

Oklahoma Law Review

Volume 36 | Number 1

1-1-1983

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Mark Stonecipher

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Recommended Citation

Mark Stonecipher, *Real Property: The Stability of Riparian Land Titles and the Wild and Unruly Cimarron River*, 36 OKLA. L. REV. 229 (1983),
<https://digitalcommons.law.ou.edu/olr/vol36/iss1/37>

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semantic and statistical confusion,"²⁰⁴ and contended that *Consumers' Counsel I* is res judicata (issue preclusion) as to the investor risk issue. Judge Locher concluded that *Consumers' Counsel I* "stands for the proposition that ratepayers are not to pay for these cancelled nuclear plants. This rule should apply whether the mechanism used to subvert the 'used and useful' principle is called 'amortization' or anything else"²⁰⁵

Consumers' Counsel II extraordinarily highlights the urgent need for reform of Oklahoma utility regulation. If the Oklahoma Supreme Court decides that the risk of loss should be borne by the stockholders, that decision may not end the controversy. Under existing Oklahoma law, P.S.O. could attempt to circumvent that decision, as did the Ohio utility, through indirect means of recoupment, such as an increased rate of return. A comprehensive statute such as Oregon section 757.355²⁰⁶ would effectively prevent indirect recovery of abandonment losses.

Real Property: The Stability of Riparian Land Titles and the Wild and Unruly Cimarron River

In 1976 the Oklahoma Supreme Court issued the opinion of *Hodgden v. Kliever*,¹ concerning riparian land located on the north and south sides of the nonnavigable Cimarron River. As evidenced by the original United States Government Survey of 1873, movements of the river led to disputed ownership of land lying north of the Cimarron River as its channel existed at the time of trial. Owners of land to the north of the disputed tract brought suit against owners of land to the south to determine title to the land referred to throughout the trial as the "hump."²

With the *Hodgden* opinion as the point of reference, this note will discuss the effect of that supreme court decision on the stability of riparian land titles in the state of Oklahoma. Instability in riparian land titles fosters recurring disputes and litigation over riparian tracts of land. The settlement of these disputes can result in large losses of land and income for a riparian owner, as was the case in *Hodgden v. Kliever*.³ In *Hodgden* the dispute in ownership arose after the mineral rights to the land in question had been leased for oil and gas exploration. In quieting title for the owners of the land to the south and across the river from the disputed tract, the court chose not to apply

204. *Id.* at 117.

205. *Id.*

206. OR. REV. STAT. § 757.355 (1979). See *supra* text accompanying note 169.

1. 557 P.2d 885 (Okla. 1976).

2. *Id.* at 885.

3. *Id.*

the reappearing riparian lands doctrine,⁴ which had been previously applied in several Oklahoma riparian cases. In rejecting the doctrine under the facts in *Hodgden*, the court clearly restricted its application to a specific set of circumstances. The possible repercussions from the court's decision to limit the doctrine's application led the dissent in *Hodgden* to believe that the majority opinion would lead to an instability in the riparian land titles, and, thus, an increase in quiet title actions in Oklahoma. The validity of the dissent's belief will be closely examined.

The Dissent

In dissenting, Justice John B. Doolin concluded that the "reappearing riparian lands doctrine" followed in previous Oklahoma cases was more equitable than the position adopted by the court.⁵ Justice Doolin stated: "[T]he majority opinion . . . overlooks rights previously protected by this court, rights to 'reappearing riparian lands.'"⁶ The majority decision, he thought, added confusion to the difficult problem of determining ownership of riparian lands after river boundaries have been changed by the forces of nature. As Justice Doolin noted, "Cimarron" was of Spanish derivation and meant runaway, wild, or unruly.⁷ His insight provided an appropriate description of the Cimarron's meandering and changing banks, which has caused litigation involving the land in question on two occasions.

Historical Background

In 1934 the movements of the Cimarron River resulted in litigation by the predecessors in title to the parties in the *Hodgden* case. In *Mitchell v. Meyer*,⁸ the District Court of Major County, in a decision that was not appealed, held that the river had moved northward by the gradual process of accretion

4. The reappearing riparian lands doctrine has been applied in conjunction with the common law doctrines of accretion and avulsion in an effort to provide stability to riparian land titles. The doctrine simply stated provides that where riparian land is lost by submergence or erosion from a river's movement, but later through subsequent change in the course of the river the water disappears and the land reappears, and the boundaries are susceptible of being definitely identified, title to the restored land is vested in the owner of the fee at the time the submerging or erosion occurred. Accretion was defined in *Willett v. Miller*, 176 Okla. 278, 55 P.2d 90, 92 (1936) as: "Addition of portions of soil by gradual (imperceptible) deposition through the operation of natural causes, to that already in possession of owner." Avulsion was defined in *State ex rel. Comm'rs of Land Office v. Warden*, 200 Okla. 613, 198 P.2d 402 (1948) as: [A] sudden removal of land from the estate of one man to "that of another by an inundation or a current or by a sudden change in the course of a river, by which a part of one man's estate is cut off and joined to the estate of another, and property thus separated continues in the original owner."

