

Transitions in the History of Water Law

- I. Riparian Doctrine
 - A. English Common Law
 1. use of the “Natural Flow” Doctrine
 2. Natural Flow: the right of the landowner to have the water flow by land, unimpaired in quantity and quality
 3. Landowner was allowed to use for domestic purposes
 4. Requires non-consumptive, on-tract usage
 5. Done to protect interests of landed gentry in England
 6. Suited to agrarian society where major uses of water were navigation & fishing
 7. Adopted by colonies
 - B. Challenges from mills
 1. Some mill usage consistent with natural flow
 2. Many mill uses inconsistent though
 3. Common Law replacement of natural flow doctrine with “Reasonable Use” doctrine
 - a. *Tyler v. Wilkinson* (1827, Rhode Island), opinion by Justice Story; complicated because use language of both natural flow and “reasonable use”
 - b. *Martin v. Bigelow* (1827, Vermont): clearer rejection of natural flow doctrine
 - c. *Snow v. Parsons* (1856, Vermont): no longer mention natural flow, only reasonable use
- II. Western Water Law Evolution
 - A. Colorado
 1. As a federal territory, land patentees had riparian rights
 2. Riparian rights recognized in 1861 and 1862 statutes
 3. Colorado Constitution (1876) adopts appropriation doctrine
 4. *Coffin v. Left Hand Ditch Co.* (1882, Col.): abolishes notion of riparian rights in this state
 5. Takings problem handled by *Broder v. Natoma Water* (1879, U.S.) assertion of pre-existing right
 - B. California
 1. California also had riparian rights
 2. *Lux v. Haggin* (1886, Cal.): California recognizes the superiority of riparian rights over appropriative rights; concern for investment undertaken in reliance on riparian rights
 3. To limit effects, adopt “source of title” rule, whereby if a non-waterfront piece of riparian land is partitioned off from the waterfront portion and then sold off, that piece loses its riparian status even if that land is later reunited with the waterfront portion
 4. See later for more discussion of attempt to abolish unexercised riparian rights by statute
 - C. Other states following mixed approach
 1. N&S Dakota, Kansas, Oregon, & Texas: statute abolish unexercised riparian rights
 2. Oregon Supreme Court (1924) and Ninth Circuit (1934) upheld constitutionality of legislation although not compensated
 3. Washington state: state supreme court in a number of decisions (1907, 1923, 1985) impose “reasonable time” limit to exercise of riparian right
 4. California and Oklahoma try to abolish unexercised riparian rights by statute, but state supreme courts held statutes unconstitutional [*Tulare Irrigation District v. Lindsay Strathmore* (1935, Cal.); *Franco-American Charolaise v. Oklahoma Water Resources Bd.* (1990, Okla.)]
 - D. Statutory Abolition of Unexercised Riparian Rights
 1. Oklahoma
 - a. *Franco-American* case (1990): 1963 water law amendments abolishing unexercised riparian rights were uncompensated taking, in case where city given appropriation that interfere with riparian rights
 - b. City re-filed appropriation, and legislature enacted new statute restating abolition of rights
 2. California
 - a. 1913: Legislature declared that nonuse of riparian rights for continuous 10 year period after that time constitute abandonment
 - b. 1935: *Tulare ID*: abandonment unconstitutional under California constitution, which had language reaffirming right of riparians to reasonable use
 - c. 1979: *Long Valley Creek*: Cal. Supreme Ct. finds that SWRCB can limit unexercised riparian claims on particular waters during adjudication comparing needs of different claimants to particular water body
- III. Strange case of judicial takings in Hawaii: *McBryde Sugar v. Robinson* (1973, Hawaii)

- IV. Administrative transition: 1967: recognizing the interdependence of water quantity and water quality, California decides to coordinate quality and quantity programs by merging 2 agencies to form the State Water Resources Control Board