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## APPROPRIATION WATER LAW ELEMENTS IN RIPARIAN DOCTRINE STATES

J. H. BEUSCHER\*

THE FIELD of water law contains more than its fair share of judicial over-generalizations. Water law discussions usually overemphasize these case law broadsides. These discussions often ignore or understress, (1) comparative analysis of actual case results; (2) the gloss of administrative case law being built up in day-to-day application of water laws by a state and local agencies and (3) the actual law-in-action at the user level. This is true of rules about diffused surface water and about ground water. It is especially true of law which relates to the use of water in streams, lakes and ponds. This in part accounts for the common habit of dividing the states of the Union into two groups with states in each group supposedly applying a common body of uniform doctrine, i.e., those states which apply *the* riparian doctrine and those which enforce *the* appropriation doctrine.<sup>1</sup>

Over-generalization in the water law field based on judicial pronouncements not only tends to blur important distinctions between states which are members of the same group, it also magnifies differences when states in one group are compared with those in another. More important, over-generalization provides unstable footings upon which to erect changes in water laws,—changes which are being sparked by rapid population increases and sharp climbs in per capita water demand curves. Besides, proposals for legislative firming up of water laws in humid states are being met by objections from orthodox riparianists who insist that such proposals are but attempts to import an alien law of appropriation from the dissimilar setting of the arid west. A showing that some appropriation-like law is already with us in humid states tends, for what it is worth, to blunt this head-on charge.

These are all reasons for encouraging greater specificity in approaching the water laws of a given state and that is the purpose of this paper. The method is to throw against the screen of doctrinal riparianism some actual humid-state legislation and court and administrative adjudications to show that there is much which does not square with pristine riparianism; that some of this legislation and adjudication, as a matter of fact, smacks more of western appropriation principles than of riparianism. I make no claim to completeness. Drawing scattered illustrations largely from four states, Minnesota, Wisconsin, Indiana and Ohio, I hope for no more than to induce some readers to take a more specific and critical look at water laws in other humid states.

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1. Actually there is a third group of states, those in which both riparian and appropriation principles are consciously applied. These are the states which border the arid west on the east and the west—the Dakotas, Nebraska, Kansas, Texas, California, Oregon and Washington. The other western states are “appropriation” only. All states east of the Mississippi are treated as riparian.

## APPROPRIATION WATER LAW ELEMENTS

The reason for the selection of the four states named lies in the fact that I have been supervising research into their water laws.<sup>2</sup> We have looked not only at the judicial pronouncements of private and public water rights doctrine but also at state and local legislation and at the degree to which state and local agencies have been molding and shaping water rights.

### CLAIMED BASIC DIFFERENCES BETWEEN RIPARIAN AND APPROPRIATION PRINCIPLES

The basic differences between riparian doctrine and appropriation principles, as usually stated, can be roughly summed up as follows:

|  | <i>Riparian</i>  | <i>Appropriation</i>   |
|--|--|--|
| <i>Source of the Water Right</i>         | The water right is tied to ownership of land contiguous to the water course. The water is, however, not owned; the landowner has a "usufructuary" right only.  | Contiguity of land to the water course is not a factor, rights are acquired by actual use. The first user acquires the best right; the second user, the second best, etc.  |
| <i>Effect of Nonuse</i>                  | Rights to use water are not lost by abandonment or nonuse. A riparian who has not been using water may at any time commence a use even though this may require previous users to reduce their withdrawals. There is, however, the chance that established users may get rights by prescription.  | Nonuse of an appropriation right may result in its loss by abandonment.  |
| <i>Place of Use</i>                      | Many riparian state cases indicate that the water must be used on the riparian land itself; others permit use on nonriparian land as long as other riparians are not measurably harmed.  | The appropriator may transport to, and use the water on, nonriparian land; in fact, use in another watershed is permitted.   |
| <i>General Nature of the Water Right</i> | Riparians are thought of as correlative cosharers in a usufructuary right to make reasonable use of water; there is accordingly no fixed quantity of water assured to any riparian.  | The appropriator once he has established his right by proof of earlier use is entitled to a specified quantity of water as against appropriators later in time. (Little attention is paid to the fact that many water users in the west actually depend for their water upon a contract with an irrigation district.)  |
| <i>Natural Flow</i>                      | Earlier case law emphasized more than current cases the natural flow requirement of a waterwheel economy, namely that after using water the riparian was to return it to the watercourse so the water would flow as it was "wont" to flow. Today concepts of public rights or public trust are more effective in preserving minimum flows in streams or levels in lakes. | There is no natural flow notion. The appropriators can take as much water as they are entitled to take even though it exhausts the watercourse. It is this aspect of assumed appropriation law which particularly arouses conservationists. Some western states, however, permit the states to file for and ultimately acquire a right to the unappropriated flow and thus preserve such flow, if desired. |