5. *Hodgden v. Kliever*, 557 P.2d 885, 890 (Okla. 1976).

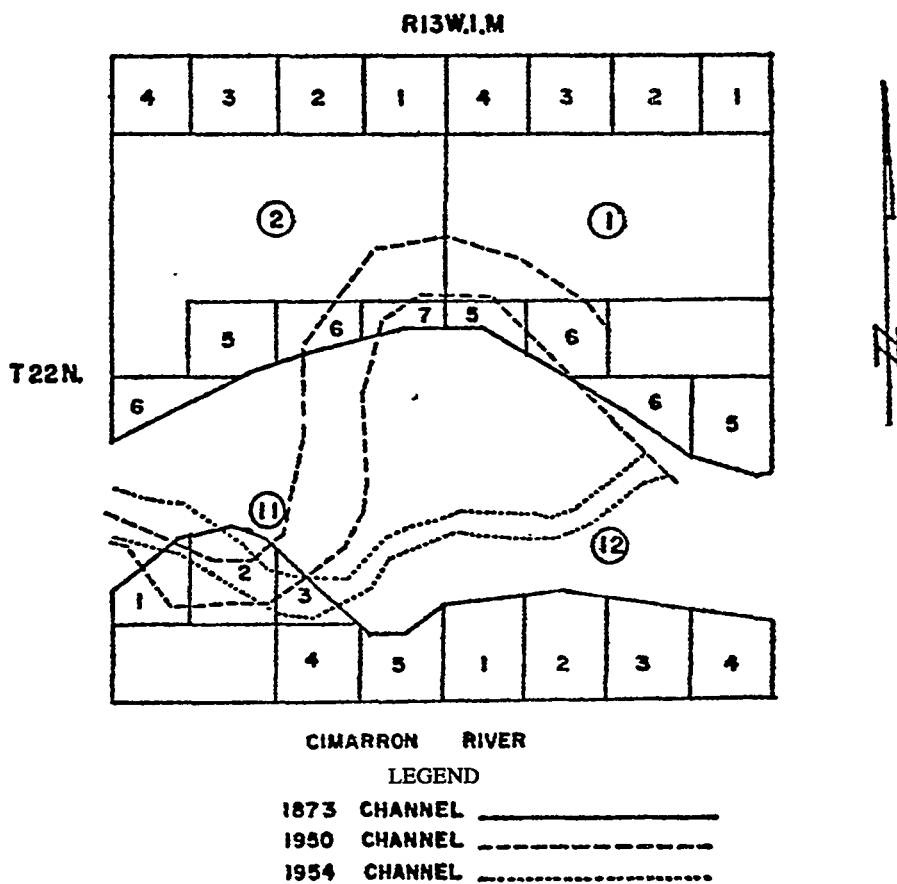
6. *Id.*

7. G. SHIRE, *OKLAHOMA PLACE NAMES* 52 (1974). The origin of the name as applied to the river is generally considered to be of Spanish derivation, from Río de los Carneros Cimarrón, or "River of the Wild Sheep."

8. No. 4489 (Dist. Ct. Major County, Okla., Sept. 14, 1934).

as evidenced by the original United States Government Survey of 1873.⁹ In 1934 the river's movement north was within its own banks, which had been surveyed in 1873 as approximately one-half to three-quarters of a mile in width.¹⁰

Thereafter, the Cimarron River moved farther north into a new channel (as shown by a 1950 survey of the river).¹¹ This northerly movement continued until May 1952, whereupon the river, as evidenced by a 1954 survey, perceivably changed its location to the south as a result of a single flood.¹² The disputed land in *Hodgden* was located in sections 1, 2, 11, and 12, all in Township 22 North, Range 13 W.I.M., Major County. The location of the Cimarron River in 1873, 1950, and 1954 is shown by the following plat¹³:



9. Cited in *Hodgden v. Kliewer*, 557 P.2d 885, 887 (Okla. 1976).
 10. *Id.*
 11. *Id.*
 12. *Id.*
 13. *Id.*

On the date of trial, Appellant Hodgden owned: lot 6 in Section 11, lots 5, 6, and 7 in Section 2, all in Township 22 North, Range 13 W.I.M., Woods County.

Appellee Kliewer owned: lots 1, 2, 3, 4, and 5 in Section 11, lots 1 and 2 in Section 12, all in Township 22 North, Range 13 W.I.M., Major County.

