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## Franco-American Charolaise: The Never Ending Story

Gary D. Allison

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# TULSA LAW JOURNAL

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## **FRANCO-AMERICAN CHAROLAISE: THE NEVER ENDING STORY**

Gary D. Allison†

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† Professor of Law, University of Tulsa; B.S. 1968, J.D. 1972, University of Tulsa; L.L.M. 1976, Columbia University. The author wishes to thank the following: George Braly for generously taking time to explain each stage in the *Franco* ordeal as it developed and for supplying copies of all relevant source documents; Dean Couch of the Oklahoma Water Resources Board for taking time to discuss the many aspects of Oklahoma Water Law that were affected by the *Franco* case; the late Joseph F. Rarick, Professor of Law at the University of Oklahoma, whose many articles on the development of Oklahoma water law were indispensable to the writing of this article; and especially the author's spouse, Barbara Henke, for the moral support and patience she provided during the writing ordeal, which at times seemed to be its own never ending story.

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## I. INTRODUCTION

The idea of eternal return is a mysterious one, and Nietzsche has often perplexed other philosophers with it: to think that everything recurs as we once experienced it, and that the recurrence itself recurs ad infinitum! What does this mad myth signify?<sup>1</sup>

This article analyzes *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Board*<sup>2</sup> (*Franco*). *Franco* is arguably Oklahoma's most important water law case because in it the Oklahoma Supreme Court declared the pro-development 1963 Water

1. MILAN KUNDERA, *THE UNBEARABLE LIGHTNESS OF BEING* 3 (1984).

2. 855 P.2d 568 (Okla. 1993), *readopting, reissuing, and denying reh'g*, 61 OKLA. BAR J. 1114 (Apr. 24, 1990), *rev'g*, 58 OKLA. BAR J. 1406 (May 19, 1987).

Code reforms to be unconstitutional.<sup>3</sup> As a consequence, Oklahoma's unitary water rights system, based mostly on appropriation principles, was converted into the dual system of coexisting incompatible water rights doctrines that existed prior to 1963.<sup>4</sup> The Court's final decision also contains several important non-constitutional holdings, some of which cast doubt not only on the stability and coherence of Oklahoma's water law, but also the Court's ability to respect the proper role of the legislature.<sup>5</sup> This analysis of *Franco* will assess the Court's holdings in light of: (1) the policies behind the Court's attempt to reconcile two water rights doctrines, and (2) the judgments rendered by courts in other states which have faced similar conflicts.

Beyond its legal significance, *Franco* is a story of dramatic conflicts which include: Oklahoma's rural and ranching heritages versus the forces of municipal development; the water needs of communities within the basins of important water sources versus the water needs of communities located elsewhere; and the aesthetic, life-nurturing and economic values of non-consumptive minimum stream flows versus those of consumptive uses. The story involves several colorful personalities engulfed in a combat between the rights of individual property owners and the communal need for Oklahoma to have an efficient and orderly system for regulating the use of its water supplies.

#### A. *The Origins of Duality and Doctrinal Conflict*

This story begins before Oklahoma became a state in 1907. Oklahoma's settlement history and climate are very similar to those of the other states in the column stretching from Texas through North Dakota [hereinafter referred to as the Plains States]. Plains States were settled first primarily by persons engaged in agriculture and ranching.<sup>6</sup> The land these settlers occupied was in most cases granted to them or their grantors by the federal government.<sup>7</sup> Federal law prevailed in these areas until territorial governments were formed, so water uses were regulated by federal riparian common law.<sup>8</sup>

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3. *Franco* is also notable for a peculiar and lengthy appeals process. See *id.*

4. *Id.* at 575-79, 582.

5. These issues include: whether the Oklahoma Water Resources Board must consider an applicant's groundwater claims when judging the applicant's need to appropriate water from a surface source, *Franco*, 855 P.2d at 579-80; and whether out-of-basin appropriations are subject to the recall when needed to meet the needs of in-basin water users, *Id.* at 580-82.

6. 1 WATERS AND WATER RIGHTS § 8.02(c) (Robert E. Beck ed., 1991).

7. *Id.* at 366. However, in Texas, the riparian doctrine was judicially adopted by at least 1856. *In re Adjudication of Water Rights (Guadalupe)*, 642 S.W.2d 438, 439 (Tex. 1982).

8. *Id.* at 366-77.

Plains States have extensive semi-arid and humid regions.<sup>9</sup> In the humid regions, where water from rainfall is reasonably plentiful, the riparian common law worked reasonably well even though water could only be used on land abutting and lying within the watershed of the surface source from which it was diverted.<sup>10</sup> As a consequence, the territorial and state governments of the Plains States expressly adopted the principles of federal riparian water rights law through legislation or constitutional amendments.<sup>11</sup>

This settlement history and climate contrasted sharply with those of many of the arid and semi-arid states located West of the Plains. There, many of the early settlers were miners prospecting for valuable metals on federal lands.<sup>12</sup> Water was scarce and often located in sources remote to most mining operations.<sup>13</sup> By necessity, miners diverted water from these remote sources and transported it considerable distances to their mines.<sup>14</sup> Similarly, the first agricultural settlers in these areas found that the agricultural industry could not exist without irrigation involving taking water and applying it to areas remote from its source.<sup>15</sup> Consequently, the Appropriation Doctrine developed by custom so that water from a specific water source could be diverted to any location at which it could be beneficially used.<sup>16</sup> The federal government acquiesced to this reality tacitly and then directly by statute.<sup>17</sup>

9. *Id.* at 366.

10. *Id.* at 366-77.

11. *Id.*

12. *California Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154 (1935).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 154-58.

17. *Id.*; see also Act of July 26, 1866, ch. 262, § 9, 14 Stat. 253 (1866). The Act provides in relevant part:

That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same. . . .

*Id.* The Act was later amended to subordinate the water rights of federal grantees to persons who established prior rights to water under local custom or law:

[A]ll patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, and as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory.

Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217, 218 (1870). Finally, with respect to 13 Western States, Congress virtually eliminated any vestiges of federal riparian common law in the Desert Land Act which provided:

Settlers of the semi-arid regions of the Plains States discovered what the early miners in the Western arid states learned: that riparian common law does not meet the needs of persons who must acquire water from sources remote to the places of use.<sup>18</sup> To survive, these settlers customarily regulated water use by appropriation principles.<sup>19</sup> These appropriation principles were also incorporated into the Plains States' territorial and state statutes.<sup>20</sup>

## B. *The Internal Contradictions of a Dual Rights System*

Water rights systems must provide answers to six main questions:

- (1) Who has the right to initiate a water use?
- (2) What water uses are permitted?
- (3) What limits, temporal, volumetric or otherwise, are placed on the right to use water?
- (4) Under what conditions can the right to use water be lost?
- (5) Are water rights transferrable?
- (6) How is water allocated among those holding water rights during times of shortage?

Given the differences in their major principles,<sup>21</sup> it is obvious that the riparian and appropriation doctrines provide very different answers to these questions.

### 1. Who May Initiate a Water Use?

Under the riparian doctrine, only owners, or the licensees and lessees thereof, of land abutting a water source may initiate a water

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[A]ll surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.

Desert Land Act of 1877, ch. 107, 19 Stat. 377 (1877).

18. 1 WATERS AND WATER RIGHTS, *supra* note 6, § 8.02(c), at 365.

19. *Id.*

20. *Id.* Oklahoma's Territorial legislature recognized both doctrines. OKLA. STAT. ch. 69, art. 5, § 4162 (1890) (adopting the riparian doctrine); 1897 Okla. Terr. Sess. Laws ch. XIX, art. I, §§ 1-21 (adopting the appropriation doctrine). Both doctrines remained in Oklahoma's Water Code after statehood until the 1963 Water Code Reforms. OKLA. STAT. tit. 60, § 60 (1961); OKLA. STAT. tit. 82, §§ 1-32 (1961).

21. For the most part, the riparian principles discussed in the comparison of appropriation and riparian doctrines are the traditional common law riparian principles. Over the last thirty years, many riparian jurisdictions have modified those principles, but since the Oklahoma State Supreme Court revived common law riparianism in language difficult to modify legislatively, traditional riparianism is the relevant variant for purposes of this article.

use.<sup>22</sup> Anyone in need of water may initiate a water use under the appropriation doctrine.<sup>23</sup>

## 2. What Water Uses are Permitted?

The riparian doctrine permits water to be applied only to reasonable uses on riparian lands.<sup>24</sup> Riparian lands generally have been defined as those which abut the water source and lie entirely within the water source's watershed.<sup>25</sup> Reasonable use is a relative concept determined by comparing all uses against each other in relation to a number of objective and subjective factors.<sup>26</sup>

By contrast, the appropriation doctrine permits water to be used anywhere it is needed to further a beneficial use.<sup>27</sup> Proposed uses are judged to be beneficial primarily by an objective analysis of whether they promote economic, environmental, recreational, or aesthetic values rather than whether they will generate more or less value than

22. *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd.*, 855 P.2d 568, 573 (Okla. 1993) (discussing ownership of land abutting a stream), *readopting, reissuing, and denying reh'g*, 61 OKLA. BAR J. 1114 (Apr. 24, 1990), *rev'g*, 58 OKLA. BAR J. 1406 (May 19, 1987); *see also* *Smith v. Stanolind Oil and Gas Co.*, 172 P.2d 1002, 1004-06 (Okla. 1946) (discussing rights of licensees).

23. 1 WELLS A. HUTCHINS, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES* 238-254 (1971). The list of entities expressly entitled to initiate water use includes "all persons," group organizations, municipalities, states and their agencies, and the federal government and its agencies. *Id.*

24. *Smith v. Stanolind*, 172 P.2d at 1004-06.

25. 1 *WATERS AND WATER RIGHTS*, *supra* note 6, § 7.02(a)(1) (discussing the contiguity requirement); *Id.* § 7.02(a)(2) (discussing the watershed rule). For a detailed application of the watershed rule, *see* *Dimmock v. City of New London*, 245 A.2d 569 (Conn. 1968).