2. This research has been carried out under a contract between the University of Wisconsin and the Economic Research Service, Farm Economics Division, U.S.D.A., with Mr. Harold H. Ellis of the Agricultural Research Service as the contracting officer's representative. Needless to say, the views expressed in this article are my own and do not necessarily represent those of the contracting parties or of Mr. Ellis.

A GLANCE BACK INTO ORIGINS OF RIPARIANISM

The first clear enunciations of riparian doctrine came in the age of the mill, dam and the waterwheel. Water taken from a stream was passed over the wheel and then returned to the stream, supposedly undiminished in quantity. Actually storage of the water in the mill pond meant some loss by evaporation, but this was not stressed.

It was Justice Story sitting as a federal circuit judge who first clearly set forth the elements of the riparian doctrine in *Tyler v. Wilkinson*.<sup>3</sup> Actually this was not a case in which adjudication of reasonable shares between co-sharing riparians was in issue. Instead the case involved a conflict between a group of lower riparians and a group of upper owners who claimed prescriptive rights to water in a diversion ditch, based not upon riparian ownership as such, but upon adverse use. Thus in this country's keystone riparian doctrine case, one group of claimants were held to have fixed and ascertainable rights to given quantities of water, even though they apparently were not riparian to the watercourse. Nevertheless, Justice Story, in approaching this conflict, announced certain fundamentals as follows:

1. He tied the right to use water to ownership of the shoreland and stream bed and made it "an incident annexed, by operation of law, to the land itself."
2. He made it clear that the landowner does not have "property in the water itself," he has "but a simple use of it, while it passes along." Just what practical consequences in case results flow from this pretty distinction is not clear, but it has nevertheless been repeated dozens of times by riparian state courts all over the land.
3. Then he set up a dilemma with an idealized horn-in-the-sky and a common-sense horn closer to the practical affairs of life:
  - a. On the idealized side he says, (1) no proprietor has a right to use water to the prejudice of another; (2) there is a "perfect equality of right" in common to all proprietors and (3) no one has a right to "diminish the quantity which will, according to natural current, flow to a proprietor below."
  - b. On the common sense side, he hastily adds, (1) *there may be diminution*, retardation or acceleration indispensable for the reasonable use of the water, and (2) the law acts "with a reasonable reference to public convenience and general good, and it is not betrayed into a narrow strictness, subversive to common sense . . . ."<sup>4</sup>

Justice Story wrote in 1827. The following year Chancellor Kent picked up Story's pronouncements and developed them in his famous *Commentaries*.<sup>5</sup> Kent again stressed the idealized and the practical sides of the doctrine of riparian water use, although, relying on French as well as Anglo-American

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3. 24 Fed. Cas. 472 (Case No. 14,312 C. Ct. R.I. 1827).

4. *Id.* at 474.

5. III Kent, *Commentaries*, 439 (2d ed. 1832).

authorities, he perhaps gave somewhat less emphasis to "reasonable use" and somewhat more to "natural flow" than did Justice Story. It was Kent's much-used book which was the principal source upon which American courts subsequently drew in planting riparianism in the humid states of the Union. His famous language is still much quoted:

Every proprietor of lands on the banks of a river, has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration.<sup>6</sup>

His common-sense qualification is phrased as follows:

Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; [to return it to its ordinary channel and not unreasonably to detain, not to give the water a new direction, and not to work material injury or annoyance to his neighbor below].<sup>7</sup>

He adds,

. . . There will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current.<sup>8</sup>

So in the case of both Justice Story and Chancellor Kent "the riparian doctrine" is a two-level structure consisting of what some call the strict natural flow doctrine on the high side and the reasonable use doctrine on the low and applied side.