Both appellant Hodgden and appellee Kliewer claimed to own land lying north of the Cimarron River as it existed at the time of trial. At the proceedings, it was shown that between 1936 and 1950 the river moved farther north in sections 1 and 2, destroying lots 6 and 7 and a portion of the N/2 of SE/4 of section 2 and lots 5 and 6 and N/2 of SW/4 of section 1.¹⁴ In 1952, the river in one flood returned to its original channel, restoring the land and lots in sections 1 and 2.¹⁵

The trial court, quieting title in the owners of the land to the south of the disputed tracts (Kliewer), held that:

(1) the river moved north by gradual and imperceptible process of accretion, adding such accreted land to the riparian lots on the south bank of the river; (2) the river, when at its northernmost point of the "hump", moved south by the process of avulsion during the flood of May, 1952, thereby cutting a new channel on the south side of the "hump" and immediately north of Lots 1 and 2 in Section 12, and Lots 1, 2, 3, 4 and 5 in Section 11, all in Township 22 North, Range 13 West; and, (3) the avulsive process did not affect the ownership of any of the "hump".¹⁶

From this verdict, Hodgden appealed to the Oklahoma Supreme Court.

*
Analysis of the Arguments in Hodgden

Kliewer submitted that the Cimarron River's movement northward by accretion had been judicially determined in the case of *Mitchell v. Meyer*,¹⁷ involving Kliewer's predecessor in title. He argued that such determination was not only conclusive but also established a presumption that accretion continued unless rebutted by clear and convincing evidence.¹⁸ The judgment in

14. *Id.* at 888.

15. *Id.*

16. *Id.* 60 OKLA. STAT. § 335 (1981) defines accretion as:

Riparian accretions: Where from natural causes land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank.

60 OKLA. STAT. § 336 (1981) defines avulsion as:

Removals in mass may be reclaimed: If a river or stream carries away, by sudden violence, a considerable and distinguishable part of the same bank, the owner of the part carried away may reclaim it within a year after the owner of the land to which it has been united takes possession thereof.

17. No. 4489 (Dist. Ct. Major County, Okla. 1934).

18. *Hodgden v. Kliewer*, 557 P.2d 885, 888 (Okla. 1976).

the *Mitchell* case vested title to 308.03 acres (part of the land disputed in *Hodgden*) by accretion in Kliewer's predecessor in title.¹⁹

Hodgden contended that in both instances the river had moved by the process of avulsion, resulting in no change upon the boundary limits when the river moved to the north and then back to within its original channel (as evidenced by the 1873 government survey). Hodgden also argued that even if the river's movement north was by accretion and back south by avulsion an original owner who loses riparian land through the river's movement would be restored such land if the river later receded to its original channel (the reappearing riparian lands doctrine).²⁰ In support thereof, Hodgden cited cases from the United States Supreme Court, the Court of Appeals for the Tenth Circuit, and the Oklahoma Supreme Court.²¹

In rejecting Hodgden's contentions, the majority opinion stated that the second argument urged by Hodgden had been mistakenly endorsed by the Court of Appeals for the Tenth Circuit in *Mikel v. Kerr*,²² and in *Herron v. Choctaw & Chickasaw Nations*²³ (each involving disputed tracts of riparian land in Oklahoma).²⁴ The *Hodgden* court held that, "there is no question about [the reappearing riparian lands doctrine] being the Oklahoma law where the river has moved in both directions by accretion."²⁵ Thus, the court rejected the proposition that the law also applied to circumstances where the river had moved first by accretion and then back by avulsion. The supreme court concluded that the misunderstanding expressed by the Tenth Circuit stemmed from a misinterpretation of Oklahoma case law.²⁶ In sustaining the district court, the supreme court held that

where the river had moved north by gradual and imperceptible processes of accretion, adding accreted land to the riparian lots on the south bank of the river, and where the river thereafter moved south by the process of avulsion during a flood, the avulsive processes did not affect ownership of any of the previously accreted land.²⁷

This was the court's determination, even though the land that had originally accreted to the riparian lots on the south bank was on the north side of the river following the flood of 1952 (avulsion).

19. *Id.*

20. *Id.*

21. *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973); *Mikel v. Kerr*, 499 F.2d 1178 (10th Cir. 1974); *Herron v. Choctaw & Chickasaw Nations*, 228 F.2d 830 (10th Cir. 1956); *Ford v. Harris*, 383 P.2d 21 (Okla. 1963); *Mapes v. Neustadt*, 197 Okla. 585, 173 P.2d 442 (1946); *Hunzicker v. Kleeden*, 161 Okla. 102, 17 P.2d 384 (1932).

22. 449 F.2d 1178 (10th Cir. 1974).

23. 228 F.2d 830 (10th Cir. 1956).

24. *Hodgden v. Kliewer*, 557 P.2d 885, 889 (Okla. 1976).

25. *Id.*

26. *Id.*

27. *Id.* at 885-86.

