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Synthesis - A Brand New Water Law

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SYNTHESIS - A BRAND NEW WATER LAW

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I. ABSTRACT

This article is intended to review the two dominant forms of water law in the United States. Its mission is to examine the successes and failures of the two, and argue for a synthesis of these two opposites. Most states east of the Mississippi River use riparian law: a system that prioritizes reasonable uses for stream waters and allocates water equitably in times of shortage. In contrast, most states west of the Mississippi River use prior appropriation law - riparian water law's antithesis - allocating water in times of shortage using a first in time, first in right

priority system. Prior appropriation arose in Colorado in the late nineteenth century and has enjoyed a quick ascendancy since that time. Prior appropriation has the benefit of allowing stream water to be used far from the streambed - or wherever it will be most useful. However, because prior appropriation water rights can be lost through nonuse, prior appropriation encourages overuse and waste of stream resources. This paper proposes that combining the reasonable use aspects of riparian doctrine with the flexibility of prior appropriation would result in a synthesis that would meet many of today's most pressing water use problems. In support of this thesis, this paper examines the Oklahoma Supreme Court's decision in *Franco-American Charolaise Ltd. v. Oklahoma Water Resources Board* and its supporting case law. This paper concludes that the Oklahoma court has proposed a brave and revolutionary new system for the allocation of stream water.

II. INTRODUCTION

Water is a strange thing. In many ways, water is simply different from other types of property. It is immensely precious, for life is impossible without its existence. It is a resource that is valuable to some only when it is consumed and valuable to others only when it is left in place. It is a fugitive resource not easily reduced to possession; how can one own a particular stretch of river, if the actual water in the river keeps changing?

From this viewpoint, it is little surprise that no property scheme adequately addresses all of the many concerns surrounding water. The states east of the Mississippi River generally follow riparian law, a communal property regime that tries to preserve the water resource for as many users as possible. The western states generally follow prior appropriation, a property regime that focuses on private uses of water and generally seeks to promote consumption. Neither quite seems to satisfy the peculiar demands of managing water. Riparian doctrine ignores the value in many consumptive uses; without consumptive use of water the modern west would likely be a very different place. Meanwhile, prior appropriation has resulted in diminished stream flows that destroy many valuable instream uses. How does one manage a resource that is valuable to some only when it is consumed and valuable to others only when it is preserved? Can we devise a property scheme that reflects water as both private property and public property all at once?

This paper puts forth the proposition that riparian and prior appropriation doctrines are not irreconcilable, despite their conflicting histories and viewpoints. Instead, the two water doctrines may form a Hegelian dialectic, where the collision of two opposing ideas merge antipodes into a new form; a synthesis that incorporates elements of its predecessors and represents an innovative step forward in water policy.

To demonstrate how this merger is possible in theory and why it is desirable in policy, this article examines several of the conflicts between prior appropriation and riparian water law doctrines. The article attempts to show how each doctrine has succeeded, or failed, and how they may be combined into a new approach that offers a way to move forward. Part I discusses property theory: why prior appropriation and riparian doctrines got off to such fundamentally different starts and their respective goals. Part II considers how each regime deals with a resource that has many conflicting user groups. Part III weighs how each regime attempts to supply the flexibility necessary to manage complex water systems featuring conflicting user groups and goals. Part IV examines how each system attempts to provide enough stability to justify investment in water dependent activities. Finally, Part V investigates the water law in Oklahoma, a state that has attempted to merge the two doctrines, in order to analyze the results one can expect from such a merger.

III. PROPERTY THEORY: A DESIGN FOR A COMPLICATED RESOURCE

In order to understand why it is so difficult to develop a coherent water law system, one must first understand how and why water is such a different resource. The great English philosopher John Locke described ownership of property as a natural right, one that exists outside of the social contract between the government and the governed.¹ According to Locke, one converts a wild resource to personal ownership through work.² Thus, if one chops down a tree, one has a property interest in the resulting lumber. Ideally, property changes status by progressing from common to private ownership.³

Water, especially running water, bucks Locke's model. How can one own a stream? Many users share the resource, each perhaps using her labor to convert a bucketful of water at a time to private ownership. The river, however, remains for all users. If one user dammed the river and took its entire flow for the users own benefit, she deprives others of the fruits of their labor, thereby violating natural law. Water is a strange thing.

Professor Carol Rose described a linear evolution of water property rights, based on Locke's theory of the creation of property.⁴ Professor

1. See JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT 129-33 (1924).

2. *Id.* at 130-31.

3. *Id.* at 132.

4. See generally Carol M. Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEGAL STUD. 261 (1990) (describing a situation where a property right defined by its public good characteristics may stabilize at the second, communal property stage). At first this may appear to be more of a "Y" shaped scheme than a linear scheme. However, since private property is still generally thought to develop

Rose's theory is analogous to a train ride with three stops and no switches. Under Rose's model, property is created in three stops.⁵ The first station is a time of bounty featuring equal access for all to a plentiful resource.⁶ The second stop is a communal property right that protects the dwindling resource for a defined group of users.⁷ The last depot is private property where, as the resource continues to shrink and the user base continues to grow, clearly defined private property rights replace the communal scheme.⁸ Rose hypothesized that water property rights could get off at either the second or third station.⁹ Riparian law, centered on a desire to promote communal, instream uses for water, disembarked at stop two, and remained there largely because communal rights effectively deal with property characterized as a public good.¹⁰ Prior appropriation, largely concerned with facilitating private consumptive uses for water, rode the train to its final stop.¹¹

However, this model may not effectively apply to water. Rose suggested stage two was the final resting place for resources with "high transaction costs and multiple interests,"¹² such as river systems, but perhaps water is a riddle Locke's property theory cannot solve. While a communal interest in water exists, there is doubtless a private interest in it as well. Many of the most valuable uses of water are consumptive applications that benefit one user to the detriment of others. Even though the private user may obtain a disproportionate benefit, once he or she consumes the water, both the supply and quality of the remaining water decreases. A property regime that considers only the communal values of water - or only the private values - is incomplete and inevitably leads to the dissatisfaction of the interests the regime fails to consider.

If one looks at the development of property rights not as a train track to private property, but rather as a forking road, one might discover more useful answers. What if the two American regimes are not evolutionary stages of the same species, but rather two dialectical¹³ ways

from a communal property phase, the more proper analogy is a linear model where riparianism and prior appropriation have taken different stops in the same line, rather than diverged onto different paths.

5. *Id.* at 263.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 265.

11. *Id.*

12. *Id.* at 285.

13. The words "dialectical," "thesis," "antithesis" and "synthesis" are used in the Hegelian sense. "The dialectical method involves the notion that movement, or process, or progress, is the result of the conflict of opposites. Traditionally, this dimension of Hegel's thought has been analyzed in terms of the categories of thesis, antithesis, and synthesis. Although Hegel tended to avoid these terms, they are helpful in under-

of dealing with a common resource problem? Nineteenth century German philosopher Georg Wilhelm Friedrich Hegel described the inevitable development of ideas, concepts, and history.¹⁴ According to the dialectical model, an intermediate concept, the thesis, engenders an opposing concept, the antithesis.¹⁵ The conflict between the two opposite ideas eventually leads to the synthesis, a resolution of the conflict that moves the idea closer to a state of truth and perfection.¹⁶

The current state of American water law reflects Hegel's model. The "thesis" riparian law spawned the "antithesis" of prior appropriation, because riparian doctrine did not allow sufficient water consumption in the arid west. What remains now is to develop the "synthesis:" the combination of the two regimes in order to solve the problems that each system presents individually.

Far from being a refinement of riparian water law, prior appropriation has many lessons to learn from its supposedly backward eastern neighbor. Additionally, *vice versa*, riparian law can learn lessons from the central philosophy of prior appropriation, which optimizes the private elements of water. Properly combined, the two regimes potentially may resolve many of their apparently irreconcilable differences.

IV. HISTORY AND EVOLUTION OF AMERICAN WATER LAW

The United States for all intents and purposes uses two basic systems of water rights, often modified by local rules, or occasionally by peripheral water rights systems left over from Spanish colonization.¹⁷ The riparian system dominates the eastern half of the country where non-consumptive water uses, especially the use of hydroelectric power for mills, have traditionally been more important.¹⁸ Originally, riparian rights were generally assumed suitable for the westward expansion, but settlers soon proved unwilling to meet the strict instream standards of

standing his concept of the dialectic. The thesis, then, might be an idea or a historical movement. Such an idea or movement contains within itself incompleteness that gives rise to opposition, or an antithesis, a conflicting idea or movement. As a result of the conflict a third point of view arises, a synthesis, which overcomes the conflict by reconciling at a higher level the truth contained in both the thesis and antithesis. This synthesis becomes a new thesis that generates another antithesis, giving rise to a new synthesis, and in such a fashion the process of intellectual or historical development is continually generated." MICROSOFT® Encarta® Online Encyclopedia 2004, *Hegel, Georg Wilhelm Friedrich*, at http://encarta.msn.com/encyclopedia_761552560/Hegel_Georg_Wilhelm_Friedrich.html (last visited Oct. 23, 2004).

14. *Id.*

15. *Id.*

16. *Id.*

17. *See, e.g.*, *Vernon Irrigation Co. v. City of Los Angeles*, 39 P. 762, 766 (Cal. 1895); *Cartwright v. Pub. Serv. Co.*, 343 P.2d 654, 668 (N.M. 1958).

18. *Rose, supra* note 4, at 266.

traditional riparian law.¹⁹ Mining and irrigation interests demanded the ability to move water out of its basin.²⁰ Thus, miners and irrigators created prior appropriation, more or less, as they went along, and water users throughout the West continually operated under its system since the middle of the nineteenth century.²¹

A. THESIS: THE RIPARIAN WATER LAW DOCTRINE

England and the eastern United States began with a common water law regime best described as natural flow riparianism.²² This water law system was primarily concerned with protecting stream flow, and strictly limited water use to owners of land abutting the water body.²³ The natural flow doctrine protected ancient uses as a fairly well defined property right.²⁴ The riparian doctrine developed in pre-industrial England, where frequent rains made consumptive uses for water less important.²⁵ Riparian law evolved with the nascent industrial revolution, where there was very little need to consumptively use water, but there was great need for the natural flow of streams to power mills.²⁶

In the United States, consumptive use of stream water became more important. In response, the reasonable use doctrine began to take form in the courts of the American Northeast.²⁷ Reasonable use considers each stream water use correlatively, meaning one may only judge the reasonableness of a use in the context of other proposed uses. Where a court determines that a use is reasonable, the court will allow the use unless the proposed use injures another user.²⁸ Reason-

19. See Gary D. Allison, *Franco-American Carolaise: The Never Ending Story*, 30 TULSA L.J. 1, 3-5 (1994). Many of these settlers were seeking to farm in the "Great American Desert." The lack of water in the vast majority of land in the plains states made farming impossible in most areas. Still, claiming that the lack of water necessitated the adoption of prior appropriation seems inapposite. The land belonged to the federal government, not the settlers, and no one was forcing anyone to set up a farm miles from any viable source of water. Not until state legislatures specifically adopted prior appropriation and the federal government approved, did the use changed from one of will to one of necessity. *Id.* at 5.