Riparian state courts have followed the lead of these two legal scholars in this tendency to state the natural flow ideal and the practical reasonable use standard together. But as Justice Holmes said, "General propositions do not decide concrete cases."<sup>9</sup> When one looks at the actual decisions about riparian rights being reached on the facts of tough, concrete cases, several points quickly become evident:

1. The natural flow precept has been receiving less and less emphasis, and many courts are today content to express riparian doctrine solely or almost solely in terms of reasonable use between riparians with the effect upon flow as just one of the evidentiary factors to be considered in determining the reasonableness or unreasonableness of the use.
2. There is actually much more protection given to the prior user of water as against a subsequent water claimant than one would

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6. *Id.* at 439.

7. *Id.* at 440.

8. *Ibid.*

9. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (dissenting opinion).

## APPROPRIATION WATER LAW ELEMENTS

have any reason to expect from a mere recitation of black-letter riparianisms.

3. The decline in emphasis on natural flow is in part evident from the substantial willingness of courts to permit water to be taken from streams or lakes for use on nonriparian lands. More and more the courts require a showing of measurable economic detriment resulting from the diminished flow before giving judicial relief.

### SPECIFIC DEVIATIONS FROM PRISTINE RIPARIANISM

#### 1. *The Prescriptive Right*

Kent recognized and Story enforced a major qualification upon correlative cosharing, namely, the vested prescriptive right based upon adverse use over time. Since their day humid-state courts have declared over and over again that a water user, be he riparian or nonriparian, may acquire a firm prescriptive right on appropriate showing of open, notorious adverse use continuously for the requisite period of time. These amount to uncompensated transfers of rights from adversely affected riparians to the adverse users. The adverse user acquires a right to a measurable quantity of water and this right is not held in common with the riparian rights; it is individual to the prescriptive holder and is unaffected by subsequent demands by riparians who for the first time choose to draw or use water.<sup>10</sup> Without getting involved in the technical requirements for the establishment of a prescriptive water right, suffice it to say that empirical investigations of water uses along some of the busier rivers in the humid states would probably disclose a great many of these fixed and enforceable rights standing firm and unyielding in a supposedly flexibly adjustable system of correlative cosharing.

#### 2. *The Right to Domestic Use*

It is familiar black-letter law that a riparian may consume as much water as is necessary, even to the exhaustion of the stream, to satisfy his domestic needs.<sup>11</sup> Domestic uses have been held to include water for drinking,<sup>12</sup> cooking,<sup>13</sup> laundry and sanitation,<sup>14</sup> the maintenance and sustenance of the proprietor and his family,<sup>15</sup> possibly the watering of a home garden<sup>16</sup> and the watering of stock and other domestic animals,<sup>17</sup> but not including feeder lot watering of animals greatly exceeding in number those which a riparian

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10. See Ellis, "Some Legal Aspects of Water Use in North Carolina" in *The Law of Water Allocation in the Eastern United States* 189, 336 (Conservation Found. 1958) and Harnsberger, *Prescriptive Water Rights in Wisconsin*, 1961 *Wis. L. Rev.* 47.

11. 6A *American Law of Property* § 28.57 (Casner ed. 1952).

12. *Meng v. Coffee*, 67 *Neb.* 500, 93 *N.W.* 713 (1903).

13. *Crawford Co. v. Hathaway*, 67 *Neb.* 325, 93 *N.W.* 781 (1903).

14. *Salem Mills Co. v. Lord*, 42 *Ore.* 82, 69 *P.* 1033, 70 *P.* 832 (1902).

15. *Hough v. Porter*, 51 *Ore.* 318, 98 *P.* 1083 (1909).