Hodgden relied upon three Oklahoma Supreme Court cases (*Hunzicker v. Kleeden*,²⁸ *Mapes v. Neustadt*,²⁹ *Ford v. Harris*³⁰) to support his proposition that “when land adjoining a river is lost through the movement of a river and the river later recedes to its original channel, the original owner is restored.”³¹ In the *Hunzicker* case, the Oklahoma Supreme Court addressed the principle of reappearing riparian lands for the first time. Adoption of the principle by the court was based partially on the South Dakota case of *Allard v. Curran*.³² In *Allard* a nonriparian tract of land became riparian through the river’s imperceptible cutting away of the original riparian owner’s land (accretion). Subsequently, by accretion, the river receded, restoring the original riparian land, whereupon the nonriparian owner claimed that upon his tract becoming riparian he was entitled to alluvion deposits on such land.³³ In rejecting the nonriparian owner’s claim, the court stated: “We believe that after appellant’s land had been restored by the action of the river, being capable of identification, it belonged to appellant and should be treated as though it had never been submerged at all.”³⁴ In rejecting the same argument by the nonriparian owner in *Hunzicker* and in adopting the reappearing riparian lands doctrine, the Oklahoma Supreme Court held:

[W]here a nonnavigable stream . . . erodes away a portion of the land of defendants, defendants’ title to said land continues to exist as a part of the river bed and, of course, under this . . . when the river recedes and abandons the river bed, said land continues to be the property of the former owners.³⁵

It is crucial to note that the court in *Hunzicker* made no actual reference to the manner in which the river receded (avulsion as opposed to accretion). This is especially important when compared with the holding in *Hodgden v. Kliever*,³⁶ in which the court stated that the Tenth Circuit had misinterpreted the Oklahoma law on reappearing riparian lands in that the law only applied where a river has receded by the process of accretion.

Upon close reading of the *Hunzicker* case, it would appear that the river may have receded by the process of avulsion. From the facts of the case it is not certain whether the river’s “abandonment” was by accretion or avulsion. However, the court’s use of the term “abandonment” would seem to imply that the river moved by the process of avulsion.³⁷

28. 161 Okla. 102, 17 P.2d 384 (1932).

29. 197 Okla. 585, 173 P.2d 442 (1946).

30. 383 P.2d 21 (Okla. 1963).

31. *Hodgden v. Kliever*, 557 P.2d 885, 888 (Okla. 1976).

32. 41 S.D. 73, 168 N.W. 761 (1918).

33. *Hunzicker v. Kleeden*, 161 Okla. 102, 103, 17 P.2d 384, 385 (1932).

34. *Id.*

35. *Id.* at 385.

36. 557 P.2d 885 (Okla. 1976).

37. See *Musser, Easy Come, Easy Go, or Avulsion Plus Accretion Does Not Equal Revulsion*, 48 OKLA. B.J. q-177 (1978).

It is also interesting that in the answer brief submitted to the *Hunzicker* court, the appellee, Kleeden, in describing the river's movement, stated "that when the river changed its course this strip of ground immediately reappeared . . . and the original boundary lines . . . could be located and run out by the surveyor. . . ." ³⁸ This factual description of the river's movement was taken from the second proposition of the answer brief, which concluded:

[T]he doctrine of submerged lands governs this suit and . . . that where land is submerged by the action of water or even where it is eroded away, when it reappears upon the same site, either by accretion, reliction or avulsion, and the original owner can locate his land, he does not lose the title thereto. ³⁹

While it might be contended that the *Hunzicker* case involved landowners on the same side of the river as compared with the *Hodgden* case where the parties owned patented lots on opposite sides of the river, the *Hunzicker* case states clearly the rights to be protected of any riparian owner under the reappearing riparian lands doctrine. Thus, where riparian property is gradually washed away and the river later abandons its channel, the owner of riparian land acquires, on its reappearance, such property as he had prior to the stream washing away said land. The *Hunzicker* court held this to be the more equitable view when the boundaries were capable of determination, and vested title in the party whose land had been washed away, since the land had been platted into lots and blocks that made it readily identifiable upon its reappearance. ⁴⁰

In *Mapes v. Neustadt*, ⁴¹ the Oklahoma Supreme Court was presented with a river that first moved by avulsion to the nonriparian tract and then receded by accretion, restoring the riparian tract. Upon restoration the riparian tract was capable of identification, which led the supreme court to hold:

We think that the reliance of Neustadt in the equitable principles applied in the *Hunzicker* case and his reliance upon the ability to identify his land by government plat and survey following the restoration of his land justified the trial court in rendering a judgment in his favor. . . . [T]he ability to identify according to government plat and survey was the basis for the *Hunzicker* case. ⁴²

In holding that *Hunzicker* controlled in the *Mapes* case, it is important to realize that even where the river's first movement was by avulsion, the court's chief requirement for applying the reappearing riparian lands doctrine was

38. Answer Brief for the Defendants in Error at 57, *Hunzicker v. Kleeden*, 161 Okla. 102, 17 P.2d 384 (1932).

39. *Id.* at 58.

40. 161 Okla. at 103, 104, 17 P.2d at 384, 385.

41. *Mapes v. Neustadt*, 197 Okla. 585, 173 P.2d 442 (1946). Here the supreme court applied the "reappearing riparian lands doctrine" to a new factual circumstance—first the river moved by avulsion and then back by accretion.

42. *Id.* at 587, 173 P.2d at 444.

still the ability to identify land according to government plat and survey upon its restoration.