In some jurisdictions riparian lands are limited by the status of their titles. 1 *WATERS AND WATER RIGHTS*, *supra* note 6, § 7.02(a)(2). In so called Unity of Title states, riparian status is conferred upon land parcels that do not abut a water course but are contiguous to, and held under common ownership with, a parcel of land that does abut the water course. *Id.* In Source of Title jurisdictions, the breaking up of large tracts of riparian land parcels deprives irrevocably the riparian status of those parcels of the tracts that do not abut the water source. *Id.* Thus, the non-abutting tracts do not regain their riparian nature even when reunited in common ownership with contiguous land parcels that abut the water source. *Id.*

26. *Franco*, 855 P.2d at 575 n.40 (citing RESTATEMENT (SECOND) OF TORTS § 850A (1979)). The *Franco* court states:

Reasonableness is a question of fact to be determined by the court on a case-by-case basis. Factors courts consider in determining reasonableness include the size of the stream, custom, climate, season of the year, size of the diversion, place and method of diversion, type of use and its importance to society (beneficial use), needs of other riparians, location of the diversion on the stream, the suitability of the use to the stream, and the fairness of requiring the user causing the harm to bear the loss.

*Id.* (emphasis added).

27. HUTCHINS, *supra* note 23, at 517-19. The seminal case illustrating this point is *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).

existing uses.<sup>28</sup> However, a use may lose its status as a beneficial use if water availability declines.<sup>29</sup> Moreover, appropriators are increasingly subjected to a reasonableness standard requiring that their methods of applying water meet changing standards of efficiency measured in part by comparison with methods used or likely to be used by current and prospective appropriators.<sup>30</sup>

### 3. What Limits Are Placed on the Right to Use Water?

Riparian landowners' rights to maintain a water use, or to initiate a new or expanded use, are limited only by the concept that all riparian landowners have reciprocal or correlative rights to use water from a common source as long as their uses will not unreasonably interfere with the lawful uses of other riparian landowners.<sup>31</sup> This reciprocity concept creates much uncertainty because the total amount of water a riparian may take pursuant to his or her riparian right is never fixed, but rather may vary as surrounding conditions change from those that existed when the riparian's use was initiated.<sup>32</sup>

The number of users seeking water from a common source, or a decline in the water available from a common source, are important conditions that might change to the detriment of existing riparian users. It would violate the reciprocal rights concept for the decision-maker simply to disallow the latest use on grounds that the common source does not contain enough water to accommodate all uses. But,

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28. See *Parks v. Idaho Dep't. of Water Admin.*, 530 P.2d 924 (Idaho 1974) (discussing what constitutes a beneficial use). The concurring opinion by Judge Bakes is particularly relevant on this point. *Id.* at 930-32.

29. *Id.*

30. See *Romey v. Landers*, 392 N.W.2d 415, 419 (S.D. 1986); *In re Water Rights of Escalante Valley Drainage Area*, 348 P.2d 679 (Utah 1960). See also Frank J. Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams*, 12 Wyo. L.J. 1 (1957) (examining the concept of reasonableness under the appropriation doctrine).

31. *Franco-American Charolaize, Ltd. v. Oklahoma Water Resources Bd.*, 855 P.2d 568, 575 (Okla. 1993), *readopting, reissuing, and denying reh'g*, 61 OKLA. BAR J. 1114 (Apr. 24, 1990), *rev'g*, 58 OKLA. BAR J. 1406 (May 19, 1987). The court stated that "the accepted rule allows a riparian owner the right to make any use of water beneficial to himself as long as he does not substantially or materially injure those riparian owners downstream who have a corresponding right." *Id.* See also *Smith v. Stanolind Oil & Gas Co.*, 172 P.2d 1002, 1005 (Okla. 1946).

32. *Franco*, 855 P.2d at 573, 577; see also, *Stanolind*, 172 P.2d at 1006 (quoting *In Re Water Rights in Silvies River*, 237 P. 322, 357 (Or. 1925)). The court in *Silvies River* observed:

The common law or riparian rights as to the use of water by riparian owners is not a doctrine of *fixed rights*. Therefore. . .when it comes to the construction of judgments and decrees in cases where they apportion the rights to use the water among the riparian owners on a stream. . .such judgments and decrees can usually be regarded as *res judicata* only so long as the conditions upon which they were rendered remain the same.

*Id.* (emphasis added).



accommodating a new use by reducing the water available for an existing riparian use does in fact harm another riparian. Nevertheless, under the riparian doctrine these zero-sum conflicts are resolved through proceedings designed to determine which of the competing uses are the most meritorious, an inquiry that gives little, if any weight, to the chronology of when the uses were initiated.<sup>33</sup> Those uses not deemed to be reasonable face a total cut-off of water, a harm in fact that is not considered to be a harm in law.<sup>34</sup> If the uses deemed reasonable represent an aggregate water demand in excess of available water supplies, the available water will be equitably apportioned among them.<sup>35</sup> Thus, under the riparian doctrine every water user is at risk of losing access to all or part of the water he or she needs as new uses are initiated or water supplies decrease.

Under the appropriation doctrine, prospective water users avoid much of this uncertainty because they face three clear limits: (1) there must be water sufficient to meet their needs; (2) they may take water volumes no greater than necessary to make feasible beneficial uses; and (3) they may not initiate new uses or make changes in their existing uses if doing so will harm existing appropriators.<sup>36</sup> Generally, these limits are the natural by-products of the appropriation doctrine's beneficial use and "first-in-time, first-in-right" principles.

A prospective use will be precluded if there is insufficient water available to supply it and the full needs of existing appropriators, even if it may produce more benefits than one or more of the current uses.<sup>37</sup> Should water be available, the prospective user may still be

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33. See 1 WATERS AND WATER RIGHTS, *supra* note 6, § 7.03(d); see also *Harris v. Brooks*, 283 S.W.2d 129 (Ark. 1955) (illustrating the relational character of the riparian doctrine's reasonable use concept, which the Court applied to rule in favor of the user last initiating a water use). While neither of the above references concerns conflict between a prospective use and existing riparian uses, they do illustrate how courts pay little, if any, attention to which use was initiated first when determining which use must be reduced or eliminated if all cannot be accommodated. The lack of examples of a prospective use versus existing uses undoubtedly stems from the fact that riparians may initiate uses at any time. In contrast, it is only after a riparian has initiated a use that harms existing riparian uses that it give rise to legal action.

34. *Harris v. Brooks*, 283 S.W.2d 129, 134 (Ark. 1955).

35. See *Prather v. Hoberg*, 150 P.2d 405, 411 (Cal. 1944); see also Robert H. Abrams, *Charting the Course of Riparianism: An Instrumentalist Theory of Change*, 35 WAYNE L. REV. 1381, 1396 (1989). Professor Abrams notes that equitable apportionment among reasonable uses is the logical implication of the RESTATEMENT (SECOND) OF TORTS § 850A suggestion that courts consider the practicality of adjusting the quantity of water used by each proprietor. *Id.* at 1402-03.

36. The Oklahoma Legislature has codified these common law appropriation doctrine requirements. OKLA. STAT. tit. 82, § 105.12(A) (Supp. 1993).

37. In re *Hitchcock & Red Willow Irrigation Dist.*, 410 N.W.2d 101, 108 (Neb. 1987); see also *Lower Colo. River Auth. v. Texas Dept. of Water Resources*, 689 S.W.2d 873, 874 (Tex. 1984).

denied an appropriation if his or her use will not produce enough benefits to be deemed beneficial<sup>38</sup> or will harm another appropriator because of the place of use, type of use or methods of diversion and transportation.<sup>39</sup> If an appropriation right is granted, the maximum amount of water the new appropriator may use is fixed at the time the permit is issued, equalling no more than the amount necessary to facilitate a beneficial use since "beneficial" is the basis, measure and limit of the appropriation right.<sup>40</sup> Appropriators may take the water needed to meet their full needs as long as water remains available after the full needs of every senior appropriator are met.<sup>41</sup> Existing appropriators, from the most senior to the most junior, are also obligated not to make changes in their uses or appropriation methods that would reduce the water available to other current appropriators.<sup>42</sup>

#### 4. Under What Conditions May a Water Right be Lost?

A riparian landowner will lose the right to maintain an existing use only if it becomes unreasonable and harms another reasonable use.<sup>43</sup> Generally, this will occur when new users come to a source, existing users expand their uses or change their methods of use, or there is a decline in available water supplies such that an existing user is prevented from getting the water necessary to meet fully his or her needs. In such circumstances, one or more uses previously deemed to be reasonable may be curtailed after being reclassified as unreasonable.<sup>44</sup> Riparian landowners always retain the right to initiate a new or expanded use even though they have failed to use water for a long period of time.<sup>45</sup>

A major corollary to the appropriation doctrine's beneficial use concept is a strong "use it or lose it" rule. Volumes of water actually

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38. *Supra* notes 27-30 and accompanying text.

39. *See generally* 2 WATERS AND WATER RIGHTS § 17.02 (Robert E. Beck ed., 1991).

40. *Id.* at § 17.03(d).

41. *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd.*, 855 P.2d 568, 580-81 (Okla. 1993), *readopting, reissuing, and denying reh'g*, 61 OKLA. BAR J. 1114 (Apr. 24, 1990), *rev'g*, 58 OKLA. BAR J. 1406 (May 19, 1987).

42. *See* 2 WATERS AND WATER RIGHTS, *supra* note 39, §§ 16.02(b), 17.02.

43. *See Franco*, 855 P.2d at 575 n.40 (citing RESTATEMENT (SECOND) OF TORTS § 85A (1979)); *see supra* notes 31-35 and accompanying text. Of course, a sudden shift in course of a water source, known as avulsion, will deprive some lands whose boundaries were in part denoted by the original location of the water course of their riparian status. 1 WATERS AND WATER RIGHTS, *supra* note 6, § 603(b)(2). Should this occur, the owners of the lands stripped of their riparian status will lose their right to take water. *Id.*

44. *Franco*, 855 P.2d at 575 n.40 (citing RESTATEMENT (SECOND) OF TORTS § 85A (1975)); *see supra* notes 31-35 and accompanying text.

45. *Franco*, 855 P.2d at 577.

used, as opposed to the volumes stated in an appropriative permit or decree, establishes the entitlement amount.<sup>46</sup> To make as much water as possible available to prospective appropriators, appropriation systems contain criteria under which water rights not fully and continuously used will be deemed abandoned or forfeited in whole or in part.<sup>47</sup>

### 5. Are Water Rights Transferrable?

Under the riparian doctrine, water rights traditionally have been transferrable only through changes in ownership of riparian land.<sup>48</sup> This inflexibility has been moderated in many jurisdictions by rules permitting riparian landowners to allow their lessees and licensees to use water in connection with reasonable uses located on the landowner's leased riparian property.<sup>49</sup> Some jurisdictions, including Oklahoma, also allow a riparian landowner to convey to non-riparians the right to make a reasonable use of water from the riparian water source on non-riparian lands.<sup>50</sup>

In most appropriation states, appropriation rights are generally deemed severable and freely transferable from the lands they benefit.<sup>51</sup> In practice, however, transferability of appropriation rights is not freely exercised. A transfer usually involves a new type of use, a use at a new location, or a change in diversion point. These changes

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46. Thus, in Oklahoma water authorized for use under a permit is forfeited and returns to the pool of public water available for appropriation to the extent the permittee never applies the full permitted amount to a beneficial use. OKLA. STAT. tit. 82, § 105.17(A) (Supp. 1993).