16. *Ibid.*

17. *Martin v. Burr*, 111 *Tex.* 57, 228 *S.W.* 543 (1921), *Hough v. Porter*, *supra* note 15, and *Crawford Co. v. Hathaway*, *supra* note 13.

could reasonably be expected to own.<sup>18</sup> Domestic uses are not apt to involve great quantities of water, unless as has happened in Ohio the state court is induced to extend the domestic use priority to all water taken by a municipal water utility from a stream for household and manufacturing requirements within the city.<sup>19</sup> Certainly such a holding permits gross disruption of co-sharing between riparians in favor of the city, and this even though most of the water will not be used on riparian land.<sup>20</sup>

### 3. Dam Owners and the Rights of Coriparians

Mill dam acts gave a private eminent domain power to entrepreneurs who chose to construct dams on streams flowing through riparian lands, a power to build the dam, flow the lands of an upstream riparian and be free of any obligation except to pay the value of the flowage right if the damaged landowner sued in time. More striking, for our purposes, however, is the express guarantee of appropriative status given to the riparian who first constructed a dam. No subsequent dam could be erected to the injury of any mill lawfully existing.<sup>21</sup> As a matter of fact, independent of legislation or prescriptive rights, American courts have protected the earlier dam against upstream or downstream structures which threatened to impair the power potential.<sup>22</sup> Similar protections are accorded hydroelectric dams erected in accordance with state-granted permits or franchises.<sup>23</sup>

Dams often disrupt the natural flow of the stream, especially in dry periods when water flowing down the stream is held behind the dam to maintain the head or power potential. Cases from mill dam and logging dam days willingly (and understandably) sustained as reasonable the complete retention of the full flow of the river for days at a time.<sup>24</sup> Economic needs dictated these blows at "natural flow" ideals. Far from protecting a bare technical right to the natural flow of the watercourse,<sup>25</sup> courts permitted complete disruption of the flow for sustained periods of time. Nor have the legislatures failed to react to similar pressures. A Wisconsin statute, for

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18. *Cowell v. Armstrong*, 210 Cal. 218, 290 Pac. 1036 (1930).

19. *Canton v. Shock*, 66 Ohio St. 19, 63 N.E. 600 (1902). The city's withdrawals so diminished stream flow that plaintiff, a lower riparian, had to shut down his mill at night.

20. The court did qualify its holding by requiring that the unconsumed sewage effluent be returned ultimately to the stream, but it apparently was unwilling to protect riparians between the point of taking and the point of return.

21. See, for example, Wis. Rev. Stats. ch. 56, § 1 (1858).

22. *Black's Pomeroy*, *The Law of Water Rights* § 10 (1893) and cases cited. See also *Bissell Chilled Plow Works v. Bend Mfg. Co.*, 64 Ind. App. 1, 111 N.E. 932 (1916).

23. See Wis. Stats. § 31.06(3) (1959). In considering applications for dams the commission is to protect "property" which presumably includes prior dams,—at least so the statute has been interpreted.

24. *Coldwell v. Sanderson*, 69 Wis. 52, 28 N.W. 232 (1886), *aff'd on rehearing*, 69 Wis. 57, 33 N.W. 591 (1887). *Apfelbacher v. State*, 167 Wis. 233, 167 N.W. 244 (1918) and cases cited.

25. In *United States v. Gerlach*, 339 U. S. 725 (1950), Mr. Justice Jackson said that such riparianism pressed to the limits of its logic enables one to play dog-in-the-manger.

example, requires the hydro-dam proprietor to let by, not the entire natural flow, but as little as 25% of it.<sup>26</sup>

#### 4. *Pollution and Correlative Riparian Rights*

Use of a watercourse for waste disposal often is a consumptive use in economic terms. It may deprive others of use opportunities. In fact, a polluting use may be more serious than a consumptive use which physically uses up a substantial part of the water, for the reason that the polluting material may make *all* the water in a long reach of the watercourse unfit for any use.

Passing over the unsatisfactory snarl of common law cases which deal with a riparian's "right" to pollute as opposed to a riparian's right to have the stream flow by quantity-wise and quality-wise as it was wont to flow, consider typical statutory pollution controls as they are administered today by state pollution control agencies. First there are the municipalities which dump raw or treated sewage in watercourses. There is a marked tendency to treat these municipal polluters as different in right from private users. Thus, for example, a Wisconsin irrigator was denied a permit because stream flow might be reduced to a point where it was not sufficient to flush sewage from a downstream municipality.<sup>27</sup> (Or is the dumping of municipal sewage effluent a public right that takes on a priority status comparable to the public right of navigation?) In any event, many upstream and downstream riparians would be prepared to argue vociferously that in practical fact their water use rights in a specified watercourse are being treated as inferior to, not as correlative and equal to, those of a municipality which is using the stream as a sewer.