The case of *Ford v. Harris*⁴³ presented the Oklahoma Supreme Court with a river that had first moved gradually by accretion to the nonriparian tract and then later also receded by the process of accretion. The nonriparian owner argued that once the river had completely passed over the land in question, reaching his own land, he became a riparian owner and was entitled to follow the river when it receded. The court, as it had done in *Hunzicker*, rejected the argument that the old boundary lines had been destroyed upon the stream completely submerging the riparian land in question. It held that when the river receded, the original riparian owner was entitled to his property, which was identifiable through a government survey.⁴⁴

It is important to note in *Ford* that the supreme court applied the reappearing riparian lands doctrine, rather than the law of accretion, to facts where a river had clearly moved in both directions by accretion.⁴⁵ Thus, the supreme court again based its decision on the ability to identify the riparian tract's boundaries by government survey upon restoration.

In a brief filed before the Oklahoma Supreme Court in support of a petition for rehearing, Hodgden stated that the facts in the *Ford* case had similarities to his own case.⁴⁶ Hodgden argued that the N/2 SW/4 of section 2 and the N/2 W/4 of section 1 were nonriparian as Ford's land was, and lots 6 and 7 of section 2 owned by Hodgden were riparian, as the Harris's land was. Therefore, Hodgden concluded that when the river first moved gradually north, passing over all of lots 6 and 7 into property that had been formerly nonriparian, the court, as in *Ford*, should have determined that Hodgden owned lots 6 and 7, which were easily identifiable by government survey after the river had abandoned its channel to the south.⁴⁷

The distinguishing factor between the *Ford* and *Hodgden* cases was that while both streams eroded away the riparian tract by accretion, in *Hodgden* the movement of the river back in the direction from which it came was by avulsion and not accretion, as in the *Ford* case. However, after examining *Hunzicker* and its progeny, it does not seem that this factor had been clearly distinguished prior to the *Hodgden* decision. Three federal cases, interpreting Oklahoma case law involving riparian land in Oklahoma, are informative for

43. 383 P.2d 21 (Okla. 1963).

44. *Id.* at 23.

45. Because of the questionable facts surrounding the *Hunzicker* case, one might argue that until a case like *Ford*, the Oklahoma law was unclear as to whether the "reappearing riparian land doctrine" would apply to facts where the river had moved in both directions by accretion. Therefore, in applying the doctrine, the supreme court refused to allow the nonriparian owner to follow the river when it receded, even under facts where the river moved in both directions by accretion.

46. Appellants Brief in Support of Petition for Rehearing at 11, *Hodgden v. Kliever*, 557 P.2d 885 (Okla. 1976) (Doolin, J., dissenting).

47. *Id.* (see plat at note 13 *supra*).

analyzing the reappearing riparian lands doctrine prior to the *Hodgden* decision.⁴⁸

In *Mikel v. Kerr*,⁴⁹ the Court of Appeals for the Tenth Circuit reviewed arguments on the right of ownership to property that had been first submerged by the gradual movement of a river, and then subsequently restored by the gradual recession of that river. The court held that the property remained in the owner of the record title upon the land reappearing, but before holding this the court closely examined the *Hunzicker* case and those following it.⁵⁰ A significant point in the *Mikel* case is that Mikel contended that *Hunzicker* and its progeny applied only in situations where a river had moved by avulsion, a contention that is diametrically opposed to what the *Hodgden* case stands for.⁵¹ While the Tenth Circuit rejected this contention, it did point out that it interpreted *Hunzicker* as applying to cases where a river subsequently receded by avulsion, but was in no way limited only to avulsion.⁵² The court, in reviewing *Hunzicker*, concluded:

While the syllabus of the court speaks of the subsequent movement of the river therein involved as an "abandonment of the channel", the text of the court's decision makes it clear that the rule therein announced applies whenever a river subsequently "recedes", uncovering land which was formerly riparian. Indeed, an examination of the authority relied upon and cited by the *Hunzicker* court establishes that Oklahoma embraced the rule that whenever riparian land reappears through a subsequent change in the course of a river, either by avulsion or by a river's gradual movement, ownership to the reappearing land, if it can be identified, is vested in the record title holder. *See Allard v. Curran*, 41 S.D. 73, 168 N.W. 761 (1918) and *Keel v. Sutton*, 142 Tenn. 341, 219 S.W. 351 (1920) (and cases cited therein), cited by the *Hunzicker* court, wherein the adopted rule is applied in instances of gradual reversal of a river's course; and *see Stockley v. Cissna*, 119 F. 812 (6th Cir. 1902), cited by the *Hunzicker* court, wherein the adopted rule is applied in instances of avulsion.⁵³

The court of appeals further expressed that its own earlier decision had recognized that *Hunzicker* and its equitable principles applied to circumstances where the land reappeared by either accretion or avulsion. In *Herron v. Choctaw & Chickasaw Nations*,⁵⁴ it was stated:

48. *Mikel v. Kerr*, 499 F.2d 1178 (10th Cir. 1974); *Herron v. Choctaw & Chickasaw Nations*, 228 F.2d 830 (10th Cir. 1956); *Choctaw & Chickasaw Nations v. Tibbetts*, 430 F. Supp. 714 (E.D. Okla. 1976).