47. *Id.* In Oklahoma water rights may be lost in whole or in part for non-use over seven continuous years. *Id.* at § 105.17(B). The terms "abandonment" and "forfeiture" are terms of art. See 2 WATERS AND WATER RIGHTS, *supra* note 39, § 17.03(a)-(b). Discontinuing a use with the intent not to resume constitutes abandonment, while forfeiture generally connotes non-use for some specified continuous term of years. *Id.*

48. See 1 WATERS AND WATER RIGHTS, *supra* note 6, § 7.04.

49. Snyder v. Callaghan, 284 S.E.2d 241 (W. Va. 1984).

50. Oklahoma Water Resources Bd. v. Central Okla. Master Conservancy Dist., 464 P.2d 748, 755-56 (Okla. 1968) (citing Smith v. Stanolind Oil & Gas Co., 172 P.2d 1002, 1005 (Okla. 1946) (stating that a riparian proprietor may convey to another the right to a reasonable use of stream water on non-riparian lands)).

51. This raises the difficult issue of appurtenance. Appurtenance is a concept that water rights attach to the lands they benefit and are transferred if the lands they benefit change ownership. In some states, however, appurtenance statutes were enacted specifying that water rights severed from lands to which they have become appurtenant do not retain their original priorities. These statutes created such barriers to water transfers that their harshness has largely been mitigated by legislative or judicial exceptions. As a consequence, appurtenance now generally means a rule of construction determining circumstances under which water rights pass with the title to the lands they benefit. See 2 WATERS AND WATER RIGHTS, *supra* note 39, § 16.02(c)(3). Oklahoma recognizes the concept of appurtenance by statutes which specify that water used for irrigation becomes appurtenant to the lands so irrigated. OKLA. STAT. tit. 82, §§ 105.22, 105.24 (1991).

may reduce the amount of water available to another appropriator for three reasons: more water may be diverted above an appropriator's diversion works; return flow may be reduced if more water is consumed or fails to return to the stream because of evaporation, percolation, or transpiration; and the return flow may enter at a lower point on the stream so that it bypasses the diversion works of an existing appropriator. If so, the transfer will be invalid to the extent it harms an existing appropriator.<sup>52</sup>

In addition, the grantor may not have fully used his or her water right for some time, a fact often discovered at the time of an attempted transfer. In such cases, other appropriators may challenge whether the full appropriation entitlement still exists as a means of reducing the amount of water that can be transferred or retained by the grantor.<sup>53</sup> Fear of such challenges may discourage appropriators from agreeing to sell their water rights.

## 6. How is Water Allocated During Shortages?

During times of shortage, the Riparian Doctrine requires that water be allocated equitably among all reasonable riparian uses.<sup>54</sup> This may be accomplished by requiring each user to accept a proportionate reduction.<sup>55</sup> However, some uses require a certain minimum amount of water to be feasible. If such uses exist, and are still regarded as reasonable, they generally will be allocated the minimum amount of water needed to be feasible.<sup>56</sup>

By contrast, in times of shortage the appropriation doctrine allocates water only to the most senior appropriators.<sup>57</sup> It matters not that a junior appropriator facing a complete water cut-off generates more benefits than do one or more protected seniors. All appropriators entitled to receive water during a shortage, except the least senior one, are able to take their maximum appropriation volumes at the expense of more junior appropriators.

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52. See 2 WATERS AND WATER RIGHTS, *supra* note 39, § 16.02(b).

53. *Green v. Chaffee Ditch Co.*, 371 P.2d 775, 782 (Colo. 1962).

54. See *supra* notes 34-35 and accompanying text.

55. See *supra* notes 34-35 and accompanying text.

56. See *Taylor v. Tampa Coal Co.*, 46 So. 2d 392, 394 (Fla. 1950) (holding that riparian owners could insist that natural water levels be maintained when necessary to facilitate a reasonable use in time of shortage).

57. *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd.*, 855 P.2d 568, 580-81 (Okla. 1993), *readopting, reissuing, and denying reh'g*, 61 OKLA. BAR J. 1114 (Apr. 24, 1990), *rev'g*, 58 OKLA. BAR J. 1406 (May 19, 1987).

### 7. A Summary of the Contradictions

Given the substantive differences between the riparian and appropriation doctrines, dual rights systems contain three major irreconcilable contradictions:

- (1) the reciprocal rights of riparian landowners to initiate or maintain reasonable water uses, regardless of when, if ever, they have used water, cannot be preserved without depriving senior appropriators the security afforded by the appropriation doctrine's "first-in-time, first-in-right" and "use it or lose it" principles;
- (2) the riparian reasonable use requirement, by which the merits of each riparian use are determined by a comparison of all riparian uses, cannot be upheld without subverting the appropriation doctrine's beneficial use requirement, which determines the merits of each appropriation use individually based on its economic, social, aesthetic, or environmental benefits; and,
- (3) appropriators not owning riparian lands may initiate a water use without seeking permission or a conveyance from riparian landowners only by destroying the core principle of riparianism, which confers rights to use water only on riparian landowners and generally requires such uses to be on riparian lands.

Consequently, a dual rights system inevitably frustrates the chief advantages of one or both doctrines. The systems are also difficult to administer when there are conflicts between riparian landowners and appropriators. Accordingly, many dual rights states have converted their water law into unitary appropriation systems.<sup>58</sup>

#### C. *Post-War Development: The Incentive for a Unitary System*

Contradictions in dual rights systems do not create desire for change until conflicts between riparian and appropriators emerge. The water reforms of 1963 were proposed, debated and enacted against a background where the Oklahoma Supreme Court had not been called on to resolve any case where the rights of riparian and appropriators were in direct conflict.<sup>59</sup> The few water use cases the Court did resolve either refined the riparian system to make it more useful<sup>60</sup> or interpreted the appropriation statutes in ways that discouraged their

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58. See generally 1 WATERS AND WATER RIGHTS, *supra* note 6, § 8.03(b).

59. Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface in the Pre-1963 Period*, 22 OKLA. L. REV. 1, 26 (1969) [hereinafter Rarick, *Pre-1963*].

60. *Smith v. Stanolind Oil & Gas Co.*, 172 P.2d 1002, 1004-06 (Okla. 1946) (declaring that Oklahoma's riparian law is based on reasonable use, not natural flow, and that derivative rights could be acquired by the licensees of riparian landowners to secure water for use on non-riparian lands). The Oklahoma Supreme Court later confirmed the reasonable use aspects of *Stanolind*

use.<sup>61</sup> Indeed, the lack of conflicts between riparian landowners and appropriators during this period may have been a function of the appropriation system being rendered moribund by judicial interpretations that made its use difficult, if not impossible, for all but the largest prospective appropriators.<sup>62</sup>

Nevertheless, by the mid-1950s a movement was growing to amend the Water Code so it could better facilitate economic development. Fuel for launching this movement had been provided by the work of America's greatest chronicler of western water law, Wells A. Hutchins of the Department of Agriculture. In 1955, the Oklahoma Planning and Resources Board published Mr. Hutchins' "The Oklahoma Law of Water Rights," which graphically identified flaws in Oklahoma's dual water rights system that threatened Oklahoma's economic development.<sup>63</sup> As a result, several organizations were created to educate Oklahomans about their water law problems and to develop a consensus for replacing the dual rights system with a unitary system based on Appropriation principles.<sup>64</sup> In response, the legislature enacted the 1963 Water Code Amendments,<sup>65</sup> which severely restricted riparian water rights and made appropriation the only way to initiate prospective uses.<sup>66</sup>

During this time, the late Joseph F. Rarick, Professor of Law at the University of Oklahoma, and one of the most colorful major players in the *Franco* drama,<sup>67</sup> began his career-long advocacy of kicking

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in *Baker v. Ellis*, the only other riparian use case decided before the 1963 reforms were enacted. 295 P.2d 1037, 1039-40 (Okla. 1956). See also Rarick, *Pre-1963*, *supra* note 59, at 17-18.

61. See *Gay v. Hicks*, 124 P. 1077 (Okla. 1912) (holding that appropriation permits were ineffective if issued before a hydrological survey of and an adjudication of the existing rights in a stream had been made). The Oklahoma Supreme Court reaffirmed this holding three years later in *Owens v. Snider*. 153 P. 833, 836 (Okla. 1915).

62. The *Gay* and *Owens* requirement that hydrological surveys and adjudications of the stream take place before effective appropriation permits could be issued made gaining an appropriation permit so expensive and difficult for all but very large users that the appropriation doctrine had become practically moribund in Oklahoma by 1963. See Rarick, *Pre-1963*, *supra* note 59, at 19, 37-44.

63. Rarick, *Pre-1963*, *supra* note 59, at 3-4.

64. Rarick, *Pre-1963*, *supra* note 59, at 3-11.

65. 1963 Okla. Sess. Laws ch. 205, Water-Property Rights; 1963 Okla. Sess. Laws ch. 207, Water Rights.

66. OKLA. STAT. tit. 60, § 60 (Supp. 1963); OKLA. STAT. tit. 82, § 1-A (Supp. 1963). These statutes provided that the riparian right to initiate new uses without a permit were effectively limited to certain well-defined domestic uses and that all other new uses must be initiated under the appropriation permitting process. OKLA. STAT. tit. 60, § 60 (Supp. 1963); OKLA. STAT. tit. 82, § 1-A (Supp. 1963).

67. A fierce proponent of the appropriation doctrine, an intense teacher who demanded quality performances from his students, a lifelong student and teacher of Native American law signified by the predominant Indian influence in his dress, Professor Rarick was at his death an attorney of record in *Franco* representing the City of Ada in defense of his life's work. It was

Oklahoma water law into the Twentieth Century. Inspired by the work of Mr. Hutchins, Professor Rarick published the first in a series of articles that are now basic documents consulted by all serious students of Oklahoma water law,<sup>68</sup> initiated Oklahoma's first formal water law course,<sup>69</sup> and developed working relationships with the legislature, water use regulators and influential Oklahomans interested in water law reform. By working with two drafting committees, Professor Rarick shaped the substance of the 1963 Water Code Amendments.<sup>70</sup>

### 1. The 1963 Amendments

Professor Rarick identified three tasks essential for turning Oklahoma's clumsy dual rights system into a pro-development unitary system primarily based on the appropriation doctrine:

- (1) find a formula reconciling the appropriation system with the riparian doctrine; that is, define what water shall be available to satisfy present and future appropriations by determining what rights will be retained for landowners in water physically associated with their land;
- (2) develop criteria for establishing present uses as valid appropriations with standards for setting their dates of priority; and
- (3) examine the procedures for determining vested *appropriative rights* and the acquisition of new appropriations with an eye to simplification.<sup>71</sup>

Reconciling the appropriation and riparian doctrines without depriving riparian landowners of their constitutional rights proved to be the most difficult task.