20. *Id.* at 4.

21. *Id.* at 4 n.17.

22. Rose, *supra* note 4, at 264, 266.

23. *Id.* at 264.

24. *Id.* at 268-69.

25. *Id.* at 267-68.

26. *Id.* at 268 n.21.

27. See generally *Tyler v. Wilkinson*, 24 F. Cas. (4 Mason) 472 (C.C.D.R.I. 1827); *Elliot v. Fitchburg R.R.*, 64 Mass. (10 Cush.) 191 (1852); *Palmer v. Mulligan*, 3 Cai. R. 307, 2 Am.Dec. 270 (N.Y. Sup. Ct. 1805); *Martin v. Bigelow*, 2 Aik. 184, 16 Am.Dec. 696 (Vt. 1827) (illustrating the early judicial interpretation of the reasonable use doctrine).

28. See, e.g., *Elliot*, 64 Mass. at 197.

able use proved popular throughout the East and the natural flow rule was all but abandoned.²⁹

The reasonable use system based upon communal correlative rights sprang up in response to the particular desire to capitalize on the flow of rivers in order to maximize power generation, an important public good.³⁰ The generation of power, like scenic, recreation, and fishing uses, was not an especially consumptive use. A consumptive use removes water from the stream, for the most part permanently. Irrigation is the prime example of consumptive use: while some irrigation water often returns to the stream from the fields, the majority is removed from the system by the crops or through evaporation. Because the uses most prized during the industrial revolution were non-consumptive uses that benefited from high stream flows, maximizing the amount of water in the stream, while allowing some reasonable uses, maximized the benefits to all of the users.³¹ Riparian law's dedication to quasi-public, instream water uses has meant that private, consumptive uses suffered simply because they were not as important in water rich climates.

As the demand on water use increased, courts and policy makers had to strengthen the private property interest in water. Professor Rose suggested the riparian jurisdictions considered prior appropriation in the earliest period of industrialization, but dismissed the regime in favor of reasonable use riparianism.³² Under Locke's theory of evolution, the move away from prior appropriation would be a step backward from clearly defined private property rights, and an endorsement of the supposedly unstable communal property interest. Professor Rose suggested the riparian jurisdictions' decisions to forgo prior appropriation for reasonable use riparianism resulted in order to encourage instream uses of water and, in particular, to reduce transaction costs for power generation and navigation.³³ The question remains important today: Is consumption the best use for an increasingly limited water supply or is *in situ* preservation?

29. *But see* Pyle v. Gilbert, 265 S.E.2d 584, 586-87 (Ga. 1980) (relying on the natural flow rule to decide the case).

30. Rose, *supra* note 4, at 266.

31. *See, e.g.,* Elliot, 64 Mass. at 195.

32. Rose, *supra* note 4, at 266.

33. *Id.* (explaining the emergence of reasonable use riparianism as way to lower transaction costs). The importance of negotiating or transactions cost for the design of property has been the subject of voluminous literature. *See, e.g.,* R. H. COASE, THE FIRM, THE MARKET & THE LAW (1988) (discussing transaction costs generally); R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (offering examples of transaction cost reduction).

B. ANTITHESIS: THE PRIOR APPROPRIATION WATER LAW DOCTRINE

The central goal of the prior appropriation doctrine has always been to provide for the consumptive use of water.³⁴ The system evolved organically, and its different goals and different settings produced vastly different results. Miners created the basics of the doctrine in the nineteenth century because they needed a steady water supply to run their mines.³⁵ Likewise, pioneers in the West found the most fertile soils were often in arid areas, far from any sufficient water supply.³⁶ Furthermore, both miners and pioneers often trespassed on federal public lands, and had no legal claim of ownership on any riparian property.³⁷ Finally, because of the investment required to transport the water, the dependability of the right was important.³⁸ Miners and farmers required a water law system that would consistently allow the transport of water over broad distances for consumptive purposes without regard for instream flow or riparian ownership.³⁹

Prior appropriation developed to meet these needs. Reflecting the developers' roots in mining, prior appropriation adopted its central tenet that the first user "to the stake gets the claim."⁴⁰ The doctrine also enabled a water user to divert water over another's property without permission, echoing the early diversions across public land.⁴¹ These rules of the rough and tumble mining towns and illicit ditch diggers spread across the west. The Colorado Supreme Court adopted prior appropriation in *Coffin v. Left Hand Ditch Co.*, and since that time every state west of the Mississippi River has adopted the prior appropriation doctrine to some extent through a court ruling, statute, or constitutional amendment.⁴²

Because the prior appropriation states created their water laws in response to demands for irrigation, "an aggregate of private goods," their laws value consumptive uses over instream uses.⁴³ The focus on

34. GEORGE C. COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 377-78 (4th ed. 2001).

35. *Id.* at 377.

36. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 449-50 (1882).

37. See David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States' Role?*, 20 STAN. ENVTL. L.J. 3, 6 (2001).

38. *Coffin*, 6 Colo. at 446.

39. See *id.* at 447.

40. Bruce Barcott, *There's an Old Saying in Colorado: You Can Steal My Wife, but Not My Water*, LEGAL AFF., July-Aug. 2004, at 48, 49.

41. *Id.*

42. *Coffin*, 6 Colo. at 447; COGGINS ET AL., *supra* note 34, at 377.

43. Rose, *supra* note 4, at 293. The expression "an aggregate of private goods" means that each water user benefits privately from the water use to the public detriment. Each appropriator consumes some of the stream water, usually returning water to the river that is contaminated with fertilizers, salt and other pollutants. In consequence, the remaining resource is diminished, and other users of the resource suffer for a private benefit.

private goods has marginalized water's public good aspects and neglected instream uses such as fishing, scenery, recreation, and environmental services. In response, western jurisdictions have begun to recognize the importance of instream values and started, to some extent, to communalize their water rights.⁴⁴

C. SYNTHESIS: RIPARIAN AND PRIOR APPROPRIATION DOCTRINES MAKE CAUTIOUS STEPS TOWARD A MIDDLE GROUND

Over the course of the nineteenth century, riparian and prior appropriation doctrines solidified in their respective jurisdictions. As time passed, legal scholars began to consider the two systems polar opposites,⁴⁵ and despite the readily apparent weaknesses on both sides, commentators, judges, and legislators paid little thought to the lessons each regime could learn from the other's successes and failures. Instead, most commentators ignored the riparian doctrine except as a curiosity of property development.⁴⁶ Prior appropriation has been seen as a private property regime whose failings can perhaps best be cured through market transactions.⁴⁷ However, dogma does not bind men and women, instead they should feel free to discard failed laws and policies and adopt those that have worked for others.⁴⁸

Nor is the combination of the regimes merely a theoretical exercise, as a closer look reveals most states may have already eroded some

44. *Id.* at 293-94. *But see generally* Reed D. Benson, *Maintaining the Status Quo: Protecting Established Water Uses in the Pacific Northwest, Despite the Rules of Prior Appropriation*, 28 ENVTL. L. 881 (1998) (detailing how four Northwestern states often do not follow the traditional prior appropriation doctrine).

45. *See* Rose, *supra* note 4, at 293 (contrasting the value placed on water by each system); Todd S. Hageman, *Water Law: Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board: The Oklahoma Supreme Court's Resurrection of Riparian Rights Leaves Municipal Water Supplies High and Dry*, 47 OKLA. L. REV. 183, 185 (1994) (discussing the irreconcilable difference between the two systems).

46. *See, e.g.,* Rose, *supra* note 4, at 264 (citing a study addressing riparian rights in the context of property development).

47. *See generally* Joseph W. Dellapenna, *The Importance of Getting Names Right: The Myth of Markets for Water*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 317 (2000) (explaining why water should be treated as a public good); *but see* Eric T. Freyfogle, *Water Rights and the Common Wealth*, 26 ENVTL. L. 27 (1996) (arguing that water markets are inefficient and do not help solve water shortage problems).

48. The doctrine of *stare decisis* conflicts with this statement. When the need to adopt a new system of policy is apparent courts typically demonstrated a willingness to adopt those systems regardless of the arguments of precedent. *See, e.g.,* *Elliot v. Fitchburg R.R.*, 64 Mass. (10 Cush.) 191, 193 (1852) (abandoning Massachusetts's occupancy rules with no discussion of why or under what precedent they were doing so). While hesitating to make the comparison, the United States Supreme Court was not deterred by precedent when passing the great Civil Rights decisions. Finally, judicial decisions are not the only methods for altering policy, or even the primary method. The political branches of government possess the primary duty to change policy and they are not constrained by *stare decisis*.

characteristics of prior appropriation and riparian doctrines. Arguments over allocation have resulted in widespread reexamination of prior appropriation law in the west.⁴⁹ Concurrently, water shortages in the East resulted in calls for more availability of water for municipal, agricultural, and fishing uses.⁵⁰

Both riparianism and prior appropriation have failed to some extent as a method for allocating water resources. Prior appropriation has led to waste and poor choices about who receives water for what purpose.⁵¹ In response, many western prior appropriation states adopted permitting schemes and instream water rights in an attempt to better incorporate the broader public interest in their water law and reflect good water policy.⁵² Meanwhile, riparian law has long been on a path away from its common law roots in the natural flow doctrine and has evolved to allow consumptive use of water,⁵³ the transference of water rights, and even transbasin water use in some cases.⁵⁴

In the past century prior appropriation and riparian doctrines have thus been quietly moving towards a common middle. The riparian doctrine experienced statutory alterations designed to make eastern rivers more productive.⁵⁵ The great weakness of riparian law is that it marginalizes consumptive uses of water and makes the transfer of water rights off of riparian land very difficult. However, eastern states have increasingly amended riparian law to improve transferability and to relax the traditional restriction on water use away from riparian land to allow market forces to put water to the most economically beneficial use. Additionally, many jurisdictions now require states to permit riparian rights. Most states presently control water use, encourage consumptive use to some extent, and buttress the reliability of water rights.