49. 499 F.2d 1178 (10th Cir. 1974).

50. *Id.*

51. *Id.* at 1180.

52. *Id.* at 1181.

53. *Id.* (emphasis added).

54. 228 F.2d 830 (10th Cir. 1956).

Whatever the rule may be elsewhere, it is the law in Oklahoma that where because of inroads of a river riparian land is lost by erosion or becoming submerged but through subsequent change in the course of the river the water disappears and the land reappears, and the boundaries are susceptible of being definitely identified, title to the restored land is vested in the owner of the fee at the time the erosion or submerging occurred.⁵⁵

While it might be argued that *Mikel* could be distinguished by the fact that the river in that case was navigable, whereas in *Hodgden* the river was non-navigable, the Tenth Circuit concluded:

It is apparent that the Hunzicker court did not consider a river's non-navigability to be a prerequisite to application of the stated rule. In fact, while the court adopted and applied the stated rule to the facts before it, where the river was non-navigable, it pointed out that the caselaw in other states for and against the adopted rule dealt with navigable streams.⁵⁶

The *Hunzicker* court, in forming its opinion with case law based on navigable streams, observed that the river's nonnavigability helped establish an additional theory for reaching its result. The court reasoned that since a riparian owner has vested property rights in a nonnavigable riverbed to the center of the stream, it followed that where the riparian owner's land becomes submerged, his title to said land continues to exist as long as any portion of the land continues to exist as part of the riverbed.⁵⁷

In the 1976 case of *Choctaw & Chickasaw Nations v. Tibbetts*,⁵⁸ handed down six months before the *Hodgden* decision and not considered in that decision, the United States District Court, Eastern District, Oklahoma, interpreted the reappearing riparian lands doctrine in Oklahoma as applying to situations where the land reemerged by the process of avulsion. In *Tibbetts* the river first moved by the process of accretion, submerging the land in question. Thereafter, by the process of avulsion, the river receded and restored the land that had been submerged by the river's first movement. Under facts identical to those in *Hodgden*, the court vested title in the original record title holder because the boundaries following reemergence were capable of being identified.⁵⁹

Hodgden also presented the United States Supreme Court case of *Bonelli Cattle Co. v. Arizona*.⁶⁰ The *Bonelli* case was examined in *Tibbetts*⁶¹ and compared with the reappearing riparian lands doctrine in Oklahoma as interpreted

55. *Id.* at 832.

56. *Mikel v. Kerr*, 499 F.2d 1178, 1182 (10th Cir. 1974).

57. 161 Okla. 102, 103, 17 P.2d 384, 385 (1932).

58. 430 F. Supp. 714 (E.D. Okla. 1976).

59. *Id.*

60. 414 U.S. 313 (1973). The *Bonelli* case was only cited in the *Hodgden* case without any specific reference being made to it by the court.

61. 430 F. Supp. 714, 716 (E.D. Okla. 1976).

by the court. In its comparison the United States District Court concluded:

The Federal rule appears to be identical. In *Bonelli Cattle Company v. Arizona*, supra, in which Federal law was applied, a navigable river moved by accretion in one direction with the law of accretion above set out applying and the river later moved back by avulsion (a man-made rechannelization but nonetheless an avulsion) with earlier submerged lands surfacing as dry land and the Court held: “. . . Now that the land has resurfaced in the process of rechannelization, it should return to the state of the riparian owner.”⁶²

To make this point clear, the district court quoted the following from footnote 27 of the *Bonelli* case:

Under the doctrine of re-emergence, when identifiable riparian land, once lost by erosion, subsequently re-emerges as a result of *perceptible* change in the river course, title to the surfaced land reverts in its former owner. See *Arkansas v. Tennessee*, 246 U.S. (158) at 174-175, 38 S.Ct. 301, 62 L.Ed. 638; *Beaver v. United States*, (9 Cir.), 350 F.2d (4) at 11. *The re-emergence doctrine has been accepted by a number of states, Herron v. Choctaw and Chickasaw Nations*, (applying Oklahoma law); *State v. Gill* [Alabama law]; *Esso Standard Oil Co. v. Jones* [Louisiana law]; *Mulry v. Norton* [New York law]. [Citations omitted.]⁶³

It appears from footnote 27 of the *Bonelli* case that the United States Supreme Court adopted the Tenth Circuit's interpretation of Oklahoma case law on the reappearing riparian lands doctrine. In *Hodgden* the majority concluded that the court of appeals had misinterpreted Oklahoma case law and rejected that court's interpretation. While the dissent in *Hodgden* reiterated the conclusions of the Tenth Circuit with an examination of the Oklahoma case law, the majority held that the reappearing riparian lands doctrine did not apply in situations where the river receded by the process of avulsion and examined only the river's first movement to determine whether any change in the property boundaries had occurred through the movement of the river by accretion.