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most fitting that in 1989 the state legislature proclaimed Professor Rarick to be the "Father of Water Law." David L. Swank, *Preface*, 43 OKLA. L. REV. ix-x (1990).

68. This series of articles includes: Joseph F. Rarick, *Appropriation of Water*, 10 OKLA. L. REV. 416 (1957); Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface in the Pre-1963 Period*, 22 OKLA. L. REV. 1 (1969); Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface Under the 1963 Amendments*, 23 OKLA. L. REV. 19 (1970) [hereinafter Rarick, *1963 Amendments*]; Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface, the Water Conservation Storage Commission and the 1965 and 1967 Amendments*, 24 OKLA. L. REV. 1 (1971); Joseph F. Rarick, *Oklahoma Water Law, Ground or Percolating in the Pre-1971 Period*, 24 OKLA. L. REV. 403 (1971).

69. Rarick, *Pre-1963*, *supra* note 59, at 7.

70. See Rarick, *Pre-1963*, *supra* note 59, at 9-11; see also Rarick, *1963 Amendments*, *supra* note 68.

71. Rarick, *Pre-1963*, *supra* note 59, at 44 (emphasis added).

## 2. Pre-1963 Riparian Rights

The pre-1963 rights of Oklahoma riparian landowners were stated in a single section of Title 60, Oklahoma's Property Code, as follows:

Ownership of water.—The owner of the land owns water standing thereon, or flowing over or under its surface but not forming a definite stream. . . . Water running in a definite stream, formed by nature over or under the surface, may be used by him. . . . as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue or pollute the same.<sup>72</sup>

Thus, riparian landowners owned the diffuse surface water standing on their land and the percolating ground water located below their land's surface, but they did not own stream water.

The stream water language appears to incorporate the natural flow variation of the riparian doctrine, which permits water to be withdrawn and consumed only in very small volumes for certain domestic uses.<sup>73</sup> Seeking to make the riparian doctrine more useful, the Oklahoma Supreme Court ignored the literal meaning of Section 60 and announced that Oklahoma followed the reasonable use variation of the riparian doctrine.<sup>74</sup> Therefore, Oklahoma's riparian landowners were entitled to use substantial volumes of stream water as long as the reasonable uses of other riparian landowners were not harmed.

## 3. Recommendations of the Citizen's Committee

The Committee believed it would be unconstitutional to deprive riparian landowners of their ownership of diffuse surface water and percolating ground water.<sup>75</sup> It also believed that riparian landowners should not be deprived of making small withdrawals for domestic purposes, since such withdrawals were the irreducible minimum permitted under all variations of the riparian doctrine and were thought to be so small that they would not substantially interfere with an appropriations system.<sup>76</sup>

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72. OKLA. STAT. tit. 60, § 60 (1961).

73. See *Franco-American Charolaise v. Oklahome Water Resources Bd.*, 855 P.2d 568, 573-74 (Okla. 1993), *readopting, reissuing, and denying reh'g*, 61 OKLA. BAR J. 1114 (Apr. 24, 1990), *rev'g*, 58 OKLA. BAR J. 1406 (May 19, 1987).

74. *Smith v. Stanolind Oil & Gas Co.*, 172 P.2d 1002, 1004-06 (Okla. 1946).

75. Rarick, *1963 Amendments*, *supra* note 68, at 27, 34.

76. Rarick, *1963 Amendments*, *supra* note 68, at 27, 37-38.



The Committee categorized remaining riparian rights as either vested or prospective.<sup>77</sup> Vested riparian rights were defined as existing non-domestic uses.<sup>78</sup> Prospective rights were defined as an entitlement to initiate new or expanded non-domestic uses without securing an appropriation right.<sup>79</sup>

The Committee determined that no person, riparian or non-riparian, had a vested property interest in a particular method for initiating new or expanded uses of the state's water.<sup>80</sup> Therefore, it recommended that persons seeking to initiate new or expanded uses, other than riparian domestic uses, be required to secure an appropriation permit under a new unitary water rights system.<sup>81</sup>

Determining what to do with vested riparian rights was more troublesome. These rights had been legally initiated, were currently being used, and had value. Nevertheless, permitting the rights to continue without being subject to the Appropriation Doctrine's beneficial use, "first-in-time, first-in-right", and "use it or lose it" rules would subvert the goal of creating a unitary system based on the appropriations doctrine.

The Committee's resolved to subject all existing stream water uses, riparian and appropriative, to vested rights determination proceedings in state district court.<sup>82</sup> Users whose uses were deemed beneficial by the court would receive an appropriation permit containing specific quantification limits and priority dates.<sup>83</sup> Only those existing uses receiving permits as a result of the vested rights proceedings would be regarded as lawful.<sup>84</sup> Apparently, the Committee believed that vested riparian uses could be constitutionally converted into permitted appropriation rights because riparians did not have vested property rights in having their existing uses administered in accordance to riparian principles.

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77. Rarick, *1963 Amendments*, *supra* note 68, at 23-24, 26-27.

78. Rarick, *1963 Amendments*, *supra* note 68, at 23-24, 26-27.

79. Rarick, *1963 Amendments*, *supra* note 68, at 23-24, 26-27.

80. *See* Rarick, *1963 Amendments*, *supra* note 68, at 20-27.

81. Rarick, *1963 Amendments*, *supra* note 68, at 20-27.

82. Rarick, *1963 Amendments*, *supra* note 68, at 23-24, 39-45.

83. Rarick, *1963 Amendments*, *supra* note 68, at 23-24, 39-45.

84. Rarick, *1963 Amendments*, *supra* note 68, at 23-24, 39-45.

#### 4. The 1963 Amendments

The Committee incorporated its findings into the 1963 Amendments. Revised Section 60<sup>85</sup> preserved the riparian landowner's ownership of diffuse surface water and percolating groundwater.<sup>86</sup> In fact, revised Section 60 made it easier for riparian landowners to claim ownership of diffuse surface water by allowing them to capture and store water by building dams on, and using the beds of, the streams abutting their land.<sup>87</sup> However, the riparian's right to initiate prospective uses without perfecting an appropriation was restricted to certain specified domestic uses.<sup>88</sup> A vested rights determination process was established<sup>89</sup> to enable all existing non-domestic users, including ripar-

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85. OKLA. STAT. tit. 60, § 60 (Supp. 1963). The revised section stated:

Ownership of water—Use of running water.—The owner of the land owns water standing thereon, or flowing over or under its surface but not forming a definite stream. *The use of ground water shall be governed by the Oklahoma Ground Water Law.* Water running in a definite stream, formed by nature over or under the surface, may be used by him for domestic purposes as defined in Section 2(a) of this Act, as long as it remains there, but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same, as such water then becomes public water and is subject to appropriation for the benefit and welfare of the people of the State, as provided by law; *Provided however, that nothing contained herein shall prevent the owner of land from damming up or otherwise using the bed of a stream on his land for the collection or storage of waters in an amount not to exceed that which he owns, by virtue of the first sentence of this Section so long as he provides for the continued natural flow of the stream in an amount equal to that which entered his land less the uses allowed in this Act; provided further, that nothing contained herein shall be construed to limit the powers of the Oklahoma Water Resources Board to grant permission to build or alter structures on a stream pursuant to Title 82 to provide for the storage of additional water the use of which the land owner has or acquires by virtue of this Act.*

*Id.* (emphasis added to note significant changes).

86. *Id.*

87. *Id.*

88. OKLA. STAT. tit. 82, § 1-A(a) (Supp. 1963). This section provides specifications of the riparian landowner's domestic use right. *Id.* This section also states the new appropriation system's beneficial use standard:

Right to use water—Domestic Use—Priorities.—(a) Beneficial use shall be the basis, the measure and the limit of the right to the use of water; provided, that water taken for domestic use shall not be subject to the provisions of this Title. Any natural person has the right to take water for domestic use from a stream to which he is riparian or to take stream water for domestic use from wells on his premises, as provided in Section 1 of this Act. "Domestic Use" means the use of water by a natural individual or by a family or household for household purposes, for farm and domestic animals up to the normal grazing capacity of the land, and for the irrigation of land not exceeding a total of three (3) acres in area for the growing of gardens, orchards and lawns, and water for such purposes may be stored in an amount not to exceed two years supply. The provision of this Act shall not apply to farm ponds or gully plugs which have been constructed under the supervision and specifications of the Soil and Water Conservation Districts prior to the effective date of this Act.

*Id.*

89. OKLA. STAT. tit. 82, § 6 (Supp. 1963) This section detailed the procedure used in determining persons possessing vested rights to water:

Procedure for determining persons possessing vested rights to water.—The Board or its authorized representatives shall proceed upon approval of this Act to make the necessary surveys and gather data and other information for the proper understanding and determination of all persons using water throughout this State for beneficial purposes in order to establish vested rights thereto. . . .Such survey data and other information shall include, but shall not be limited to, the names and last known mailing address of all applicants or claimants for the use of water of record with the Board. . . .As soon as one or more county or counties and/or one or more stream systems have been surveyed. . .the Board shall carefully review the same and make an order listing the applicants or claimants who, in the Board's opinion from the information then available to it, are vested water rights holders. . . .Provided that the said order shall be plainly marked "Tentative Order establishing vested rights in such county or counties and/or stream systems". . . .As soon as the tentative order. . . is prepared, a copy of said order shall be forwarded by registered or certified mail to each applicant or claimant to the use of water within the area in which vested water rights are to be determined and. . .notice of public hearing shall be included therewith:

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All of the following persons may, but need not appear at the hearing regarding their rights to continue the use of water:

- (1) Those persons claiming a right to the use of water for domestic use.
- (2) Any person who is a party to any suit pending in the courts for an adjudication of water rights in the area under study when such suit shall have been filed prior to the effective date of [this Act].
- (3) Any person who is in agreement with the findings of the Board for determination of vested rights as determined by the tentative order of vested water rights under consideration at the hearing.

Any person claiming a vested right for the beneficial use of water within the area under study for which vested rights are to be determined may appear at the hearing in person or represented by legal counsel.