The appropriative right has moved in the other direction: away from an all-costs consumptive use approach and towards a position that gives more protection to non-consumptive uses.⁵⁶ In an effort to keep some water in the stream for *in situ* uses, such as fishing and recreation, many western states now recognize instream uses as beneficial. Most western states also have permit restrictions on appropriation that put at least some regulatory control in the hands of the government.

49. Rose, *supra* note 4, at 293-94. See generally Benson, *supra* note 44 (arguing the apparent movement toward communal interests in water have been frustrated by an unwillingness to apply even the basic elements of prior appropriation law).

50. See, e.g., Douglas Jehl, *Atlanta's Growing Thirst Creates Water War*, N.Y. TIMES, May 27, 2002, at A8. See also OKLA. STAT. ANN. 82, § 105.12(B) (West 1990).

51. Freyfogle, *supra* note 47, at 27-28.

52. See Benson, *supra* note 44, at 893-96 (listing examples of permitting systems and methods employed by states to prevent water waste, while promoting beneficial use).

53. See Elliot, 64 Mass. at 193-94.

54. See, e.g., Smith v. Stanolind Oil & Gas Co., 172 P.2d 1002, 1005 (Okla. 1946).

55. Rose, *supra* note 4, at 293.

56. *Id.* at 293-94.

While riparian law and prior appropriation law are to some extent merging already, many commentators and scholars still look at the two regimes as matter and antimatter, oil and water; impossible to combine in a stable form.⁵⁷ However, law is not necessarily binary; there is no immutable rule of law that demands riparian and appropriative regimes must remain forever separate or forever enemies. In order to properly consider the complicated and special aspects of water, one must create a complicated and special property scheme to manage the resource. Since water has both private and public goods associated with it, the property scheme must be both private and communal. The scheme must allow consumption of the resource, but only if allowing consumption is the most efficient choice compared to the full range of alternative uses.

V. FRICTION: STEPS TOWARD AND REASONS FOR MERGER

When one makes policy decisions, the scope of one's inspection is vitally important to the quality of the decision. When one makes economic decisions with too narrow a purpose, without considering the full range of opportunities and outcomes, the results are often disastrous. Thus, we have poisoned cotton fields in Uzbekistan, boondoggled water projects in Arizona, and sprawling development in Los Angeles.⁵⁸ To the extent that both riparian and prior appropriation jurisdictions are attempting to consider the full range of uses for water, they should be on a path toward more efficient results and better water policy. However, if those jurisdictions do not examine the entire range of uses, externalities will result and inefficiencies will damage the resource.

An externality is an economic concept that describes inefficiencies generated by transactions that produce costs for third parties. Ideally, in a transaction each party exchanges goods or services of equal value. An externality arises when neither party addresses a cost of the transaction that should rightly be borne by one of the parties to the transaction. An example is when a driver purchases of a tank of gas. The driver pays the gas station for the fuel and the gas station exchanges the fuel for money, but in this simple example neither party pays for the cost of the air pollution the fuel generates when it burns. The increasing air pollution is an external cost of the transaction. If unaddressed, externalities can cause mounting problems. Since neither

57. See *id.* at 265 (contrasting the different purposes of each system).

58. See generally David H. Getches, *From Ashkabad, to Wellton-Mohawk, to Los Angeles: The Drought in Water Policy*, 64 U. COLO. L. REV. 523 (1993). Getches uses the examples of Ashkabad, Wellton-Mohawk, and Los Angeles to demonstrate that unintended consequences often result from well-meaning, but poorly considered projects that do not consider either the full range of opportunity costs or external costs. Such costs occasionally make the original decision seem breathtakingly foolish in retrospect.

party pays a direct cost for the air pollution, neither party has a direct incentive to address the problem. Each faces the potential health and environmental costs of air pollution, but because those costs are so minor in each transaction and every such transaction entails the same external costs, both parties ignore the externality. Over time and as a result of a great many gallons of gas sold, air pollution has very real costs for everyone from asthma, to acid rain, to global warming.

Externalities are best addressed by regulation, and closing externalities is a core purpose for government. Gasoline taxes push the cost of a gallon of gas closer to its efficient level, and when the proceeds of such taxes are used to ameliorate the effects of air pollution, the government takes a step toward closing the externality.

External costs may be readily apparent, or they may be latent and difficult to discern. One needs a very broad focus in order to notice and then close externalities, as even small costs left unaddressed in a market transaction can accumulate and cause major problems over time. In the water context, reduced or eliminated stream flows entail a variety of obvious and subtle external costs. If there is no water in the river, an obvious cost is the loss of potentially valuable recreational opportunities. If a group of users takes the whole stream to water their crops, then other users are unable to use the same water to irrigate their crops, power their mills, or cool their power plants. However, an emptied stream has other costs as well: property values sink, fish and wildlife suffer, ecosystem services are lost, aesthetic beauty is sacrificed, and tourism declines. To ensure the most efficient use of water, one must consider all the costs, including the costs of the opportunities lost because of the diminution of the resource.

Riparian and prior appropriation water law doctrines address this issue in different ways. Each started at opposite ends of the spectrum, but they have moved closer together over time. To some extent, the process of synthesis has been long underway.

A. THE SEARCH FOR A SUFFICIENTLY BROAD SCOPE OF INSPECTION

Early in riparian law's development, the doctrine addressed problems through a very narrow lens. Only "natural" uses were allowed and all "artificial" uses were unacceptable *per se*.⁵⁹ The distinction between natural and artificial uses was particularly inconvenient because irrigation was not included as a natural use. The vast majority of states rejected the natural use doctrine, and those states replaced the natural

59. JOSEPH L. SAX ET AL., *LEGAL CONTROL OF WATER RESOURCES* 25 (3d ed. 2000). Natural uses are those identified as "domestic uses," which include drinking, bathing, and small scale agriculture. *Id.* The rights to navigate, fish, swim, and erect reasonable wharfs may also be seen as natural uses. *Id.* at 27-28. Artificial uses are all other uses, and a court may allowed them on a case by case basis, or declare them *per se* unreasonable.

use doctrine with the reasonable use doctrine.⁶⁰ Under reasonable use, water may be used reasonably, even if some of the stream water is thereby consumed.⁶¹

Courts determine reasonableness case by case, even if a use was reasonable in the past, a court may deem it unreasonable in the future if conditions change.⁶² The Restatement Second of Torts lists several reasonableness factors the courts should consider: a) the purpose of the use; b) the suitability of use to the watershed or lake; c) the economic value of the use; d) the social value of the use; e) the extent and amount of harm it causes; f) the practicality of avoiding such harm by adjusting the use or method of use of one proprietor or the other; g) the practicality of adjusting quantity of water used by each proprietor; h) the protection of existing values of water uses, land, investments, and enterprises; and i) the justice of requiring the user causing the harm to bear the cost.⁶³

A court will allow a use that is reasonable to continue, while it will not protect an unreasonable use if challenged.⁶⁴ If all uses are reasonable, a court will apportion the water among the users so that the stream accommodates as many reasonable uses as possible.⁶⁵ In times of shortage the definition of reasonable changes and some uses will inevitably be curtailed. Thus, the water uses of other riparian owners limits the extent of another's riparian right. Many commentators see this flexibility as the central drawback of riparian law, because of the resulting reduction in the certainty of the water right and to some extent the flexibility may reduce incentives for investment.⁶⁶ However, the correlative nature of riparian rights means the system has great flexibility and assures that in times of drought water will be apportioned equitably, not based on a predictable but arbitrary hierarchy that may utterly deny water to the those who would use it most beneficially simply because their uses were established relatively recently.

Appropriation doctrine allows users to divert water for beneficial use only.⁶⁷ Beneficial use is a more static concept in practice than reasonable use, and, as a result, a water user may generally expect a use that a court deemed beneficial in the past to remain protected in the future.⁶⁸ Beneficial use is closely tied to diversion. Historically, in-

60. Carol M. Rose, *Riparian Rights*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 344-45 (Peter Newman ed., 1998).

61. *Id.* at 345.

62. *Elliot v. Fitchburg R.R.*, 64 Mass. (10 Cush.) 191, 193-94 (1852).

63. RESTATEMENT (SECOND) OF TORTS § 850A (1982).

64. *See Elliot*, 64 Mass. at 193-96.

65. *See Smith v. Stanolind Oil & Gas Co.*, 172 P.2d 1002, 1005 (Okla. 1946).

66. *See, e.g., Hageman, supra* 45, at 193-94 (discussing the unreliability of municipal water supplies as a result of the flexibility in the riparian doctrine).

67. Benson, *supra* note 44, at 886-87.

68. *See Allison, supra* note 19, at 6-7.

stream uses were not beneficial uses, perhaps because leaving the water instream was not considered use.⁶⁹ Beneficial use generally requires actual diversion and then implementation in some type of economic, environmental, recreational, or aesthetic activity.⁷⁰

Beneficial use and reasonable use are most importantly distinguished by the breadth of their scope. Reasonable use considers the entire array of factors in determining which use will prevail during a conflict. Because one must consider so many factors in making the reasonable use judgment, the outcome of a conflict is hard to predict. However, what the doctrine lacks in certainty, it makes up for in fairness and flexibility. Ideally, prior appropriation has a very clear winner and loser. As long as both uses are beneficial, the holder of the senior water right will prevail. The scope of the decision is narrowly focused; the only factor that really matters is priority. While the outcome is predictable, and thus encourages investment, the outcome may not be equitable or consider the external effects of the decision and thus be inefficient.

Imagine that two users are in conflict over the flow of a stream. One user runs a white water rafting company and the other is an irrigator with a senior water right. Both uses are beneficial, but the raft company does not divert, and, therefore, cannot hold a water right in most states. In a prior appropriation jurisdiction, the irrigator will win every time. If the irrigator grows high value crops and the rafting company is small, then giving the water to the irrigator would perhaps be an efficient outcome. However, if the rafting company is more profitable, or if there are significant external costs to the irrigation, then the likely outcome may be quite inefficient. Making decisions based on data that are unrelated to the costs and benefits of the transaction - and the duration of water use has little bearing on the use's benefits - is a poor way to reach reasonable conclusions.

In a riparian jurisdiction the outcomes of such clashes are uncertain, but the results will be more equitable and more fairly reasoned. The court will consider the amount of flow both users will need, the relative economic value of each use, and, most importantly, the effect of the use on other riparian owners. Because the reasonable use analysis views the situation so broadly, the court is empowered to make decisions that maximize efficiency and minimize adverse external effects. Imagine that the above irrigator dries up the entire river. While the irrigator's use may be more economically valuable than the rafting company's, after considering the results of the use, significant costs exist. No third-party users may use the water, which eliminates potentially valuable enterprises. Property values may be lowered because of the lost water frontage. Ecological services may be lost. Fishermen

69. Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447 (1882).