Analysis of the Dissent in Hodgden

In examining the Oklahoma law, Justice Doolin, in his dissent, concluded that the majority opinion overlooked rights previously protected.⁶⁴ Justice Doolin asserted that the Oklahoma case law “has heretofore applied the ‘reappearing riparian lands doctrine’ to riparian lands where the original

62. *Id.* at 716-17.

63. *Id.* at 717 (emphasis added).

64. *Hodgden v. Kliever*, 557 P.2d 885, 890 (Okla. 1976).

boundaries of a river can be identified from an existing governmental survey. . . ."⁶⁵ He further stated:

I conclude the majority simply adds confusion to this most difficult problem by not clearly accepting or overruling the . . . doctrine as espoused in the Tenth Circuit in *Mikel v. Kerr*. . . . I believe that the "reappearing lands" doctrine is more equitable, particularly for a river where an untrained observer can detect the meanderings and changes of banks within the old channel with comparative ease. Location of the boundaries is likewise in my opinion, a simple task of carrying "direction and distance" to an identifiable point on the ground from a United States governmental survey.⁶⁶

Justice Doolin believed that the doctrine of "reappearing lands" was conducive to the stability of riparian land titles and emphasized: "Its retention or adoption would lessen or curtail quiet title actions such as this and the one had in 1934, covering a part of these same lands."⁶⁷

Conclusion

Whether the Tenth Circuit misinterpreted *Hunzicker* and its progeny, as the majority concluded in *Hodgden*, is a question that upon close examination of *Hunzicker* alone, remains open to doubt. This doubt seems warranted based on three points:

- (1) the holding of *Stockley v. Cissna*,⁶⁸ which the *Hunzicker* case followed in adopting the reappearing riparian lands doctrine;
- (2) the language used in the *Hunzicker* case, which seems to imply the river's second movement was by an avulsive process; and
- (3) the *Hunzicker* court's holding for the defendant Kleeden, whose proposition stated that title is not lost by the original owners when the land reappears by accretion, reliction, or avulsion.

First, in *Mikel*⁶⁹ the Tenth Circuit stated: "see *Stockley v. Cissna*, . . . cited by the *Hunzicker* court, wherein the adopted rule is applied in instances of avulsion."⁷⁰ In *Stockley*⁷¹ the Court of Appeals for the Sixth Circuit, in quoting a portion of *Murly v. Norton*,⁷² stated: "It is equally true, however, that when the water disappears from the land, either by gradual retirement therefrom, or the elevation of the land by avulsion or accretion, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owners."⁷³

65. *Id.*

66. *Id.* at 890-91.

67. *Id.* at 891.

68. 119 F. 812 (6th Cir. 1902).

69. *Mikel v. Kerr*, 499 F.2d 1178 (10th Cir. 1974).

70. *Id.* at 1181.

71. *Stockley v. Cissna*, 119 F. 812 (6th Cir. 1902).

72. 100 N.Y. 426, 3 N.E. 581 (1885).

73. *Stockley v. Cissna*, 119 F. 812, 831 (6th Cir. 1902). *Murly v. Norton* applied to a beach

Second, as pointed out in *Mikel*, the *Hunzicker* court spoke of the river's subsequent movement as involving an "abandonment" of the channel, a term the Tenth Circuit looked upon as usually denoting avulsion.⁷⁴

Third, in Kleeden's answer brief (judgment for Kleeden and appeal affirmed), the second proposition stated that "where land reappears upon the same site, either by accretion, reliction or avulsion and the original owner can locate his land, then such owner is entitled to reclaim said property."⁷⁵ Furthermore, Kleeden's answer brief stated: "[T]he record clearly discloses that when the river changed its course, this strip of ground immediately reappeared."⁷⁶

The refusal of the *Hodgden* court to apply the reappearing riparian lands doctrine where a river receded by avulsion forces an Oklahoma court to turn to a river's first movement to determine the parties' boundaries as followed by the law of accretion or avulsion. The law of accretion and avulsion has been codified in the state of Oklahoma.⁷⁷

The doctrine of accretion, having its roots in the common law, has been justified on the desirability of assuring the riparian owners' access to the water when the riparian quality of a tract may be its most valuable feature (i.e., to the owner of the tree belongs the fruit). Such a justification seemed quite relevant when this country was a new frontier and property values were greatly increased by riparian property that provided the only means for drinking water and irrigation.

Today, however, with other means of obtaining water, with the high level of pollution in many rivers, and with the inability to use a nonnavigable river for transportation,⁷⁸ it seems doubtful that it can be said that the riparian quality of a tract is its most valuable feature. This is especially true in Oklahoma where the ownership of the mineral rights of the riparian property would have to be one of the most valuable features of that tract when con-

being washed away and then reappearing. *Stockley* applied the case to a quiet title action involving disputes to land ownership through the movement of the Mississippi River.