Any person dissatisfied or who feels his rights are impaired by the findings and determination of the Board in the tentative order of vested water rights under consideration at the hearing shall file pursuant to this Section at the hearing, or to the Board at its office prior to the hearing. . . .

*Id.* The statute then described the details of notice and appeal:

In addition thereto the Board shall give public notice of such hearing by publication in a newspaper of general circulation in each county of the stream system in which the vested rights are to be determined, once each week for two consecutive weeks prior to the hearing; and the last notice shall be published at least thirty days prior to the date set for the hearing. . . .

At the hearing the Board shall hear the evidence of any person interested. . .and all such evidence shall be considered by the Board in its determination of vested rights to beneficial use of water. As soon as possible. . the Board shall make a final order determining the vested rights of such claimants who have made beneficial use of water as vested rights users, and the extent of their uses, and shall notify all such claimants and contestants as to the contents of such final order within sixty days after said hearing is completed.

Service of such final notice shall be deemed complete:

- (a) Upon depositing a copy of such final order in the post office as registered or certified mail addressed to each vested right claimant and contestant whose name and address is known to the Board; and
- (b) Upon the publication of an abstract of such final order once each week for two consecutive weeks in a newspaper of general circulation in each county of the stream system wherein claims of vested rights to beneficial use of water are determined; and
- (c) Two or more copies of the final order shall be filed in the office of the County Clerk of each county of the area in which vested rights have been determined. Any person. . aggrieved by the order. . may appeal. . .If no appeal is taken the determination concerning such claims or contests of such vested

ians exercising vested riparian rights and all appropriators, to receive new quantified appropriation rights with specified priorities.<sup>90</sup>

#### D. *The Vested Rights Determination Process: A Riparian Rip-off?*

The vested rights determination process imposed several serious disadvantages on individuals exercising vested riparian uses vis-a-vis others who had, or attempted to have, perfected an appropriation. Revised Section 60 did not mention vested riparian rights much less state that they had to be protected through the vested rights proceedings.<sup>91</sup> The process required the Oklahoma Water Resources Board

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rights. . . shall be conclusive and no action concerning those matters covered by the determination of the Board shall be brought at any time thereafter.

*Id.*

90. OKLA. STAT. tit. 82, § 1-A(b) (Supp. 1963). This subsection establishes seven priority standards, each of which specifies how the date of the priority is to be determined. *Id.* Each standard clearly states that the quantity of the right is subject to any volumes lost by reason of forfeiture for non-use under the pre & post-1961 versions of OKLA. STAT. tit. 82, § 32. *Id.* In summary, the standards include:

- (1) Beneficial uses initiated before statehood, which were to receive priorities dating from their initiation;
- (2) Beneficial uses decreed to exist during adjudications performed under the old appropriations statutes prior to the 1963 reforms, which were to receive priorities assigned to them in the adjudication decrees;
- (3) Beneficial uses perfected as appropriations under the applications filed and ruled on under the old appropriations statutes prior to the 1963 reforms, which were to receive priorities dating from the date of the applications;
- (4) Beneficial uses perfected as appropriations under the reformed appropriations system established by the 1963 Amendments, which were to receive priorities dating from the date of the applications;
- (5) Beneficial uses perfected as water rights pursuant to certain federal government water withdrawals for the benefit of a federal project, which were to receive priorities from the date of notification specified under a provision of the appropriations system that coordinates federal withdrawals with Oklahoma's water rights system;
- (6) A catchall category including current beneficial uses that were initiated after statehood but before the 1963 reforms and had not been perfected under the old Appropriations statutes, which were to receive priorities dating from their initiation as long as they were not superior to any priority established under standards one through five;
- (7) Beneficial uses based on pre-1963 undertakings of flood control projects by Oklahoma's Soil and Water Conservation Districts, which were to receive priorities dating from the time affect landowners granted the easements required to make the projects feasible;

*See id.* For beneficial uses based on flood control projects undertaken after the 1963 reforms, the priorities described in paragraph seven were to be established as perfected appropriations under standard described in paragraph four. Paragraphs one, two, three and six describe standards relevant only during the vested rights process. *Id.* Vested riparian rights could receive priorities only under the standards summarized in paragraphs one and six. *Id.* Thus, vested riparian rights initiated after statehood but before the 1963 reforms were to receive priority dates inferior to any appropriation right perfected during that time even if they were the earliest uses.

91. OKLA. STAT. tit. 60, § 60 (Supp. 1963). The Court in *Franco* found this omission significant, commenting that the 1963 reforms failed to notify riparians expressly that their riparian rights were being limited and that their existing uses could be preserved only by participation in

to provide mail notice of the vested rights hearings only to persons who had attempted to perfect an appropriation prior to the 1963 reform.<sup>92</sup> Otherwise, notice was only published on two days, once during each of two successive weeks, the last of which was to be no later than thirty days before the vested rights hearing.<sup>93</sup> As a result, only 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.<sup>94</sup>

Standards for assigning priorities to the new permits were unfavorable to riparian uses. The standards contained non-use limitations specifying that priorities were not to be established for any use that had been subject to forfeiture under the pre-1963 appropriation system's non-use statute.<sup>95</sup> During most of the pre-1963 period, forfeiture was applied to rights not exercised for two successive years.<sup>96</sup> Riparian rights are not limited by non-use requirements, so a riparian user was much more likely to have experienced non-use periods than appropriators.

Moreover, existing uses initiated after statehood, but not perfected as appropriations under the pre-1963 Appropriation system, were to receive priority dates junior to any appropriation perfected prior to 1963.<sup>97</sup> Consequently, a vested riparian use initiated in 1920 would have received a priority date junior to a use perfected as an appropriation in 1962, even if the riparian had maintained his or her use at a constant consumption level.

Riparian landowners seeking to validate consumptive vested riparian uses that had been initiated before statehood were more fortunate. Prior to statehood, appropriations could be perfected simply by

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the vested rights proceedings. *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd.*, 855 P.2d 568, 577 (Okla. 1993), *readopting, reissuing, and denying reh'g*, 61 OKLA. BAR J. 1114 (Apr. 24, 1990), *rev'g*, 58 OKLA. BAR J. 1406 (May 19, 1987).

92. OKLA. STAT. tit. 82, § 6 (Supp. 1963).

93. *Id.*

94. *Id.*

95. See OKLA. STAT. tit. 82, § 1-A(b) (Supp. 1963); see also *Rarick 1963 Amendments*, *supra* note 68, at 41.

96. See OKLA. STAT. tit. 82, § 32 (1961) (stating the forfeiture provision that prevailed from 1907 until the Spring of 1961). See also *Rarick 1963 Amendments*, *supra* note 68, at 41-42.

97. OKLA. STAT. tit. 82, § 1-A(b)(6) (Supp. 1963). See *Rarick 1963 Amendments*, *supra* note 68, at 39-40, 44-45.

diverting water and applying it to a beneficial use.<sup>98</sup> Therefore, it was likely that a consumptive riparian use initiated before statehood would have involved all of the acts necessary to perfect a pre-statehood appropriation. If so, it could have been validated under the vested rights proceedings, with a priority set at the date the use was initiated,<sup>99</sup> unless it had been forfeited for non-use.

Of course, nothing in the statutes prevented riparians from seeking to back vested riparian rights by securing a parallel appropriation right covering the same use. Indeed, the fact that riparian uses are subject to equitable reductions during times of shortage provided riparians with the incentive to secure parallel appropriation rights. If the parallel appropriation was senior enough, the riparian may have been immune from any water rationing losses during times of shortage.

In *Gay v. Hicks*,<sup>100</sup> the Oklahoma Supreme Court held that valid appropriation permits could not be issued on any stream for which a hydrographic survey and an adjudication of rights had not been completed.<sup>101</sup> Prior to 1963, adjudications had been completed only on Spavinaw Creek, Grand River, North Canadian River, Blue River and North Boggy Creek.<sup>102</sup> Few, if any, riparian users participated in these adjudications.<sup>103</sup>

Since it was time-consuming and expensive for water users to participate in the pre-1963 stream adjudications, small consumptive users,

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98. The only administrative act statutorily relevant to pre-statehood appropriations was the filing of an intent to appropriate at the local court house, which allowed the appropriator's priority date to relate back to the time of initiation. See 1897 Okla. Terr. Sess. Laws, ch. XIX, art. I, §§ 6-8.

99. OKLA. STAT. tit. 82, § 1-A(b)(1) (Supp. 1963).

100. 124 P. 1077 (Okla. 1912).

101. *Id.* at 1081-82. The Court justified this holding by noting the impossibility of determining whether water was available to satisfy appropriation until an initial stream adjudication was held and that the section establishing the adjudication process preceded the section establishing the appropriation certification process. *Id.* Professor Rarick characterized the reasoning of the Court as dubious at best. Rarick, *Pre-1963*, *supra* note 59, at 33-37.

A stream adjudication involves a court or administrative proceeding during which the state seeks to identify and quantify all valid claims to use water from a specific stream system. Prior to 1963, these adjudications were court proceedings established by statute. OKLA. STAT. tit. 82, §§ 11-14 (1961). The pre-1963 procedures for securing a valid appropriation were established by OKLA. STAT. tit. 82, §§ 21-28 (1961).

102. *City of Tulsa v. Grand-Hydro*, Civ. No. 5263, (Dist. Ct., Mayes County Feb. 14, 1938) (involving only Grand River and Spavinaw Creek); *Oklahoma City v. City of Guymon*, Civ. No. 99028, (Dist. Ct., Oklahoma County Dec. 20, 1939) (involving only the North Canadian River); *City of Durant v. Pexton*, Civ. No. 19662, (Dist. Ct., Bryan County 1955) (involving only Blue River); *Oklahoma City v. Bd. of Pub. Affairs*, Civ. No. 10217, (Dist. Ct., Atoka County Oct. 28, 1958) (involving only North Boggy Creek); See OKLA. STAT. tit. 82, § 105.2(B)(2)-(3) (1981); see also Rarick, *Pre-1963*, *supra* note 59, at 37-44.