70. Allison, *supra* note 19, at 6.

may not be able to fish and perhaps the neighborhood fly store will go out of business. On the whole, allowing the water to go to the irrigator might be a disastrous decision. Or it might not be. The point is that under reasonable use review, a court may examine the totality of the circumstances. Under prior appropriation, a court may not.

On the other hand, prior appropriation is theoretically well suited for market transactions because of the certainty of the rights in question. Ideally, one knows exactly what one is purchasing when one buys a water right and a purchaser will spend more for a senior right than a junior right. In a properly functioning market, market action will ensure that water goes to its highest use. However, the exchange of water rights is not, and probably cannot be, governed by market transactions, because many factors conspire to cause failures that cannot be remedied without intervention. There are too few sellers, too few buyers, and there are many external costs to the transaction. The transferability of both riparian rights and prior appropriation rights are reviewed in the next section.

B. THE DOCTRINES INCREASINGLY SEEK TO ALLOW FOR FLEXIBILITY

Occasionally, water users must change various aspects of their use. The user may wish to stop farming and open a factory; she may wish to use water in the winter instead of the summer; she may desire to take more water, take water from a different location, or she may wish to convey her water right to another party. Each regime places limitations on the permissibility of such alterations.

Riparian rules make it easy to change types of use, amount of use, and time of use, but the rules have also placed limitations on transfer of the right to non-riparian parties. The reasonable use doctrine is flexible and it places the burden on the plaintiff to show injury resulting from his neighbor's changing use.⁷¹ On the contrary, the riparian water right often may not be transferred to parties who do not own riparian property and the water may not be used off of the riparian tract.

1. Regulated Riparianism and the Model Water Code

The difficulty involved in transferring water rights has traditionally been seen as a telling weakness of riparian law. Selling riparian rights is difficult because of how reasonableness changes. The extent of the right is hard to quantify, resulting in difficulty in setting a price for the riparian right. In response, many states have moved toward a regulated riparian doctrine. Such efforts exist in a continuum from patchy water statutes slightly altering the common law riparian background

71. See, e.g., *Elliot v. Fitchburg R.R.*, 64 Mass. (10 Cush.) 191, 192-93 (1852).

through permit requirements to the Regulated Riparian Model Water Code ("Model Code").⁷² Nineteen states require permits or other restrictions similar to those proposed in the Model Code⁷³, though none have yet fully adopted the Model Code. Regulated riparian law retains traditional reasonable use's dependence on equitable balancing, but permits changing many rights that common law riparian owners take for granted. Time of use, amount of use, and duration of use are all likely to be restricted. Renewing permits means the government has some control over the change of uses.

The Model Code makes several progressive policy decisions. First, and perhaps most importantly, the code ambitiously attempts to untie the riparian right from the riparian land.⁷⁴ The Model Code allows non-riparian property owners to purchase riparian water rights separate from the land so they may use water on non-riparian land.⁷⁵ The Model Code adopts the unity of title rule, meaning a riparian may freely use water on all contiguous portions of his property.⁷⁶ Finally, the Model Code rejects the watershed limitation, supplementing its definition of reasonable use as the only check on out of basin transfers with a requirement that parties seeking an inter-basin transfer pay a fee into a compensation fund.⁷⁷ In determining reasonableness, the Model Code suggests priorities favoring consumptive use of water, placing human consumption first, followed by agricultural demands, and finally all other uses in order of their sustainable economic benefits.⁷⁸ This order of preference closely parallels the classification of beneficial uses in prior appropriation jurisdictions, again indicating progress away from pure riparianism and toward appropriation doctrine.

Adopting a code to regulate the common law riparian doctrine instills some predictability. At least in theory, a code reflects the broad vision and expertise of water experts. Such expertise should allow for the unified plan necessary in dealing with a common resource that *ad hoc* court decisions cannot supply. The code changes the role of the court by placing the court in a position of deference to agency expertise.⁷⁹ The courts maintain authority to oversee the agency action, en-

72. REGULATED RIPARIAN MODEL WATER CODE (Am. Soc'y of Civil Eng'rs 2003).

73. George William Sherk, *Eastern Water Law: Trends in State Legislation*, 9 VA. ENVTL. L.J. 287, 294 (1990).

74. REGULATED RIPARIAN MODEL WATER CODE § 2R-1-02 cmt. at 14.

75. *Id.* § 2R-1-02.

76. *But see id.* § 2R-1-02 cmt. at 14 (recognizing a right to withdraw water when the land is not contiguous).

77. *Id.* § 6R-3-06 cmt. at 113 (listing the "Special Standard for Interbasin Transfers," which includes factors apart from the compensation fund as the sort of equitable considerations that any court would make in determining whether the proposed use is reasonable).

78. *Id.* § 6R-3-04.

79. *See id.* § 5R-3-02 (providing for judicial review, only after the exhaustion of all other administrative remedies).

suring that the agency does not act arbitrarily or unconstitutionally. From a certain point of view, however, adopting the Regulated Riparian Model Water Code politicizes the process. Certain groups are more likely to influence legislative decision-making than others. To the extent that the legislature considers more narrowed positions, the unaddressed externalities will continue to diminish the value of the policy behind its actions.

2. Prior Appropriation Doctrine and Market Realities

The Model Code moves further away from the natural flow doctrine, adopting some of the core aspects of appropriation doctrine, such as easy transferability and relaxed place of use restrictions. At the same time, prior appropriation states, faced with dewatered streams and rampant waste, have moved toward certain riparian ideals. Many states have asserted instream uses may be beneficial uses. Diversion is sometimes no longer necessary to initiate a water right. While there is no explicit adoption of anything like a natural flow doctrine, both represent attempts to keep water instream.

Reasonable use has been embraced to some extent as well. Some western states attempted to enforce the doctrine of waste as they have come to the conclusion that wasteful uses are simply not reasonable. California has acknowledged a public trust obligation to its citizens that requires the state to keep some water instream.⁸⁰ Permitting requirements in most states theoretically give the state authority to reexamine the reasonableness of uses when the permits come up for renewal. While most of these efforts have had little practical effect on how water is used and how streams are managed, they probably reflect an acknowledgment that prior appropriation has produced many negative externalities that need attention.

In theory, one of the greatest strengths of prior appropriation doctrine is its amenability to transfer. The argument goes that the ability to transfer water rights will allow market forces to dictate how the water is used. The water will then be put to its highest best economic use and waste will be minimized.

Unfortunately, various obstacles have led to quite the opposite outcome. While ancient use featured strict rules, at least in part to encourage market transactions, prior appropriation's strict rules tend to discourage market transactions. When an appropriator wishes to change her water right in any material aspect, she must show that her alteration does not harm other appropriators, even if they are junior to the appropriator seeking the change.⁸¹ When one uses river water for

80. *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161, 169-70 (Ct. App. 1986).

81. Benson, *supra* note 44, at 887.

irrigation, a certain amount of the water is lost to the atmosphere or absorbed by the crops, but a certain amount also predictably returns to the river; this water is called return flow. Junior users may legally depend on senior users' return flows for their own water supply, so a court may bar any change in use that negatively affects the rights of junior appropriators.⁸² The burden of proof lies with the party seeking to change an aspect of her use⁸³ and since there is essentially no metering of water on any stream in many states, it is often very difficult to prove the proposed change will not affect junior users.

Further, since users may over-appropriate many waterways and utilize the maximum flow of the river, nearly any change in use is likely to have some effect on the amount of water available to downstream users. Prior appropriation law does not bar transferring a water right to other parties or other places, even to sites outside of the basin of origin.⁸⁴ However, such transfers face the same procedural difficulties as changing the type or place of use, thus, the return flow doctrine creates a gridlock of obstacles and perverse incentives for appropriators who wish to change aspects of their water right.

Without the role of market signals in resource management, users will rarely put the resource to its highest and best use.⁸⁵ The true and best use is obfuscated and no party fully considers the externalities and opportunity costs. In part, this is why many senior water rights use their water for economically inefficient purposes, such as irrigating low-value, water intensive crops such as hay and alfalfa.⁸⁶ Inefficient uses consume the resource more quickly with less benefit to society as a whole. If market transactions were allowed to occur, perhaps instream users would be willing to pay more to keep water in the river than farmers are willing to pay to remove the water from the river. Because transferability is discouraged, the market does not exercise as much control over how water is allocated as some commentators believe is necessary.⁸⁷

Unfortunately, even if transfers did not protect junior appropriators, there is no consensus that market operation would lead to efficient results.⁸⁸ Water markets suffer because there is a small pool of

82. SAX ET AL., *supra* note 59, at 230.

83. See JOSEPH L. SAX, *WATER LAW, PLANNING & POLICY* 240-41 (1968) (discussing the burden of proof in water cases).

84. Taiawagi Helton, *Indian Reserved Water Rights in the Dual-System State of Oklahoma*, 33 *TULSA L.J.* 979, 984 (1998).

85. See generally RICHARD W. WAHL, *MARKETS FOR FEDERAL WATER: SUBSIDIES, PROPERTY RIGHTS, AND THE BUREAU OF RECLAMATION* (1989) (explaining how inherent water subsidies in the western United States led to inefficient water use in the context of transfers).

86. *Id.* at 45.

87. See Dellapenna, *supra* note 47, at 325-26.

88. Freyfogle, *supra* note 47, at 30.

market participants, are high transaction costs, and a lack of perfect knowledge about the costs and outcomes of actions in the complicated hydrological system.⁸⁹ Additionally, water's public character creates many externalities to which market forces are largely unable to respond. When large benefits are spread out among many people, their value may be overlooked because of the dispersal. Thus, ecological services and wildlife values, which the vast majority of people probably value as background interests, are often ignored. Unless society as a whole can aggregate its anxieties and focus them either politically or economically, the relatively unprofitable users will continue to dominate water policy. These diffuse concerns are further diluted because they may only manifest over a period of time and thus are valued at a discount.⁹⁰

Market action does not protect the public values of many resources adequately. To protect these values the government regulates many areas of the market. The relative importance of the public goods of waterways demands the government regulate carefully. The need to regulate water for the public good is not new, but it is too often forgotten.