Or take the familiar case of several industrial polluters on the same stream. Assume they are paper mills. The oldest mill is upstream from the others. With its older facilities sulfate liquor can be treated only to a 42% efficiency level. A more modern plant downstream manages a 68% efficiency level and the most modern and farthest downstream plant of the three achieves a 75% treatment level. In actual administration the third plant will be required on one hand to receive the heavily polluted water from above and to treat and filter it at considerable cost before it can use it, and on the other to achieve a substantially higher treatment level for its own liquor than the upstream mills. Again practical economics makes a shambles of equal, correlative rights. The older upstream mills have as a practical matter a prior and "better" right to use of the stream for waste disposal. It is uneconomic to require them to make the heavy investment necessary to bring their older plants to the level of treatment efficiency it is possible to achieve in the recently constructed plant. Usually when we think of pollution control

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26. Wis. Stats. § 31.34 (1959).

27. Wis. Pub. Serv. Comm. 2-WP-1174 (1957).



we think of the public matched against an individual polluter. An intensive look at the actual operation of pollution controls as between private water users on the same watercourse might prove highly instructive not only in terms of the contrast to correlative sharing which will emerge but also in terms of the unequal burdens of costs imposed on some users to treat or remove wastes dumped into the water by others. Further, sometimes the investigator will find that a particular class of industry has been definitely preferred over other industrial or agriculture users by permitting it to use a stream for waste disposal almost regardless of consequences to the downstream riparians.<sup>28</sup>

We have segregated the law of water pollution into the nuisance domain. The time has come to start thinking of waste disposal in terms of priority of water use.<sup>29</sup>

##### 5. *Municipal Water Utilities and Rights of Coriparians*

The generally accepted "view" is supposed to be that ordinary riparian rights do not include the privilege of withdrawals for municipal water supply even though the municipality is a riparian owner.<sup>30</sup> Actually courts have often refused to close down municipal water utilities drawing water from watercourses giving as reasons: (1) failure to show damages; (2) estoppel or laches or (3) a prescriptive right in the municipality.<sup>31</sup> In Ohio, however, as we have seen, the court did not feel it necessary to establish rights in municipalities to take water for city purposes by these backdoor devices. Instead the court flatly announced not only a riparian right in a municipal water utility but a right superior to that of downstream riparians of the same priority status as a domestic use privilege. The withdrawal of water by a municipal utility for city purposes such as street-sprinkling, for industrial purposes and for household use was thus given a priority status even though most of it was used on nonriparian land.<sup>32</sup> Again, in Minnesota a comparable priority for municipal use has been established,<sup>33</sup> but this time the priority was based on the declaration that the withdrawal was a public use and thus superior to private water power use by a downstream riparian. Probably we can expect such priority declarations in favor of municipal utilities to grow in number.

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28. See *Salem Iron Co. v. Hyland*, 74 Ohio St. 160, 77 N.E. 751 (1906).

29. See Banks, *Priorities for Water Use and Fox, Pollution, the Problem of Evaluation*, both in *Proceedings of the National Conference of Water Pollution*, December 12-14, 1960 at pp. 153 and 114 respectively (U.S. Dept. of Health, Education and Welfare, 1961).

30. See Marquis, *Freeman and Heath, The Movement for New Water Rights in the Tennessee Valley States*, 23 *Tenn. L. Rev.* 797, 813 (1955) and *Annot.*, 141 *A.L.R.* 639 (1942).

31. See *Annot.*, 74 *A.L.R.* 1129 (1931); 141 *A.L.R.* 639 (1942), and 56 *Am. Jur. Waters* § 335 (1947).

32. *Canton v. Shock*, 66 Ohio St. 19, 63 N.E. 600 (1902).

33. *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 56 *Minn.* 485, 58 *N.W.* 33 (1894).

6. *Preferences to Some Industrial Users over Others*

In Minnesota an irrigator who gets a water use permit is supposed to use the water on the 40-acre parcel, or government lot lapped by the water.<sup>33a</sup> There seems to be no comparable limitation applied to permits for industrial use generally and certainly not for mining use in particular.<sup>34</sup> Water may be withdrawn from the watercourse and transported to the mine located on non-riparian land, lying perhaps a great distance from the water source. Obviously it is easier to bring the water to the mine than the mine to the water.