74. See Musser, *supra* note 37.

75. Answer Brief for the Defendants in Error at 54, *Hunzicker v. Kleeden*, 161 Okla. 102, 17 P.2d 384 (1932).

76. *Id.* at 57.

77. 60 OKLA. STAT. §§ 335, 336 (1981):

Riparian accretions: Where by natural causes land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank.

60 OKLA. STAT. § 336 (1981):

Removals in mass may be reclaimed: If a river or stream carries away, by sudden violence, a considerable and distinguishable part of a bank, and bears it to the opposite bank, or to another part of the same bank, the owner of part carried away may reclaim it within a year after the owner of the land to which it has been united takes possession thereof.

78. All of the major Oklahoma rivers have been determined as nonnavigable except a portion of the Arkansas River. See *Vickery v. Yahola Sand & Gravel Co.*, 158 Okla. 120, 12 P.2d 881 (1932).

sidering that the smallest change in boundaries could mean the loss of thousands of dollars in oil and gas royalties. Both the *Hunzicker* and *Hodgden* cases resulted from disputes in ownership over a tract of land after it had been leased for oil and gas exploration.

In *Hodgden* the court ignored a receding river that exposed land clearly identifiable by government survey. The court, in determining the parties' disputed boundaries, looked to the river's first movement and applied the common law doctrine of accretion as adopted by the Oklahoma legislature. However, to determine the riparian owners' boundaries by the laws of accretion and avulsion alone, under these circumstances, seems highly inequitable—especially in Oklahoma, where it is now arguable that the desirability of assuring access to a river's water may no longer be justified on the common law belief that the riparian quality of a tract of land is its most valuable feature. The application of these common law principles, in *Hodgden*, where the river suddenly receded and exposed identifiable land, seems questionable when it is considered that in the end not only did the riparian owner to the south retain access to the river, he also gained more than 300 acres of property on the north side of the Cimarron.⁷⁹

With results such as this, is it not time to examine the soundness of following the common law doctrines of accretion and avulsion as the state's primary means for providing stability to riparian land titles?⁸⁰ Historically, the doctrines provided simple rules for determining ownership disputes when there were no adequate methods to identify accurately the boundaries of riparian tracts of land. Moreover, the law of accretion attempted to ensure access to a river at a time in history when even the smallest amounts of water were extremely valuable. Yet, even today, if the riparian owner is lucky and the river moves in the "right" direction by an imperceptible process, he not only retains access to the river but also acquires additional valuable property. Can it be said that such a result is fair when property boundaries can be clearly identified by a government survey? Furthermore, if the riparian owner is unlucky and the river moves suddenly, overnight, away from his land, under the law of avulsion, such an owner will not be able to follow the river, and thus he will have lost his so-called "most valuable feature" of the property.

When considering, first, how valuable the mineral rights can be to a riparian tract of land in Oklahoma, and second, the advancements made since statehood in obtaining water through irrigation, reservoir collection, and water wells, it must be said that the primary importance once placed upon the riparian quality of a tract of land has been greatly eroded. This statement is further supported by Oklahoma's statutory water rights provisions, which allow the nonriparian owner to appropriate stream water for beneficial use through the Oklahoma Water Resources Board.⁸¹

79. *Hodgden v. Kliever*, 557 P.2d 885, 887 (Okla. 1976).

80. Note, *Oil and Gas: The Inapplicability of Accretion to Severed Mineral Estates*, 34 OKLA. L. REV. 826 (1981).

81. 82 OKLA. STAT. § 105.2(A) (1981) states: "Beneficial use shall be the basis, the measure and the limit of the right to the use of water. . . ." 82 OKLA. STAT. § 105.2(B) (1981) states:

Although the equitable principles of the reappearing riparian lands doctrine, as first espoused in *Hunzicker v. Kleeden*,⁸² attempted to provide stability to riparian land titles in Oklahoma, the decision in *Hodgden* severely limited the application of the doctrine. This limitation fails to curtail quiet title actions such as the one in *Hodgden*, which concerned land that has been involved in litigation twice since 1934.

The reappearing riparian lands doctrine in *Hunzicker* may not have been the definitive answer for the stability of land titles and riparian rights, but it was a step in the right direction—a step over which the Oklahoma Supreme Court has appeared to stumble with its decision in *Hodgden v. Kliever*.⁸³ Thus, as land becomes more valuable, the Oklahoma courts may be faced with recurring litigation involving riparian tracts of land bordering rivers such as the wild and unruly Cimarron.

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“Priority in time shall give the better right.” 82 OKLA. STAT. § 105.3 (1981) states: “Any person, corporation or association may exercise the right of eminent domain to acquire right-of-way for the storage or conveyance of waters for beneficial use.” Thus, the nonriparian owner has statutory rights to appropriate stream water for his beneficial use through the Oklahoma Water Resources Board.

82. 161 Okla. 102, 17 P.2d 384 (1932).

83. 557 P.2d 885 (Okla. 1976).