C. CERTAINTY OF RIGHT AND CERTAINTY OF SUPPLY

Transaction costs are a central reason markets have failed to properly distribute water rights in prior appropriation states. They are not, however, the only obstacle. The common wisdom holds that prior appropriation is necessary to economic development because it creates certain water rights that investors may rely upon. While it is true that prior appropriation promises to provide a certainty of right in senior users, it often results in an uncertainty of supply for numerous reasons. It is important to carefully consider the tension between certainty of right and certainty of supply, as both are important.

First it time, first in right is the central tenet of prior appropriation law. The benefit of this system is the clear certainty that senior users have to their water right. In contrast, the rights of riparian users are murky and ever changing,⁹¹ leading at least one commentator to label riparian rights "archaic and awkward."⁹² This viewpoint overlooks that certainty of right is worth little if there is no certainty of supply.

The riparian system places great stock in supplying water to all riparian owners on a river. The right is uncertain, but it does make water available for reasonable use. On the other hand, there is a great deal of uncertainty in the prior appropriation system as a result of

89. *Id.*

90. *Id.* at 31.

91. See Hageman, *supra* note 45, at 193-94.

92. *Id.* at 193.

three factors: (1) widespread lack of political will for enforcement of the doctrine's tenets; (2) a lack of information on how much water is available and how much is used; and, (3) the absence of a clear and effective definition of waste.⁹³

The supposed certainty of prior appropriation is further eroded because *sub rosa* rules designed to protect existing uses have replaced the basic rules of prior appropriation.⁹⁴ There can be no certainty when the legal rules are not enforced: changing administrations can decide to enforce the prior appropriation doctrine diligently, or they may follow the *sub rosa* code. The results could be extremely different through no fault of the diverters.⁹⁵ "No one, not even the owner of vested senior water rights, should assume that her interests are safe simply because she is entitled to protection under basic water law rules."⁹⁶ Without certainty of supply, the certainty of right should mean little to investors. This lack of certainty is another factor that frustrates the operation of market forces on water allocation in prior appropriation states.

Secondly, while the amount of water a user may claim and the order of the users is certain, most users simply have no idea how much water they divert. There is consequently a great deal of uncertainty in enforcement. Without accurate measurements of water flow and studies of the situational hydrology, it is difficult to know when a junior user injures a senior user. Where there is a lack of good information about water availability or water use, "existing uses may differ dramatically from users' legal rights."⁹⁷ Moreover, states tend to apply the prior appropriation rules unevenly and inconsistently.⁹⁸ When legal rights conflict with actual use, there is no certainty, there is no right, and there is no law.

Finally, while the standard in every western state is beneficial use without waste, the definition of waste has proved elusive and ineffective at improving efficiency in practice.⁹⁹ A commonsense definition of waste would include water that could be retained if best practices were used or water that is more costly to lose than retain. However, courts have decided waste is "the amount of flow diverted in excess of reason-

93. Benson, *supra* note 44, at 893.

94. *Id.* at 890 ("With rare exception, states abide by the following basic precepts: 1) enforce the law only when necessary, 2) change the law where needed to protect existing uses, 3) avoid the position of having to curtail established water uses, 4) prevent instream demands from threatening existing out-of-stream uses.").

95. *Id.* at 901.

96. *Id.* at 916-17.

97. *Id.* at 889.

98. *Id.*

99. Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use* 9 (Jan. 31, 2001), <http://www.lclark.edu/dept/water/publications.html>.

able needs under customary practices."¹⁰⁰ Basing a definition of waste on existing practices runs afoul of the same problems of granting priority to the oldest uses; old uses are often inefficient and wasteful.

The customary practices definition of waste provides no incentive for conservation; users with favorable priority rights continue their wasteful practices because those practices are customary. If thirty, forty, fifty, even sixty percent of their diversion is lost through leakage on the way to their fields; there is no cost to them. Junior users and the health of the river may suffer, but the senior user is unlikely to face a diminished water right because a court finds his use wasteful.¹⁰¹ More perversely still, water saved by adopting more efficient methods of use and diversion is not added to the user's water right. Thus, a senior water user faces no real threat of punishment for inefficient practices and no real benefit from adopting better practices.¹⁰² Again, a certainty of right is only helpful for the most senior rights holders. The other users should be more worried about certainty of supply.

As we have seen, numerous factors frustrate the promise of efficient water allocation under a prior appropriation regime. Also, riparian rights in their historic form are probably too strict to support reasonable development. I propose a complete merger of the two regimes as a solution to their separate problems. In 1993, the Supreme Court of Oklahoma attempted just such a merger, essentially placing prior appropriation on top of a bedrock of riparian rights. The following section analyzes the Oklahoma Doctrine.

VI. THE OKLAHOMA DOCTRINE: AN EXAMPLE OF MERGER

To summarize the previous discussion, we have seen the complicated characteristics of water call for a complicated system of rights to govern its use. Prior appropriation and riparian water law are two opposed responses to the same problem: how do you regulate a resource that is defined both by its communal nature and its private nature? Riparian law values the communal at the expense of the private, while prior appropriation allows the communal resource to suffer for the benefit of private users.

Each approach is single minded and each has failed in significant ways. Riparian law leaves a property owner with a fuzzy right that is difficult to quantify; it allows for little consumptive use and generally no off property or transbasin use. These restrictions hamper investment and market operation. On the other hand, prior appropriation has resulted in vast consumptive use and the degradation of the resource. Further, because the system is so dedicated to private rights,

100. *Id.* at 20 (citation omitted).

101. *Id.* at 24.

102. *See id.* at 25-27.

the public good aspects of water are ignored, and the myopic "beneficial" use review does not leave room to consider the "best" use. Finally, states have not applied prior appropriation law consistently, so while certainty exists in the paper right, there is little certainty that each user actually receives her fair share.

Meanwhile, Oklahoma acknowledged concurrent riparian and appropriative rights, threatening to merge the two doctrines into a new synthesis. Oklahoma added itself to the list of states that honor both riparian and appropriative rights in 1990 when it handed down its controversial decision in *Franco-American Charolaise v. Oklahoma Water Resources Board*.¹⁰³ *Franco-American* is heralded for "resurrecting the full-blooded common law riparian right from the dead."¹⁰⁴ Commentators have remarked that the case provided unwarranted, paternalistic protection for riparian water users¹⁰⁵ in a manner that created a "[c]haotic [w]ater [r]ights [r]egime"¹⁰⁶ and damaged the prestige of the court.¹⁰⁷ Commentaries approvingly analogized the Oklahoma holding¹⁰⁸ to California's protective take on the public trust doctrine in *National Audubon Society v. Superior Court of Alpine County*.¹⁰⁹

So which is *Franco-American*? Is it the end for economic growth in Oklahoma? Is it a policy tool on par with the landmark Mono Lake decision? Is it a black eye for the court? Is it defensible on either a legal or a policy basis?

A. OKLAHOMA WATER LAW'S EARLY DEVELOPMENT

In actuality, *Franco-American* was the final step in a string of cases that attempted to fuse the two doctrines. Oklahoma had acknowledged both riparian and prior appropriation rights since 1897 when the legislature allowed appropriation with the consent of riparian owners, though water could be taken for public use by condemnation without riparian consent.¹¹⁰ Oklahoma removed the riparian permission clause in 1905, added it back in 1909, and eliminated it again in 1910.¹¹¹ In 1925, the legislature passed a further law that stated beneficial use would form the basis of all water uses and all appropriation for

103. *Franco-American Charolaise, Ltd. v. Oklahoma Water Res. Bd.*, 855 P.2d 568, 580 (Okla. 1990).

104. Allison, *supra* note 19, at 35.

105. Hageman, *supra* note 45, at 196.

106. Allison, *supra* note 19, at 51.

107. *Id.* at 58.

108. Drew L. Kershen, *An Oklahoma Slant to Environmental Protection and the Politics of Property Rights*, 50 OKLA. L. REV. 391, 392 (1997).

109. *Nat'l Audubon Soc'y v. Super. Ct.*, 658 P.2d 709, 712 (Cal. 1983).

110. *Franco-American Charolaise, Ltd. v. Oklahoma Water Res. Bd.*, 855 P.2d 568, 572 (Okla. 1990) (citations omitted).

111. *Id.* (citations omitted).

irrigation could only be used on appurtenant lands.¹¹² Even after 1925, the Oklahoma Supreme Court decided several cases that made it clear the riparian right was a live issue in the state. These cases also significantly changed the right, maximizing the ability to use water consumptively within a reasonable use system.

The 1933 case of *Broadly v. Furray* involved a dispute over a natural dam that formed as a result of a flood.¹¹³ Plaintiff operated a fish hatchery and recreational fishing resort in the resulting pond.¹¹⁴ Defendant sought to remove the dam, but was barred.¹¹⁵ The court held each user was entitled to a reasonable use of the stream.¹¹⁶ The court ruled that reasonableness depends on whether removal of the dam resulted in a greater loss to plaintiff than its removal would benefit the defendant.¹¹⁷ Because the dam caused little, if any, damage to the defendant and provided a valuable service for the plaintiff, the court concluded its use was reasonable and barred its removal.¹¹⁸

In 1946 the Oklahoma Supreme Court decided *Smith v. Stanolind Oil & Gas*.¹¹⁹ The court upheld *Broadly* and significantly altered the traditional common law.¹²⁰ The court held that conveying a riparian right to a third party and using riparian water off of riparian property were not *per se* unreasonable activities.¹²¹ The court took a broad view of how a riparian land owner may act reasonably: “[A] riparian owner has the right to make any use of water, beneficial to himself, which his situation makes possible, so long as he does not inflict substantial or material injury on those below him who are to be deemed as having corresponding rights.”¹²² Further, the court held riparian law was “not a doctrine of fixed rights”¹²³ and it took pains not to limit the scope of uses the parties could pursue in the future. In perhaps the most telling harbinger of *Franco-American*, the *Smith* court refused to uphold the statutory requirement that entitled riparian owners to the natural flow of the stream, stating “[t]he contention . . . can be supported only by a literal definition of the statute.”¹²⁴ The court showed a willingness to disregard even very clear commands by the state legislature.

112. *Franco-American*, 855 P.2d at 572 n.14, quoting 1925 OKLA. SESS. LAWS ch. 76, § 1.

113. *Broadly v. Furray*, 21 P.2d 770, 771 (Okla. 1933).

114. *Id.*

115. *Id.* at 772.

116. *Id.* at 771.

117. *Id.* at 772.

118. *See id.* at 771-72.

119. *Smith v. Stanolind Oil & Gas, Co.*, 172 P.2d 1002 (Okla. 1946).