103. See Rarick, *Pre-1963*, *supra* note 59, at 37-44.

riparian and non-riparian, found it difficult to secure valid appropriations prior to the 1963 reforms.<sup>104</sup> Nevertheless, non-riparian users on non-adjudicated streams did apply for and receive permits from the State Engineer even though the validity of the permits was questionable under the *Gay v. Hicks* decision.<sup>105</sup> Riparian users on non-adjudicated streams were much less likely to have sought these questionable appropriations permits, since their water uses were already validated by their ownership of riparian land. Some non-riparian water users with questionable appropriation permits were rewarded for their gamble, because in three of the four stream adjudications occurring before 1963 their uses were deemed to be valid appropriations.<sup>106</sup>

### 1. Summary of Riparians' Status After the 1963 Amendments

Under the 1963 Amendments, riparian landowners were not to take stream water without having an appropriation permit except for domestic uses.<sup>107</sup> Riparian landowners were given the opportunity to convert existing non-domestic riparian uses into permitted appropriation rights by participating in vested rights determination proceedings. However, riparian water users failing to participate in the vested rights determination proceedings lost their right to use stream water beyond that needed for domestic uses. As noted previously, since riparian water users were less likely to have received notice of the vested rights determination proceedings, many non-domestic riparian water uses were extinguished.

Riparian landowners who successfully traded their existing riparian uses for permitted appropriation rights were subject to the appropriation principles of "use it or lose it" and "first-in-time, first-in-right." Their rights to use volumes of water not continuously used for long periods of time were subject to forfeiture. Riparian landowners were to receive water in times of shortage only if their priorities were sufficiently senior to those of other users. Otherwise, they were not to receive any water, even if their uses were beneficial enough to have

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104. Rarick, *Pre-1963*, *supra* note 59, at 37-44.

105. See Rarick, *Pre-1963*, *supra* note 59, at 37-44.

106. See Rarick, *Pre-1963*, *supra* note 59, at 37-44.

107. OKLA. STAT. tit. 82, § 1-A (Supp. 1963). Domestic use is:

the use of water by a natural individual or by a family or household for household purposes, for farm and domestic animals up to the normal grazing capacity of the land, and for the irrigation of land not exceeding a total of three (3) acres in area for the growing of gardens, orchards and lawns, and water for such purposes may be stored in an amount not to exceed two years supply.

*Id.*

been deemed reasonable under the riparian reasonable use principle. Riparians eligible to receive water in times of shortage would receive their full appropriation entitlement, unless they were the most junior user to receive water, rather than the proportionately reduced share they would have received under the Riparian reciprocity principle.

The 1963 Amendments were to give riparian landowners one benefit in return for losing their right to initiate prospective non-domestic uses without an appropriation permit and accepting regulation of their non-domestic uses by appropriation principles. For the first time they were to be allowed to use the bed of a water course abutting their property to capture and store diffuse surface water.<sup>108</sup> However, in *Oklahoma Water Resources Board v. Central Oklahoma Master Conservation District*,<sup>109</sup> the Oklahoma Supreme Court drastically reduced the utility of the new benefit. It held that the common law rule converting diffused surface water into stream water once it reaches the channel of a stream applies against riparian landowners who store surface water in the stream's bed if other users perfected a right to take water from the stream prior to the effective date of the 1963 Amendments.<sup>110</sup> Once surface water is converted into stream water, it can no longer be captured as private property because it has become public water that can be used only as specified by state water use regulations.<sup>111</sup>

## 2. The 1972 In-Basin Preference Provision

The Legislature reorganized and re-codified the appropriation provisions in 1972. In so doing, the Legislature enacted the following provision governing the approval of appropriation applications:

After the hearing on the application the Board shall determine from the evidence presented whether:

1. There is unappropriated water available in the amount applied for;
2. The applicant has a present or future need for the water and the use to which applicant intends to put the water is a beneficial use; and
3. The proposed use does not interfere with domestic or existing appropriative uses.
4. In the granting of water rights for the transportation of water for use outside the stream system wherein water

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108. OKLA. STAT. tit. 60, § 60 (1981).

109. 464 P.2d 748 (Okla. 1969).

110. *Id.* at 753-55.

111. *Id.*



originates, *applicants within such stream system shall have a right to all of the water required to adequately supply the beneficial needs of the water users therein.* The Board shall review the needs within such area of origin every five (5) years.<sup>112</sup>

Paragraphs one through three stated the classic appropriation doctrine requirements for obtaining a valid appropriation right.<sup>113</sup> However, paragraph four established an in-basin preference never before included in Oklahoma's Water Code.<sup>114</sup>

From its wording, it is difficult to determine the meaning of this in-basin preference provision. The first phrase refers to applications involving places of use outside the basin of origin,<sup>115</sup> but the second phrase refers to applicants seeking in-basin uses.<sup>116</sup> Accordingly, there is no basis for determining conclusively whether the protected applicants for in-basin uses are the ones before the Oklahoma Water Resources Board ("OWRB" or "the Board") contemporaneously with the applicants for out-of-basin uses or with the potential future applicants for in-basin uses. The board is commanded to assess in-basin water needs every five years, but it is not told whether the needs to be assessed are existing or future needs. Nor is the Board instructed what it should do when there is no water available to meet the needs of an applicant for an in-basin use because there is not enough water to appropriate unless appropriation rights previously granted to out of basin users are curtailed. Confusion over the meaning of this provision had a significant impact on the Court's handling of *Franco*.

### III. THE RETURN OF THE RIPARIAN

#### A. *Initiation of the Franco-American War*

On August 21, 1980, seventeen years after the legislature extinguished all non-domestic riparian rights and eight years after the legislature established an in-basin preference, the City of Ada made an application to the OWRB for increased appropriation rights from

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112. OKLA. STAT. tit. 82, § 105.12 (1981) (emphasis added) (amended 1988).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

Byrds Mill Spring (“the Spring”).<sup>117</sup> The timing of Ada’s application was most inauspicious, since this part of Oklahoma was experiencing one of the driest summers in history.<sup>118</sup> As a consequence, even though the Spring perpetually produces water from the Arbuckle, Oklahoma’s most abundant ground water aquifer, Mill Creek, the stream created thousands of years ago by the Spring’s generous direct flows, and other streams that derive water from Mill Creek, dried out for the first time in years.<sup>119</sup> As a result, riparian domestic users and senior appropriators on these streams were without water.

It is significant that many streams in this area are wet weather streams, meaning they contain water only if there is enough precipitation run-off to keep their beds wet.<sup>120</sup> However, this is rarely true of Mill Creek, and the downstream stream systems to which it is connected, because the Spring is capable of producing a constant flow during prolonged absences of rainfall. Thus these streams are known as dry weather streams, meaning they normally have water flows regardless of the weather.<sup>121</sup> They will go dry only if extraordinary circumstances interfere with the flow of the Spring into Mill Creek.

From the record of the OWRB hearings on Ada’s appropriation application, it appears that Ada caused this extraordinary interference.<sup>122</sup> Ada had previously perfected an appropriation to take 3,360 acre feet of water annually from the Spring for municipal water supply purposes.<sup>123</sup> During July and August of 1980, Ada persisted in taking most of its appropriation entitlement from the Spring in the face of reduced production therefrom even though this caused the remaining Spring flow into Mill Creek to be inadequate to serve the needs of riparian domestic users and senior appropriators downstream.<sup>124</sup> Despite receiving many complaints from downstream users, Ada failed to release enough water at the Spring to meet their needs.<sup>125</sup>

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117. *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd.*, 855 P.2d 568, 571 (Okla. 1993), *readopting, reissuing, and denying reh’g*, 61 OKLA. BAR J. 1114 (Apr. 24, 1990), *rev’g*, 58 OKLA. BAR J. 1406 (May 19, 1987).

118. *Id.*

119. *See infra* notes 148-151 and accompanying text.

120. *See infra* notes 148-151 and accompanying text.

121. *See infra* notes 148-151 and accompanying text.

122. *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd.*, 855 P.2d 568, 571 (Okla. 1993) (discussing the Application for Stream Water Permit by the City of Ada, Record on Appeal in the Dist. Ct., 25th Judicial Dist., Coal County, Oklahoma), *readopting, reissuing, and denying reh’g*, 61 OKLA. BAR J. 1114 (Apr. 24, 1990), *rev’g*, 58 OKLA. BAR J. 1406 (May 19, 1987).

123. *Id.*

124. *See infra* notes 148-51.

125. *See infra* notes 148-51.

Ada's actions in the Summer of 1980 led to subsequent opposition of its appropriation application. Chief among the opposition was the late Mack M. Braly, and his son and business partner, George Braly.<sup>126</sup> The Bralys were appropriators who operated farming and ranching operations on lands riparian to the Clear Boggy Creek, which is fed by Mill Creek.<sup>127</sup>

In the summer of 1980, Mack Braly was nearly 70 years old.<sup>128</sup> He had grown up in the Ada area and so was familiar with the characteristics of its various stream systems.<sup>129</sup> His son, George Braly, was an attorney with an undergraduate degree in engineering from Brown University, where he concentrated in the field of fluid mechanics.<sup>130</sup> George Braly represented himself and his father throughout the Franco-American wars. In the Braly's, Ada attracted two fierce, highly motivated and well prepared opponents to its appropriation application.

### B. *The OWRB Hearings*

On December 18, 1980, the OWRB hearing that provided *Franco's* factual record was held.<sup>131</sup> The most remarkable aspect of this hearing was that the evidence introduced and the legal arguments made gave no hint that *Franco* could be the vehicle for reviving riparian rights in Oklahoma. Evidence was marshalled mainly around the legal standards Ada had to meet to secure the appropriation, which required Ada to show:

- (1) a need for additional water;

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126. *Protest Hearing on City of Ada Stream Water Application No. 80-107*, O.W.R.B., at 97-101 (Dec. 18, 1980) [hereinafter *M. Braly Testimony*] (testimony of Mack Braly); *Protest Hearing on City of Ada Stream Water Application No. 80-107*, O.W.R.B., at 101-107 (Dec. 18, 1980) [hereinafter *G. Braly Testimony*] (testimony of George Braly).

127. *M. Braly Testimony*, *supra* note 126; *G. Braly Testimony*, *supra* note 126.

128. *M. Braly Testimony*, *supra* note 126, at 97.

129. *M. Braly Testimony*, *supra* note 126 at 97-100. Mack Braly had also been a colonel on General Patton's officer staff during the Third Army's legendary campaign against German forces after the Normandy invasion, and was in 1980 still vigorously possessed of the ruggedly independent character one might expect of a person with his background. Interview with George Braly, in Ada, Oklahoma (March 14, 1994).

130. *G. Braly Testimony*, *supra* note 126, at 101.

131. *Protest Hearing on City of Ada Stream Water Application*, No. 80-107, O.W.R.B. 4-14 (October 7, 1980). Originally, this hearing was scheduled for October 7, 1980. In fact, a hearing did commence on that date, but it quickly ended when Ada requested a continuance in the face of a Braly motion demurring to evidence presented by Ada. Without the continuance, George Braly's motion probably would have been granted, since Ada had come to the hearing without any witnesses to support its documentary evidence. Braly demurred after noting that he was entitled to cross-examine persons who prepared the crucial documents in order to test their credibility.

