereby being prohibited under regulations from producing gas. Thompson v. Consolidated Gas Utilities Corp. struck down the order. Stating that a presumption of the existence of facts justifying the exercise of power is given to all administrative regulations made under legally delegated authority, the Court concluded that orders were invalid if they bore no reasonable relation to protection of correlative rights or prevention of waste, or if otherwise shown to be arbitrary. The Court continued: "[T]his Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." The Oklahoma court stated the same philosophy in Grison Oil Corporation v. Corporation Commission. Noting proper instances of invoking police power, the court warned that while private rights must yield to the power, "it is not contemplated that they be annihilated thereby, or that they be interfered with to any greater extent than is reasonably required . . . taking into consideration the legitimate object to be accomplished." Both private rights and the public benefit are important factors.

Conclusion

In Ricks, the court interpreted the previous statute to avoid a constitu-

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recovery was not per se waste. The court reasoned that because the legislature did not act when the Water Resources Board used the opinion to formulate rules, the legislature intended to allow use of fresh water for the recovery process.

188. For a discussion of Mobil Oil Corp. and its impact on oil recovery, see Note, Fresh Groundwater and Tertiary Oil Recovery: Oklahoma Water Resources Board v. Texas County Irrigation & Water Resources Association (Mobil Oil Corp.), 21 Tulsa L.J. 565 (1986).
189. 300 U.S. 55 (1937).
190. Id. at 78.
191. Id. at 80.
tional question. That is proper. In so doing, the court avoided unnecessary judicial activism. Its decision, however, required the OWRB to mediate conflicts between surface and mineral owners, a job the OWRB apparently did not want. The change in the law reflects the Board's philosophy, as is evidenced by the similar language in the new statute and the Board's prior regulation.

Despite the justifiable reluctance of the court to hold a statute unconstitutional, there appears to be little choice in this case. The Ricks court forcefully declared that a mineral owner—here, one who had used no water in his operations on this particular mineral estate—has a vested interest in the use of fresh groundwater. The legislature then made an equally forceful statement by changing the law to specifically exclude such owners.

It might be possible to avoid a constitutional dilemma by interpreting the new statute as operating only prospectively. But in so doing, one must question its effectiveness insofar as the stated aims of the Act are concerned. It is likely that there were far more severed mineral estates and leases in existence when the statute was modified than there will be new ones being prospectively affected by the statutory change. To interpret the statute as operating only prospectively would effectively emasculate the provision by limiting its applicability. Nevertheless, absent such an interpretation or some creative thinking—not impossible given the excellent wordsmiths on the court today—a showdown seems inevitable. This showdown seems all the more inevitable when examining one paragraph in the Ricks case. The court quoted subsection 1020.11(D) as it existed at the time and then said:

By interpreting this section to exclude owners of interests other than surface from the allowable class of applicants, the Board in effect has placed the mineral owner in the position of having to bargain with the surface owner for what is recognized as his common-law right of free access to reasonable use of groundwater for oil and gas purposes. In order to reach the result sought by the Board, we would have to conclude that the Act operates to alter private common law rights of the mineral owner. We cannot so hold.194

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194. Ricks, 695 P.2d at 504 (emphasis added).