In Wisconsin, irrigators cannot get permits to withdraw from streams until they have first received written consents from hydroelectric power plant owners below; a dramatic grant of appropriative status to power companies of the whole flow of the river.<sup>35</sup> But the appropriative "right" is good only against those who wish to irrigate or to make agricultural uses of the water. Industrial and municipal users may withdraw water without permits and without power company consents.<sup>36</sup>

Again, irrigators in Wisconsin were, by administrative adjudication, restricted in their use of water to "riparian land" defined by the strict source of title test, namely that parcel lapped by the water and located in the watershed and which has come down to the present owner in an uninterrupted chain of title from the government patent.<sup>37</sup> The state legislature has twice permitted use of such permit water for irrigation of land contiguous to the riparian land, but only for temporary periods.<sup>38</sup> In the meantime, the legislature passed a liberal permit law permitting withdrawals over long terms for the processing of low grade iron ores at perhaps great distances from the water source, possibly even in a different watershed.<sup>39</sup>

33a. By M.S.A. § 105.38 (1959) et seq. permits are required for all withdrawals except for domestic uses. The system is administered by the Division of Waters, Conservation Department. See the division's files P.A. 57-161; 57-197 and 58-268. The Minnesota Supreme Court has never reviewed this administrative interpretation of the permit statutes.

34. See M.S.A. §§ 105.46 and 105.64 (1959). These mining use permits in Minnesota are indeterminate. In Wisconsin the permits are issued for such periods "as is necessary to permit the mining to exhaustion." Wis. Stats. § 107.05(4) (1959). Here is an interesting attempt in a riparian state to assure a water user a fixed quantity of water for a fixed period of time.

35. *Nekoosa-Edwards Paper Co. v. Public Service Commission*, 8 Wis. 2d 582, 99 N.W.2d 821 (1959) interpreting Wis. Stats. § 30.18 (1959).

36. Wisconsin's permit law applies only to agricultural or irrigation uses. Wis. Stats. § 30.18(1) (1959).

37. The irrigation permit system under Wis. Stats. § 30.18 (1959) is administered by the state Public Service Commission. It chose the "source of title" test in preference to the more generous "unity of title" test under which a riparian may add to his riparian holdings by acquiring contiguous land in the watershed. See *Modjeska, Wisconsin's Water Diversion Law: A Study of Administrative Case Law*, 1959 Wis. L. Rev. 279, 292-293. On these "tests" for determining riparian tracts, see Note, 27 Mich. L. Rev. 479 (1929).

38. Wis. Stats. § 31.14(8) (1957), expired Jan. 1, 1959 and Wis. Stats. § 30.18(5) (1959) expired Jan. 1, 1961.

39. Wis. Stats. § 107.05 (1959).

## APPROPRIATION WATER LAW ELEMENTS

One more illustration. For several generations nonriparian bog lands in Wisconsin have been supplied with great quantities of water through ditches from watercourses for the growing and harvesting of cranberries.<sup>40</sup> The supreme court of the state has been careful to avoid discussing the validity of these arrangements, long authorized by the so-called cranberry statutes.<sup>41</sup>

I do not want here to pass judgment on any of these contrasts in use rights. There may be bases upon which they can be rationally explained. The point is merely that they hardly present a rounded and ordered picture of correlative sharing. Rather the law of water use in these states, and I'm sure comparable contrasts can be found in others, present jagged priority points pushed out by economic interest groups over time.

### 7. Preferences Assured by Land Use Zoning

Local governments can by zoning regulate the use of riparian land and thereby restrict the use of water on such land. Assume that land in X City along a river or lake is zoned, most of it for single family residential use, a small part of it for industrial use. In the residential zone landowners no longer have their common-law rights to make any reasonable commercial, agricultural or industrial use of the water. Landowners in the industrial zone have in effect been granted an exclusive right to make industrial uses of water as against their coriparians in the residential zone.

Again, in some states, including my own, agricultural uses have been zoned out of forested areas. Riparians whose lands are located in forest zones are barred from establishing irrigation enterprises to the advantage of coriparians who are located on unzoned reaches of the river.<sup>42</sup>

True, in most instances, the zoning was established, not as a water use regulatory measure, but to regulate shore and other lands. Nevertheless, the effect has been seriously to limit use privileges of some riparians and thereby to enhance the privileges of others.