120. *Id.* at 1005.

121. *Id.* at 1003.

122. *Id.* at 1005.

123. *Id.* at 1006 (quoting *In re Water Rights in Silvies River*, 237 P. 322, 357 (Or. 1925)).

124. *Id.* at 1004.

In 1956, the Oklahoma Supreme Court decided *Baker v. Ellis*,¹²⁵ which clarified the relationship between consumptive use by riparian owners and the right to continued flow. *Baker* held "the right of *all* to have the stream *substantially* preserved in its natural size, flow and purity, and protected against *material* diversion."¹²⁶ While the court strenuously pointed out that it must judge each reasonableness ruling on its particular facts, it held that a riparian may not block the flow of a stream so that little or no water reaches his downstream neighbors.

B. *FRANCO-AMERICAN CHAROLAISE V. OKLAHOMA WATER RESOURCES BOARD*

In 1963 the legislature passed a statute intended to reconcile the two water law regimes.¹²⁷ The 1963 statute limited all future riparian rights to domestic uses.¹²⁸ The act allowed users to convert current beneficial riparian uses to appropriative rights, but the riparian right suffered from many restrictions and limitations that effectively rendered it a poor relation to its appropriative cousin.¹²⁹ All future water rights, except riparian domestic uses, would be acquired by appropriation. The act effectively capped riparian use to preexisting "beneficial" uses, but even these preexisting uses had to be converted to appropriative rights in order to be maintained.¹³⁰ This required riparian owners wishing to acquire an appropriative right to participate in "vested rights proceedings" that few riparian owners knew about¹³¹ or had sufficient financial stakes in to warrant their participation.¹³² Even this low level of protection for riparian owners was limited to those who somehow received notice of the requirement to attend a vested rights pro-

125. *Baker v. Ellis*, 292 P.2d 1037 (Okla. 1956).

126. *Id.* at 1038 (emphasis added). While it appears reasonable to conclude that "all" refers to all riparian owners, the holding of *Franco-American* seems to indicate that the Supreme Court, unlike the state legislature, may in fact be read literally. If "all" means a literal all, then this may be another support in the link that Kershen perceives between Oklahoma's riparian jurisprudence and California's public trust doctrine. See Kershen, *supra* note 108, at 392-93.

127. OKLA. STAT. tit. 60, § 60 (1963).

128. *Id.*

129. See Allison, *supra* note 19, at 19-20 n.91 (discussing the statutory limitations imposed on existing riparian rights). In order for a riparian use to be recognized as a preexisting beneficial use, it had to meet the appropriative nonuse restrictions which statutorily voided a water right after two years of nonuse. Of course, riparian users had no notice whatsoever that their right could be limited for nonuse until the statute was passed and by then it was too late. Further, beneficial riparian uses that began after statehood were given a priority date of 1963, even if they were in fact much older.

130. See *id.* at 20.

131. *Id.*

132. *Id.* at 21-22.

ceeding.¹³³ Those who failed to attend these meetings lost legal protection for their rights to non-domestic water use.

Against this background it should not have been a surprise that the Oklahoma Supreme Court continued to protect the riparian water right. Because the *Franco-American* case came during a lull following the 1963 legislation, the holding surprised many who relied on the statute. The facts of the case were as follows: A cattle rancher with an appropriative water right on Mill Creek challenged the Oklahoma Water Resources Board's ("OWRB") approval of an appropriation by the City of Ada ("Ada") to the remaining flow of the creek.¹³⁴ Plaintiffs alleged OWRB failed to consider the harm it would cause to holders of riparian and appropriative rights, it should have considered that Ada had pending applications for ground water that would fulfill their water need, and that Ada's water allocation would be subject to recall because it was an out of basin transfer.¹³⁵ Ada's own experts admitted the level of appropriation approved for Ada would result in a totally dewatered stream in normal water years if all appropriators claimed their full share.¹³⁶ The trial court found for Plaintiff.¹³⁷

Both parties appealed.¹³⁸ The Oklahoma Supreme Court reversed in part and upheld in part.¹³⁹ The court held the Oklahoma Water Resources Board did not need to consider the groundwater application and concluded the out of basin transfer was subject to recall.¹⁴⁰ The central portion of the ruling held that the OWRB failed to consider the vested rights of riparian owners to the undefined future use of Mill Creek. The Oklahoma riparian property owner enjoyed a vested common law right to the reasonable use of the stream. Under Oklahoma common law, a vested right was "the power to *do certain actions* or possess certain things lawfully."¹⁴¹ The riparian right to use water at any time was closely analogous to an easement and the Oklahoma Constitution forbids the takings of easements without compensation.¹⁴² The

133. *Id.* at 20 ("[O]nly those riparian landowners who had sought parallel appropriation rights to back up their riparian rights, been lucky enough to read the newspaper publication, or otherwise been told about the hearings would have participated in the vested rights proceedings. Water users who failed to participate in the vested rights proceedings lost their water use rights.").

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

135. Allison, *supra* note 19, at 31 (citations omitted).

136. *Id.* at 29.

137. *Id.* at 35.

138. *Id.* at 41.

139. *Franco-American*, 855 P.2d at 568.

140. *Id.* at 580-82.

141. *Id.* at 576 (citations omitted).

142. *Id.* (citing OKLA. CONST. art. 2, § 24 providing in part "[p]rivate property shall not be taken or damaged for public use without just compensation. . . [private prop-

riparian right to initiate reasonable uses at any point in the future could not be taken without just compensation and to the extent that the 1963 legislation removed the riparian right to future use without compensation, it was unconstitutional.¹⁴³

The Court held the mechanism for elimination of future riparian rights provided in the 1963 legislation was unconstitutional for several reasons. First, the mechanism could not be sustained as valid regulation because the private right was not just limited, but also put to public use.¹⁴⁴ Zoning laws may be distinguished from takings because in zoning the landowner's property right is merely limited. In a taking, the property may no longer be used by its owner and the property is put to public use. The 1963 legislation specifically provided the "powers granted by this act are in all respects for the benefit of the people of the state."¹⁴⁵

Secondly, the riparian right was not protected in its full bloom. The court held the heart of the riparian right was that it may be exercised at any time.¹⁴⁶ Further, the 1963 legislation purported to forever freeze the definition of reasonable. The court held that a flexible definition of reasonableness was central to the riparian right.¹⁴⁷ After the 1963 legislation, the only way that a riparian could claim a water right was through appropriation, where her use would not be judged by its reasonableness, but rather by its place in time.

The Court did not entirely displace prior appropriation as an option for water rights acquisition in Oklahoma, but instead attempted to fuse the two doctrines. The court held "the statutory right to appropriate stream water coexist[ed] with, but [did] not preempt or abrogate, the riparian owner's common-law right."¹⁴⁸ In order for these doctrines to coexist, the court needed to resolve some of their inherent contradictions. This effort necessarily rested on the bedrock holding that the unquantifiable future use of riparian rights could not be taken without compensation. Because of this constitutionally derived command, prior appropriation had to rest atop the riparian regime, rather than displace it.

The court ruled that OWRB could approve Ada's appropriation only if there was surplus water remaining after it provided for all anticipated in-basin needs, including those of appropriators and present and future reasonable riparian uses, regardless of whether they had

erty] includes easements, personal property, and every valuable interest which can be enjoyed and recognized as property." (internal quotations omitted).

143. *Id.* at 571.

144. *Id.* at 577.

145. OKLA. STAT. tit. 82, § 1086.1(B) (1990).

146. *Franco-American*, 855 P.2d at 577.

147. *See id.*

148. *Id.* at 576.

perfected their riparian right under the 1963 legislation.¹⁴⁹ Thus, the Oklahoma Supreme Court created a hierarchy: riparian owners received the superior water right, but were limited to reasonable use. Below all the riparian owners were the prior appropriators, arranged by priority date. Since the amount of water riparian owners claimed could change, the appropriators then would have more or less water to divert depending on the amount of water required by the riparian owners.

VII. DEFENDING THE OKLAHOMA DOCTRINE ON LEGAL GROUNDS

The Oklahoma Supreme Court's holding came under immediate fire, but its reasoning was at least as sound as any that has attacked the holding. The dissent differed from the majority on three main points. First, the dissent argued the future use of stream water was not a vested right.¹⁵⁰ Second, the dissent would have ruled the right to use water, as other natural resources, could be limited or forfeited for nonuse over time.¹⁵¹ Finally, the dissent asserted the court should have upheld the 1963 legislation as a reasonable regulation of riparian rights comparable to zoning statutes, not a taking.¹⁵²

Writing for the dissent, Vice Chief Justice Lavender argued the majority misunderstood riparian and prior appropriation rights. Justice Lavender correctly pointed out that the majority decision was contrary to the vast majority of decisions – even its closest analog in California.¹⁵³ According to the dissent, the unquantifiable, correlative nature of the riparian claim could not vest into a protected right. In the dissent's view, only "preexisting uses . . . [could] be said to be property in any real or actual sense."¹⁵⁴

Secondly, despite the majority's conclusion that riparian rights were vested and thus constitutionally protected from government taking, the dissent argued no taking had occurred.¹⁵⁵ In its first line of reasoning, the dissent relied on the finding in the 1963 legislation that the riparian right could be limited because continuous nonuse of water was wasteful and injurious to the beneficial use of a valuable resource.¹⁵⁶ The dissent saw the history of the riparian right in Oklahoma as protecting riparian *use*, not the riparian right.¹⁵⁷ This led the dissent

149. *Id.* at 578.

150. *Id.* at 582 (Lavender, J., dissenting).

151. *Id.*

152. *Id.* at 582-83.

153. *Id.* at 583.

154. *Id.* at 584.

155. *Id.* at 595.

156. *Id.* at 584.

157. *Id.* at 586.

to conclude the riparian right was usufructuary and therefore not protected from government regulation.¹⁵⁸

Because the dissent would have ruled that riparian rights were not vested, it saw the issue as a facial attack on the validity of the 1963 legislation, because it asserted an adverse affect on riparian land values.¹⁵⁹ The dissent disposed of this argument using an analogy to zoning law and applying the test for substantive due process: whether the regulation substantially advances legitimate state interests without denying the landowner economically viable use of the land.¹⁶⁰ Because there was no evidence that the 1963 regulations rendered use of riparian land economically unviable, the dissent would have upheld them.¹⁶¹

While the dissent's arguments were the conventional conclusions one would generally expect a court to reach, none of these three arguments were as effective as those suggested by the majority.