- (2) the availability of spring water sufficient to satisfy the new appropriation; and
- (3) an increased use of the Spring which would not interfere with existing domestic or appropriative uses downstream.<sup>132</sup>

Ada addressed these issues with experts who based their testimony on certain metering records and published flow data.<sup>133</sup> This evidence dealt exclusively with the extent of water flows from the Spring and within certain downstream creeks,<sup>134</sup> projections of Ada's future water needs,<sup>135</sup> and cursory representations about the water needs of downstream riparian domestic users and appropriators.<sup>136</sup>

The Bralys acted as aggrieved downstream appropriators rather than riparian landowners seeking restoration of their common law rights. In presenting their argument, they relied upon cross-examination of Ada's witnesses<sup>137</sup> as well as testimony by current and former Ada employees,<sup>138</sup> an OWRB employee,<sup>139</sup> and various downstream riparian domestic users and appropriators.<sup>140</sup> The Bralys used this evidence to attack the credibility of Ada's claims regarding need, water flows, and harm to downstream users.

132. OKLA. STAT. tit. 82, §§ 105.12, 105.14 (1981).

133. *Protest Hearing on City of Ada Stream Water Application No. 80-107*, O.W.R.B., at 4-18 (December 18, 1980) [hereinafter *Dudley Testimony*] (testimony of Richard F Dudley, Jr., Consulting Engineer for the City of Ada); *Protest Hearing on City of Ada Stream Water Application No. 80-107*, O.W.R.B., at 38-43 (December 18, 1980) [hereinafter *McComas Testimony*] (testimony of Murray McComas, Consulting Geologist for City of Ada).

134. *McComas Testimony*, *supra* note 133.

135. *Dudley Testimony*, *supra* note 133.

136. *McComas Testimony*, *supra* note 133.

137. *Protest Hearing on City of Ada Stream Water Application No. 80-107*, O.W.R.B., at 18-38 (December 18, 1980) [hereinafter *Dudley Cross*] (cross examination of Richard F Dudley, Jr., Consulting Engineer for the City of Ada); *Protest Hearing on City of Ada Stream Water Application No. 80-107*, O.W.R.B., at 44-67 (December 18, 1980) [hereinafter *McComas Cross*] (cross examination of Murray McComas, Consulting Geologist for City of Ada).

138. *Protest Hearing on City of Ada Stream Water Application No. 80-107*, O.W.R.B., at 75-89 (December 18, 1980) [hereinafter *Briley Testimony*] (testimony of Leonard Briley, Ada City Manager as a Braly hostile witness); *Protest Hearing on City of Ada Stream Water Application No. 80-107*, O.W.R.B., at 89-92 (December 18, 1980) [hereinafter referred to as *Sullivan Testimony*] (testimony of Earl Sullivan, Superintendent of Ada's Waste Water Maintenance Department as a Braly hostile witness).

139. *Protest Hearing on City of Ada Stream Water Application No. 80-107*, O.W.R.B., at 93-96 (December 18, 1980) [hereinafter *Pulley Testimony*] (testimony of Marc Pulley, OWRB Employee and Braly witness).

140. *Protest Hearing on City of Ada Stream Water Application No. 80-107*, O.W.R.B., at 69-70 (Dec. 18, 1980) [hereinafter *Cannon Testimony*] (testimony of William Cannon, Mill Creek appropriator and Braly witness); *Protest Hearing on City of Ada Stream Water Application No. 80-107*, O.W.R.B., at 72-74 (Dec. 18, 1980) [hereinafter *Bateman Testimony*] (testimony of F. E. Bateman, Mill Creek riparian landowner and Braly witness); *M. Braly Testimony*, *supra* note 126; *G. Braly Testimony*, *supra* note 126.

George Braly introduced two lines of evidence which raised unique legal, but not constitutional, issues. One line of questioning concerned whether Ada had previously secured, or was about to secure, ground water rights in quantities sufficient to meet its projected needs without a new appropriation.<sup>141</sup> From this inquiry sprang an intense legal debate as to whether the OWRB should consider prior ground water rights possessed by applicants for stream water appropriations in determining their need for stream water.

The other question referred to the Water Code's in-basin preference provision and evidence that 80% of Ada was physically located outside of the Clear Boggy Creek system.<sup>142</sup> Braly argued that any new appropriation quantities the OWRB might give Ada must be subject to a right of recall exercisable by users within the Clear Boggy Creek system's basin if the water given to Ada should be needed to meet the users' future needs.<sup>143</sup>

Drawing conclusions about the fair inferences that should have been made from the evidence contained in the transcript of an old hearing is always a task fraught with the potential for doing injustice to one or more parties. Nevertheless, the author has formed certain opinions as to the conclusions the evidence supports on the critical legal issues facing the OWRB.

Ada introduced population and water needs projections which supported the conclusion that Ada's water needs would total 10,523 acre-feet by the year 2020.<sup>144</sup> Although George Braly's cross-examination of Ada's expert was vigorous,<sup>145</sup> it did not destroy the credibility of the projections and no alternative projections were offered through opposing testimony. Therefore, the record supports Ada's allegation that it needed more water.

In contrast, evidence on the record tends not to support Ada on the critical issues of whether there was water available from the Springs to satisfy Ada's water needs and whether allowing Ada to

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141. See *Dudley Testimony*, *supra* note 133, at 19-22 (recounting a discussion involving George Braly, Leslie B. Younger (City Attorney for Ada), and Tom Lay (General Counsel for the OWRB) during which it was admitted that the City of Ada had applied for groundwater rights in 1959 but that this application had not yet been granted and that its status was uncertain).

142. *McComas Cross*, *supra* note 137, at 65.

143. *Protest Hearing on City of Ada Stream Water Application No. 80-107*, O.W.R.B. at 123 (Dec. 18, 1980) [hereinafter *Braly Closing*] (closing argument of George Braly).

144. *Dudley Testimony*, *supra* note 133, at 8-14, 18.

145. *Dudley Cross*, *supra* note 137, at 25-29.

take that water would harm existing users. One Ada expert introduced testimony that was not effectively rebutted showing that the average total annual yield of Byrds Mill Spring is about 9,910 acre-feet, of which Ada has a prior appropriative right to take 3,360 acre-feet.<sup>146</sup> Ada also introduced testimony tending to show that the total vested water rights of others in the Clear Boggy Creek system equalled 5,783 acre-feet annually which could amply be met through precipitation run-offs having a minimum volume of 23,866 acre-feet and an average volume of 59,851 acre-feet.<sup>147</sup>

The credibility of this testimony was greatly diminished on cross-examination. Ada's expert confessed his lack of knowledge regarding how much precipitation run-off was impounded by flood control structures on the Clear Boggy system,<sup>148</sup> admitted his inability to identify which streams on the system were wet weather or dry weather streams,<sup>149</sup> acknowledged that dry conditions had sometimes reduced stream flows to nothing on the Clear Boggy system below the Buck Creek intersection,<sup>150</sup> conceded that Clear Boggy system water users located below the Buck Creek intersection might have benefitted in dry years from a generous flow of water from the Spring into Mills Creek,<sup>151</sup> admitted his awareness that the Clear Boggy will be dry for thirty days at least one year out of every ten,<sup>152</sup> and, most importantly, conceded that the stream bed of Mill Creek would remain dry year round if Ada received its new appropriation and exercised it fully.<sup>153</sup>

At this point, the Bralys introduced their own evidence to reinforce the damage inflicted upon the credibility of Ada's expert through cross-examination. The evidence consisted of eyewitness testimony from several persons, including themselves, that various parts of Mill Creek and Clear Boggy Creek went dry during the summer of 1980,<sup>154</sup> despite the fact that Ada released between one and three million gallons of water a day into Mill Creek.<sup>155</sup>

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146. *Dudley Testimony*, *supra* note 133, at 17.

147. *McComas Testimony*, *supra* note 133, at 42-43.

148. *McComas Cross*, *supra* note 137, at 44-45.

149. *McComas Cross*, *supra* note 137, at 50.

150. *McComas Cross*, *supra* note 137, at 55-58.

151. *McComas Cross*, *supra* note 137, at 55-58.

152. *McComas Cross*, *supra* note 137, at 66-67.

153. *Dudley Cross*, *supra* note 137, at 24.

154. *Cannon Testimony*, *supra* note 140, at 69-70; *Bateman Testimony*, *supra* note 140, at 73-74; *Pulley Testimony*, *supra* note 139, at 93-96; *M. Braly Testimony*, *supra* note 126, at 99-100; *G. Braly Testimony*, *supra* note 126, at 102-107.

155. *Briley Testimony*, *supra* note 138, at 85-86; *Sullivan Testimony*, *supra* note 138, at 89-92.

The testimony also indicated that these creeks had dried out at least three or four times in the years between 1955 and 1980.<sup>156</sup> Of particular importance on this issue is George Braly's testimony that he repeatedly made trips up and down the system, from the Spring to a point thirty miles downstream on Clear Boggy Creek, and found that the releases by Ada into Mill Creek were not adequate to keep the stream beds wet along this stretch.<sup>157</sup>

Factual evidence concerning the recall issue was slight, but clear. It showed that only twenty percent of the City of Ada lies within the basin of origin.<sup>158</sup> Nevertheless, based on the record of the December 18, 1980 hearing, the OWRB staff prepared a proposed order granting Ada an appropriation stream permit to take an additional 5,340 acre-feet annually from Byrds Mill Spring subject to a requirement to release at the diversion point 1.55 cubic feet per second for the benefit of downstream domestic users and appropriators.<sup>159</sup> The order was based on several key factual determinations tending to show that Ada had a need for the additional water and that its needs could be satisfied by appropriating much of the Spring's remaining flow without harming existing users on the Clear Boggy System. These factual determinations held that: Ada had established a need based on a proposed beneficial use; Byrds Mill Spring has an average annual yield of 9,820 acre-feet;<sup>160</sup> Ada must permit a discharge from the Spring into Mill Creek of 1,120 acre-feet annually to meet the needs of downstream users with superior rights.<sup>161</sup>

The order addressed one additional key factual issue. It stated that Ada lies partially in and partially out of the basin of origin, the Muddy Boggy River Basin, but its water works lie totally within the basin of origin.<sup>162</sup> Furthermore, it stated that Ada had used water continuously from the basin since 1911 and does so today under the

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156. *M. Braly Testimony, supra* note 126, at 99-100; *G. Braly Testimony, supra* note 126, at 102-107; *see also McComas Cross, supra* note 137, at 55-56.