Only two court decisions have been found which discuss the subject. In *Peneleit v. Dudas*<sup>43</sup> the defendant, a riparian, began to fill in along his shore in accordance with a permit. After reclaiming 225 feet of land he started a boat livery on the new land. Zoning prohibited commercial uses. The city sued to enjoin operation of the boat livery. The defendant claimed (a) that the filled land was not subject to the zoning ordinance and (b) that if it was subject the ordinance was unconstitutional as an undue interference with his riparian rights. The Connecticut Supreme Court brushed aside the defenses

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40. Wis. L. ch. 40 (1867), now Wis. Stats. §§ 94.26-94.32 (1959).

41. Ibid. See *Cranberry Creek Drainage Dist. v. Elm Lake Cranberry Co.*, 170 Wis. 362, 174 N.W. 554 (1919) and *Ramsdale v. Foote*, 55 Wis. 557, 13 N.W. 557 (1882). Prescriptive rights now probably protect most cranberry water withdrawals.

42. See Saltoun, *Role of Local Government in Water Law*, 1959 Wis. L. Rev. 117, 135.

43. 141 Conn. 413, 106 A.2d 479 (1954).

and granted the injunction, saying: "To the extent that by zoning regulations a municipality may limit the uses to be made of property generally, it may also by zoning regulations limit the exercise of riparian rights."<sup>44</sup>

The second case<sup>45</sup> arose in a Minnesota federal district court. Plaintiffs owned riparian lands on a lake. They planned to use the land for a boat livery, but before they could do so this use was forbidden by a village zoning ordinance and the plaintiff's land was placed in a residential zone. Again the court upheld the ordinance against constitutional attack. The fact that the plaintiff's land was of less value in a residential zone was not controlling, nor was the riparian character of the tract.

Thus in very real and dramatic ways cosharing equality among riparians has been disrupted by zoning ordinances in many places for many years. The significance of this fact when courts approach problems of constitutionality of newer statutes which allocate water as such may be great. After all, zoning ordinances frequently take privileges of use from one group of landowners and give them to others. Water use regulations which do the same, even to the extent of taking privileges of use from riparians and giving them to non-riparians may find support in the numerous cases upholding the basic constitutionality of zoning.

#### CONCLUSION

These scattered illustrations suggest that a description of "riparian water laws" in many of our states is a far more complicated task than would appear from the repeated quotations of repetition-smoothed, rounded phrases about reasonable use, equality of right, and correlative cosharing. Actually it is more difficult and complicated than I have made it appear. I have left out of account the appropriation-like claims to public rights which impinge on private riparians whose lands border navigable waters in various states. Formerly these were merely claims to right of commercial navigation. Now by judicial<sup>46</sup> or statutory<sup>47</sup> expansion they have come to be claims of right to fish, hunt, swim, go boating, admire the scenery or otherwise use the water for public recreation. When such expansions are accompanied by an increasingly generous test of "navigability" for purposes of determining which waters are subject to such public claims,<sup>48</sup> more and more riparians find their rights of reasonable use subject to greater and greater restrictions.

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44. *Id.* at 417, 106 A.2d 481.

45. *Dennis v. Village of Tonka Bay*, 64 F. Supp. 214 (D.C. Minn. 1946), *aff'd* 156 F.2d 672 (8th Cir. 1946).

46. See Waite, *Public Rights to Use and Have Access to Navigable Waters*, 1958 Wis. L. Rev. 335; *Muench v. Public Service Commission*, 261 Wis. 492, 53 N.W.2d 514 (1952); *Mentor Harbor Yachting Club, Inc. v. Mentor Lagoons, Inc.*, 170 Ohio St. 193, 163 N.W.2d 373 (1959).

47. *Burns Ind.* § 27-620; Wis. Stats. § 31.06(2) (1959).

48. ". . . capable of floating any boat, skiff or canoe, of the shallowest draft used for recreational purposes." *Muench v. Public Service Commission*, 261 Wis. 492, 506, 53 N.W.2d 514, 519 (1952).