A. VESTED RIGHTS

Whether the riparian right or the prior appropriation right may be taken without compensation is an interesting question. The Oklahoma decision seemed to indicate that riparian rights were more protected than appropriative rights. This conclusion is contrary to the conventional wisdom. Many consider prior appropriation right a much stronger property interest than the riparian interest because it has more definite terms, such as amount, time, etc. and because by definition it is "vested by use" whereas many riparian rights are inchoate. The conventional wisdom is incorrect as it misses the essential character of the water rights under each regime.

Prior appropriation gives appropriators license to divert water as it crosses their territory. They have no right to water they do not or may not divert and they have no claim of right over the remainder of the water. The requirement that the appropriator continue to use the water makes his interest similar to a license, where a private party's use of a property is allowed only so long as a condition is met. If this analogy is apt, then that license may be removed without compensation.

Contrastingly, I would argue riparian law conveys a right to use all of the water that crosses the riparian owner's property, whether it is diverted or not, so long as the water is used reasonably. In effect, as the water crosses the riparian owner's property boundary, she is vested with a fee simple ownership over that quantum of water that exists on her property at any moment in time, subject, of course, to the old

158. *See id.*

159. *Id.* at 593.

160. *Id.* at 594.

161. *Id.*

maxim that one may not use one's property so as to injure another.¹⁶² Additionally, the riparian right does not depend on any particular use. The water need not be diverted, used in place, swam in, fished on or used in any other way; it cannot be lost simply because of nonuse. This makes the riparian right more like other types of physical property. The continuance of the right is not based on use and thus is not truly usufructuary. The mischaracterization of riparian rights as purely usufructuary resulted in uncompensated takings in many jurisdictions, but when one considers the character of the riparian right, it is my opinion that such takings cannot be justified except under condemnation law.

Alternatively, the riparian has an easement to use the water - or not - as it crosses her land. There are certain limitations that are enforced over this property, but the use of all forms of property may be regulated by the state in a proper exercise of its police power. It is the ability to *not use* a riparian water right, and yet retain it that makes the riparian right a vested property interest. Barron's Dictionary of Legal Terms defines a vested right as one that is not contingent, any right or title to something that is not dependent upon the occurrence or failure of some specified future event.¹⁶³ The riparian's right to not use her water, and not lose the right, makes her right vested and thus protected from taking under the Oklahoma Constitution.

B. FORFEITURE

The dissent's second point of argument also misunderstood the scope of the riparian right and sought to judge the right by prior appropriation standards. The argument that the riparian right should not have been upheld because other common property regimes could be lost by nonuse was illogical. The fact is that the rules for riparian rights are different and these rights are not lost for nonuse.

The argument also did not consider the full scope of what it means to "use" riparian property. More than likely the vast majority of riparian owners use their water non-consumptively. Under appropriation law, these uses would not be considered because they divert no flow; but riparian law allows reasonable uses that do not require diversion. Thus using water to increase property value, for recreation and for the support of wildlife, is a reasonable use.¹⁶⁴ Under riparian law, a ripar-

162. See *Reid v. Gifford*, 1 Hopk. Ch. 416, 419 (N.Y. Ch. 1825) ("The water in its natural descent from the lake becomes the property of each of the complainants successively; all the complainants thus have right in the same subject; and the nature of the case, forms a community of interests, in the complainants."). See also *Rose*, *supra* note 4, at 284 (describing *Reid* as one of the foundational cases in the development of reasonable use riparianism).

163. BARRON'S LAW DICTIONARY 549 (5th ed. 2003).

164. *Franco-American*, 885 P.2d at 578 n.53.

ian owner has been using his property, if only to enjoy the view from his back porch. Dewatering the stream would destroy this use.

C. THE ZONING ANALOGY

Finally, the dissent argued that instead of a taking of riparian rights, the legislation should be viewed as a permissible and reasonable exercise of police power. The argument went that because the legislation limited the right to use a property and did not take the property; the legislation was a proper exercise of the police power, and not a taking. This argument has several flaws.

First, the Oklahoma legislation did not merely limit the use of property, but instead took it for public use. Zoning may be construed as permissible regulation, because it does not take the property for public use. Instead, zoning limits what activities may be conducted on the property; forbidding certain industries or limiting the heights of buildings are two examples. In effect the legislature can say "don't do that!" within the confines of the Fifth Amendment;¹⁶⁵ the legislature may not say "gimme that!" unless it pays just compensation. The Oklahoma Legislature did not merely limit what riparian rights holders could do with their property; instead it took that property and redistributed it to appropriators.

Such an action is closer to uncompensated taking than it is to zoning regulation. Apart from the above argument, distribution of water rights differs from zoning; even granting the dissent's analogy, their conclusion is not convincing. If viewed as regulation similar to zoning, the 1963 legislation can only be seen as a zoning law that demands the discontinuation of lawful, preexisting, non-conforming uses. Such laws have been held per se confiscatory.¹⁶⁶ Any arguments that riparian right holders were not using their property are attempts to apply beneficial use doctrine to takings and zoning jurisprudence. Judging use by a general standard reveals that riparian users were using their water; they just may not have been diverting it.

Arguments regarding the legal reasoning of the majority opinion in *Franco-American* are certainly interesting, but more central to this paper are the arguments surrounding the policy implications of the ruling. It should come as no surprise that I argue the policy implications are promising indeed.

165. Unless, of course, it "goes too far." See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

166. See, e.g., *Hoffman v. Kinealy*, 389 S.W.2d 745, 753 (Mo. 1965); *Pennsylvania Northwestern Distribs., Inc. v. Zoning Hearing Bd.*, 584 A.2d 1372, 1376 (Pa. 1991).

VIII. DEFENDING THE OKLAHOMA DOCTRINE ON POLICY GROUNDS

The Oklahoma Supreme Court's decision not only flowed from a strong legal background, it also has the promise to accomplish many of the positive elements of synthesis. This section will look at the possible outcomes of the Oklahoma doctrine, examining how it allows for a more sensible management of the resource, how it allows for a strong and steady supply of water for municipalities, and how it adopts the most effective aspects of riparian doctrine while retaining the most positive elements of prior appropriation.

A. THE DECISION ENCOURAGES SENSIBLE RESOURCE MANAGEMENT

The Oklahoma Supreme Court not only relied on good law in making its decision, it also made a decision that reflected great foresight and understanding of policy matters. Riparian law is a doctrine that peculiarly involves a wide range of stakeholders in deciding how the common pool resource of stream water should be used. This wide range of interests has the best chance of closing externalities and leading to true sustainable use of stream water resources.

Creating policy that properly administers common property resources is among the greatest challenges humanity faces today. As famously described by Garret Hardin, perverse incentives cause users to over utilize and destroy common property resources.¹⁶⁷ The tragedy of the commons results because each user of the resource receives a particularized benefit for his use, but the cost for the diminution of the resource's value is borne by all of the users. Thus, one gets a large reward, but a small cost, from utilizing the resource. A rational actor when faced with a particularized benefit and a shared cost will attempt to utilize the resource as quickly as possible. The tragedy is best avoided by converting the common resource into a private resource, but as discussed, this conversion is problematic when it comes to water. For a resource with inalienable common goods, careful management is the best hope.

When common resources are managed for only select stakeholders, the externalities from those transactions accumulate and the resource deteriorates. Prior appropriation is a perfect example of the management of a common resource for an insufficient number of stakeholders. Appropriation favors diversion and in its classic form offers no protection for instream uses. The doctrine drives diversion to the point where a valuable river will be over appropriated and often no

167. See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. AM. 1243 (1968). See also NAT'L RESEARCH COUNCIL, *THE DRAMA OF THE COMMONS* 24 (Elinor Ostrom et al. eds., 2002).

water will remain in dry months. Many of the external costs of this system are obvious; the system damages ecological benefits and harms or kills wildlife. Fisheries are destroyed and the societies supported by those fisheries are injured and displaced. However, there are less obvious costs that may not be exposed unless there is full involvement of all affected parties.

The cost that the community shares for the diminution of the common resource is an external cost of consumptive water use. Much of the practice of policy making in common pool resources is concerned with closing externalities. Predicate to eliminating the externalities is understanding the external costs assessed from the transaction. The simplest way to identify all of these costs is to solicit input from all of the stakeholders.

It is often difficult to recognize the entirety of the parties in a transaction; affected parties are not necessarily interested parties and they may not even know how or why their interests are being affected. Thus, transforming affected parties into interested and educated stakeholders who are involved in the policy making process is a key to effective management of common pool resources. The riparian doctrine as it stands today is quite effective at that transformative process. As one commentator noted: "In a very real sense, the protection of the public-good aspect of the eastern rivers was the actual mission of riparian law. Riparian law allowed a modicum of consumption . . . but preserved the bulk of the river for all of them."¹⁶⁸

The same scholar described "hooks" that cause people to place a stake in ecosystem protection, which she called a great nebulous stock.¹⁶⁹ Over time, hooks such as the economic uses of an ecosystem product (fishing, irrigation), property rights (view, property value), charismatic plants and animals (salmonids), geographic values and aesthetics (the scenic rivers), and ecological education have all been effective in increasing a widespread desire for "healthy" rivers.¹⁷⁰ The riparian approach, with its reasonable use standard, allows these public desires to find expression in actual river management.

Since many property owners exercise correlative rights over the course of the entire river, the broad spectrum of uses are considered and protected to the extent that they are reasonable. The hooks that Professor Rose described helped inform courts and water managers about the scope of reasonability. Thus, extractive uses that are of low monetary value are likely to offend stakeholders who have been "hooked" by any of these concerns. If a stream is dewatered to irrigate an alfalfa field, fishing guides and higher value irrigators may be of-

168. Rose, *supra* note 60, at 346.

169. Carol M. Rose, *Demystifying Ecosystem Management*, 24 *ECOLOGY L.Q.* 865, 867-68 (1997).

170. *Id.* at 867.

fended by what they see as economically poor allocation of resources. Home owners will protest lowered property values. As their recreational opportunities are imperiled, the general public, to some extent enamored with animals such as trout, beaver, and river otters, will be outraged that the species they value are suffering in order to provide more water for cattle. Visitors to wild and scenic rivers will not stand for it when the centerpieces of those parks are reduced to a turbid trickle. Those schooled in the broad importance of healthy ecosystems will protest their destruction. All of these viewpoints are properly considered under what constitutes a reasonable use.

This flexibility and responsiveness, combined with the basic tenet of riparian law that water should remain in stream, contrast starkly with true prior appropriation law, which demands water for older uses without regard to whether those uses are reasonable under modern standards. It makes little policy sense that a use should be continued simply because it has persisted for a long time. Indeed, as society progresses it is often the new use that has the greatest economic value and efficiency. The tangle of ancient, often inefficient water use permits may discourage new, more efficient investments.

Further, when appropriators are confronted with a continued and evolving standard of reasonableness they will be given an incentive to improve the efficiency of their use. This incentive is quite obviously missing from the true appropriative scheme. The strict requirements that any changes to an appropriation not affect downstream juniors that rely on return flows inhibit improvements that would make diversions more efficient. At the same time, the waste doctrine is not seriously enforced in many appropriation jurisdictions.¹⁷¹ The reasonable use standard of riparian law is flexible enough to rule that wasteful uses are unreasonable and the improving efficiency should be encouraged.

Professor Rose explains why it is important to spread the benefits of resource use: when everyone receives a benefit, everyone has a stake.¹⁷² If all of the interests are recognized then externalities are diminished; the whole picture is examined. At the same time, spreading costs increases the sense of ownership, again leading to increased stake holding and fewer externalities. Because prior appropriation looks at individual uses to see whether they are beneficial in a very limited sense, the regime often overlooks the impact of the use on the broader river system. Reasonable use's focus on the overall picture makes it more effective in deciding what uses should be allowed and what uses should be phased out.

171. Peter G. Scott, *Aquifer Storage and Recovery in the Columbia Basin: The Need for Legislative Action*, 21 PUB. LAND & RESOURCES L. REV. 36, 60 (2000).

172. Rose, *supra* note 169, at 869.

B. THE DECISION ALLOWS FOR DEPENDABLE MUNICIPAL WATER SUPPLIES

The *Franco-American* decision was derided as having “endangered every municipal water supply in Oklahoma.”¹⁷³ And yet life in Oklahoma goes on.¹⁷⁴ Oklahoma survived one of the most severe droughts in recorded history in 1995-96¹⁷⁵ without overturning the *Franco-American* decision. The alarmists fail to note that riparian law provides adequate protection for municipal water supplies.

Because the riparian right is considered to be so uncertain in quantity and because the traditional doctrine tied water rights so closely to riparian property, many commentators who favor appropriation are skeptical about the doctrine’s ability to provide water for growing cities. Of course, cities such as New York¹⁷⁶ have arguably had less water related growth problems than cities in western appropriation states. The obvious response to this observation is that the west is significantly more arid and comparisons are therefore inapt. While this argument has merit, it is undeniably true that a city like New York must supply more water to its residents than it has access to within its boundaries. In supplying water to city populations, riparian doctrine has proven flexible and dependable.

Riparian cities collect water in three main ways. First they may purchase riparian land through voluntary sale or via eminent domain. Second, they may use their groundwater resources. Finally, they may collect rainwater and surface water runoff in reservoirs. Most municipalities use all three methods. For example, starting in 1667 New York City pumped water from a well in Bowling Green Park.¹⁷⁷ In the late nineteenth century and through much of the twentieth centuries, New York City consistently improved its water supply, acquiring the land necessary for Delaware, Catskill, and Croton reservoir systems through

173. Hageman, *supra* note 45, at 193.

174. Detractors claim that life goes on because the legislature and the OWRB essentially ignored the Supreme Court’s holding. See Allison, *supra* note 19, at 58. Whether this contention bears merit is beyond the scope of this article.

175. OKLAHOMA DROUGHT MGMT. TEAM, OKLAHOMA DROUGHT CONTINGENCY PLAN 1 (Aug. 1997), http://www.owrb.state.ok.us/supply/drought/pdf_dro/drought_plan.pdf.

176. While New York is experiencing increasing stress on its water supply, this problem is arguably more related to water quality and infrastructure rather than quantity. New York City is currently constructing a third underground aqueduct to increase supply from its existing reservoir system and should the Hudson River restoration project eventually be successful, New York will have enough drinking water for the foreseeable future.

177. THE CITY OF NEW YORK, DEP’T OF ENVTL. PROT., CELEBRATING NEW YORK CITY’S CLEAN DRINKING WATER, at <http://www.nyc.gov/html/dep/html/celebrate.html> (last visited Sept. 12, 2004).

voluntary purchases and state endorsed condemnation actions.¹⁷⁸ These reservoirs accumulate stream and rain water and store it for city use.¹⁷⁹

Municipal water uses are likely to be protected because their reasonableness is so plainly expressed by their importance. Apparently, many casual observers fear that municipal water supplies will be curtailed under the doctrine of reasonable use. However, reasonable use determinations are made on equitable bases. It is hard to imagine a situation where a judge would rule municipal water use unreasonable unless it is truly unnecessary or wasteful. If the city's water use is manifestly wasteful then it seems obvious that such use should be curtailed if it harms others.

Riparian doctrine's flexibility in providing municipal water is demonstrated in the case law. On May 4, 1931, the United States Supreme Court decided that New York could divert water from the headwaters of the Delaware River for the people of New York City.¹⁸⁰ Justice Oliver Wendell Holmes Jr. wrote for the United States Supreme Court, and stated,

A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower states could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may. The different traditions and practices in different parts of the country may lead to varying results but the effort always is to secure an equitable apportionment without quibbling over formulas.¹⁸¹

The first imperative of reasonable use review is always the best result. It is time for those who create water law and policy to turn their eyes to that end. The best result will never allow Tulsa to dry up and blow away.

Municipal supplies are further protected by the Oklahoma Supreme Court's early acceptance that use of riparian water off riparian property does not affect determinations of reasonableness.¹⁸² Given these facts, it is safe to say that once Oklahoma cities acquire riparian

178. DIANE GALUSHA, *LIQUID ASSETS: A HISTORY OF NEW YORK CITY'S WATER SYSTEM* (2002).

179. *Id.*

180. *New Jersey v. New York*, 283 U.S. 336, 346 (1931).

181. *Id.* at 342-43.

182. *Smith v. Stanolind Oil & Gas, Co.*, 172 P.2d 1002, 1005 (Okla. 1946).

property they will have a more secure and dependable water right than if they acquired an appropriation right on the same stream.

C. THE DECISION RETAINS BENEFICIAL ASPECTS OF PRIOR APPROPRIATION

It is difficult to dispute that the *Franco-American* court preserved more of the riparian right as it existed prior to 1963, than it did the appropriative regime legislated in that year. However, one must remember that the riparian right by that time had already adopted the most important and beneficial aspects of prior appropriation law; in fact, no state relies solely on the English doctrine riparian scheme.¹⁸³ It is crucial to keep in mind that *Franco-American* does not represent a return to natural flow riparianism.

Riparian water law began as a restrictive doctrine, quite hostile to consumptive use and development, but it has since adopted the most important and sensible aspects of prior appropriation. Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, New Jersey, New York, North Carolina, Virginia, and Wisconsin are all regulated riparian states,¹⁸⁴ and as discussed above, Oklahoma's riparian doctrine has made significant reforms of the English doctrine riparian law.

Riparian states have adopted many of the most important aspects of prior appropriation. First and foremost, regulated riparian jurisdictions, including Oklahoma, generally require permits for any withdrawal of water.¹⁸⁵ The regulated riparian Model Water Code allows a broad range of consumptive uses, not just domestic and ancient uses. The requirement that water be used only on riparian land has been left by the wayside, taking with it the unity of title rule.¹⁸⁶ Since 1946, water had been separated from riparian land. The holding in *Smith v. Stanolind Oil & Gas* allowed riparian owners to sell their water rights to off property consumers who could use the water anywhere they chose, so long as they used it reasonably.¹⁸⁷ This decision presaged similar recommendations in the Regulated Riparian Model Water Code by over fifty years.

The *Franco-American* court took the extra step of allowing appropriation on the same river as riparian rights so that consumers in need of water need not purchase it from riparian owners. The court also

183. Joseph W. Dellapenna, *The Three Models of Surface Water Allocation Law in the United States*, Materials for the Eastern Water Resources Law, Policy and Technology Seminar 10 (May 6-7, 2004) (on file with author).

184. *Id.* at 21.

185. Oklahoma Water Resource Board, *Frequently Asked Questions*, at <http://www.orwb.state.ok.us/util/faq.php?s=wu> (last visited Sept. 12, 2004).

186. Dellapenna, *supra* note 183.

187. *Smith v. Stanolind Oil & Gas, Co.*, 172 P.2d 1002 (Okla. 1946).

retained the priority system for allocating water between appropriators in times of shortage. In many ways, Oklahoma case law had already taken riparian doctrine to the midpoint and prepared it for synthesis. In *Franco-American*, the court moved prior appropriation to the midpoint as well.

IX. CONCLUSION

In summation, the Oklahoma doctrine represents sound water policy because it includes a wider assortment of interests than does prior appropriation. Involving all user groups tends to close externalities, enabling sensible resource allocations. The riparian system has proven adequate for securing water rights for some of the nation's largest cities; the incorporation of appropriative rights into the equation merely allows municipalities one more way to acquire water. Finally, allowing for use of water off of riparian land extends the riparian doctrine to allow for thorough development of water resource while maintaining the oversight of reasonable use review to ensure that water is used responsibly. The Oklahoma doctrine may be able to rectify the failures of the traditional water law regimes and emerge as a coherent synthesis for the future, if we just give it the chance.

While most states that have adopted prior appropriation have entirely discarded riparian law, Oklahoma has to some extent maintained a hybrid system where riparian and appropriative rights are both respected. Many commentators see the two doctrines as irreconcilable and predict that the hybrid states will soon be forced to choose one or the other. These commentators assume that water rights are binary and can only be addressed by opposite and irreconcilable regimes. Further, nearly every commentator assumes the riparian doctrine is inexorably tied to water rich areas while prior appropriation is inescapably tied to areas where water is scarce. This view ignores the ability of laws to evolve to address changing situations and it ignores the current state of water use in both areas. In fact, the two regimes have been moving toward a common middle ground since their very conception. Oklahoma has merely taken another step in this process of synthesis.

Water is a strange thing. It is a complicated resource with important private aspects and vital public aspects, all of which must be carefully considered if a system of water law is to be what Justice Holmes asked of it: "an equitable apportionment."¹⁸⁸ A synthesized jurisdiction allows the private and public aspects of water to reach an economically efficient balance by looking at the totality of circumstances – including external costs – and consciously and continuously deciding which uses are most reasonable. A synthesized jurisdiction will place its highest

188. *New Jersey v. New York*, 283 U.S. 336, 343 (1931).

priority in ensuring that water is put to its best use, not its oldest use or its most natural use. A synthesized water law is the next step. It is the future.