157. *G. Braly Testimony, supra* note 126, at 106-107.

158. *McComas Cross, supra* note 137, at 65.

159. *Order of the Oklahoma Water Resources Board in the matter of Stream Water Application of the City of Ada, O.W.R.B. at 2-4* (April 14, 1982) [hereinafter *Final Order*] (final order stating language identical to that of the proposed order).

160. *Id.* This figure is based on Ada's average annual diversion of 3,488 acre-feet plus the 620 acre-feet of overflow from Ada's reservoirs into Clear Boggy Creek. *Id.*

161. *Id.* This figure is based on 416 acre-feet to meet the needs of senior appropriators on Mill Creek plus 584 acre-feet to meet the needs of riparian domestic users on Mill Creek and that portion of Clear Boggy Creek between its intersection with Mill Creek and its intersection with Buck Creek plus 120 acre-feet of unavoidable losses. *Id.*

162. *Id.*

authority of a vested water right re-established by application in 1959.<sup>163</sup>

From these facts, the proposed order stated three key legal conclusions: (1) Ada had met all the requirements for securing an appropriation permit;<sup>164</sup> (2) the OWRB need not consider what ground water rights Ada might be awarded under a pending ground water rights application in determining that Ada needed additional stream water;<sup>165</sup> and (3) the appropriation will not involve transportation of water outside of the basin of origin, so it is not subject to recall.<sup>166</sup>

George Braly made a spirited protest of the proposed order at the OWRB meeting of April 14, 1981. The protest primarily addressed the failure of the staff to consider the needs of both senior appropriators on the Clear Boggy Creek, which Mr. Braly estimated to total approximately 6,000 acre-feet annually, and domestic users on the Clear Boggy Creek below its intersection with Buck Creek.<sup>167</sup> Mr. Braly emphasized the anomaly of protecting domestic users, but not appropriators, on some portions of the Clear Boggy Creek.<sup>168</sup> Overall, his primary concern was that the order did not adequately protect any of these users during nine dry months each year.<sup>169</sup>

Asked by a Board member why the needs of the appropriators on Clear Boggy Creek were not considered, a staff member replied:

“Okay, the staff had to, we couldn’t just consider the entire basin to be served by Byrds Mill Spring. That would be, it just wouldn’t be very reasonable. So we had to draw a line someplace so we drew our line at Mill Creek. . . . Now to make our figure more conservative on the domestic use we took not just the riparian rights along Mill Creek we took all the rights in the watershed and took all the number of households and stuff in that area and come up with our domestic figure for that and then we went ahead and extended the

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163. *Id.*

164. *Id.* at 5.

165. *Id.* at 2.

166. *Id.* at 4.

167. *Meeting of the Oklahoma Water Resources Board*, at 9-17 (Apr. 14, 1981) [hereinafter *Braly Board Argument*] (argument of George Braly). Mr. Braly also protested the proposed orders findings of fact and conclusions of law concerning whether Ada’s appropriation would be an out of basin use subject to recall by in-basin users. *Id.* at 20-21, 31. He also disputed the appropriateness of considering Ada’s application for ground water in determining if it had a need for water. *Id.* at 31-32. The OWRB proceeded to approve the proposed order without discussion of the latter two issues. *Id.*

168. *Id.* at 11-12.

169. *Id.* at 12-17, 22-24.



domestic reach on downstream to make the figure a little more conservative.<sup>170</sup>

Despite the inherent arbitrariness of this position, the Board approved the Staff's recommendation that Ada be required to discharge only 1,120 acre-feet from the Spring into Mill Creek.<sup>171</sup> Discussion among Board members indicated they believed the discharge amount did not need to be altered to protect downstream users, since during times of shortage the law requires Ada to release from the Spring any volume of water that would be useful and necessary to meet the needs of downstream users with superior rights.<sup>172</sup>

Having rejected Mr. Braly's protest, the Board proceeded to approve the proposed order, including its findings of facts and conclusions of law.<sup>173</sup> On May 12th, 1981, the City of Ada received a permit to appropriate stream water from Byrds Mill Spring in the amount of 5,340 acre-feet.<sup>174</sup>

### C. *Proceedings in the Coal County District Court: The Home Court Advantage*

Anticipating the OWRB loss, Mr. Braly had carefully planned for an appeal. Perhaps his most significant action was to file his appeal in the District Court of Coal County at 4:45 PM on April 14, 1981—the earliest moment he could file an appeal after the OWRB approved the final order.<sup>175</sup> He selected Coal County, since that is the location of the appropriators on the Clear Boggy Creek whose interests were ignored in establishing the amount of water Ada had to release into Mill Creek.<sup>176</sup>

More importantly, Coal County had long been served with distinction by District Court Judge Lavern Fishel, and Mr. Braly believed

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170. *Meeting of the Oklahoma Water Resources Board*, at 21-22 (Apr. 14, 1981) (answer of Mr. Springer, OWRB staff).

171. *Meeting of the Oklahoma Water Resources Board*, at 24-31 (Apr. 14, 1981).

172. *Meeting of the Oklahoma Water Resources Board*, at 24-31 (Apr. 14, 1981) (discussion involving several Board members, including Borelli, Males, Walker, McPherson, Johnson, and Tucker).

173. *Meeting of the Oklahoma Water Resources Board*, at 33 (April 14, 1981) (vote of the Board adopting the staff's proposed order).

174. *Official Minutes of the Oklahoma Water Resources Board Meeting*, at 3 (May 12, 1981) (vote of the OWRB to grant Ada's permit).

175. OKLA. STAT. tit. 82, § 1085.10 (1991); OKLA. STAT. tit. 75, § 318 (1991). The statutes also gave Mr. Braly the opportunity to file an appeal in any county where there was property affected by the OWRB's order. title 82, § 1085.10; title 75, § 318.

176. Interview with George Braly, in Ada, Oklahoma (February 12, 1993); Interview with George Braly, in Ada, Oklahoma (March 14, 1993).

Judge Fishel would be the ideal person to hear this case.<sup>177</sup> Not only was Judge Fishel familiar with water conditions in the area as a long-time resident of Coal County, he also knew a great deal about water law from presiding over an important water rights case during the water wars of the 1950s in which Oklahoma City attempted to perfect out-of-basin appropriations to secure its municipal water supplies.<sup>178</sup>

In his Coal County appeal, Mr. Braly once again raised his contentions that: Ada should not be deemed in need of water until consideration is given the amount of ground water it might receive through a 1959 Application for ground water;<sup>179</sup> any appropriation Ada might receive should be regarded as an out-of-basin appropriation subject to recall when needed by in-basin users;<sup>180</sup> the final OWRB order failed to make proper provisions to protect the superior rights of appropriators on Clear Boggy Creek and riparian domestic users downstream from its intersection with Buck Creek.<sup>181</sup> He defended these propositions essentially the same way he had in front of the OWRB.<sup>182</sup>

In addition to these arguments, he resurrected the ghost of riparian non-domestic uses, a right the legislature had laid to rest in 1963.<sup>183</sup> However, the riparian right he championed was not the right to initiate a non-domestic use without securing an appropriation.<sup>184</sup> Instead, he noted that the OWRB order allocated the entire flow of Byrds Mill Creek among consumptive users, which would cause the beds of the streams fed by the Spring to be dry most of the time during average flow years.<sup>185</sup> He then argued that allowing the streams to run dry in this manner would constitute a taking without just compensation<sup>186</sup> because riparian landowners have the right to a "minimal continued instream flow" of water sufficient to maintain fish, wildlife and aesthetic values in streams abutting their lands.

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177. *Id.*

178. *Id.*

179. Brief by George Braly at 22-24, *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd.*, No. 81-23 (Okla. Dist. Ct., Coal County, Sept. 21, 1981), *aff'd in part, rev'd in part*, 58 OKLA. BAR J. 1406 (May 19, 1987), *rev'd*, 61 OKLA. BAR J. 1114 (Apr. 24, 1990), *re-adopted, reissued, and reh'g denied*, 855 P.2d 568, 571 (Okla. 1993).

180. *Id.* at 14-16.

181. *Id.* at 17-21.

182. *Id.*

183. *Id.* at 20-22.

184. *Id.*

185. *Id.* at 21.

186. *Id.* at 21-22.

The OWRB defended its refusal to consider Ada's ground water rights primarily by arguing that the Board did not have to consider rights neither acquired nor exercised by Ada at the time the stream water application was being processed.<sup>187</sup> It also quoted Mr. Braly's closing argument in the Protest Hearing for the proposition that Ada did not have any ground water rights worthy of consideration.<sup>188</sup>

In defense of its ruling on the recall issue, the OWRB merely noted that the apparent ambiguity in the in-basin preference provision and contended that its interpretation should prevail since the OWRB is the State's expert on water law.<sup>189</sup> The OWRB also held that the ambiguity stemmed from a lack of clarity in the statute as to the status of water uses that are partially in and partially out of a basin.<sup>190</sup> Admitting that there were three plausible interpretations as to how the statute should be applied to such circumstances, the OWRB contended that its interpretation was reasonable.<sup>191</sup> Having Ada's use classified as in-basin was critical because the OWRB never contended it was error to interpret the statute as requiring a recall of water appropriated for out-of-basin uses whenever it was needed to serve an in-basin user. In this case, if the OWRB lost on the classification issue a seventy year use sanctified by a 1959 vested rights decree could be reduced or extinguished by such a recall.

On the issue of whether superior downstream rights were properly protected, the OWRB relied for the most part on the record testimony of its expert that run-off flows were plentiful enough to supply all appropriators on the Clear Boggy Creek without any contributions from the Spring.<sup>192</sup> Significantly, the OWRB also made it clear that its staff had made estimates of downstream domestic users' needs without putting the basis of those estimate on the record.<sup>193</sup> Then, it fell back on the logic that more specificity in the order as to domestic

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187. Brief for the OWRB at 8-9, *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd.*, No. 81-23 (Okla. Dist. Ct., Coal County, Oct. 26, 1981), *aff'd in part, rev'd in part*, 58 OKLA. BAR J. 1406 (May 19, 1987), *rev'd*, 61 OKLA. BAR J. 1114 (Apr. 24, 1990), *readopted, reissued, and reh'g denied*, 855 P.2d 568, 571 (Okla. 1993).

188. *Id.* Here, the Board quoted Mr. Braly's closing argument from the protest hearing in which he stated: "I want to tell you, I don't think the ground water rights are worth the paper they are written on under the law and I've looked at it pretty carefully." *Braly Closing, supra*, note 137, at 121.

189. Brief for the OWRB at 21, *Franco* (No. 81-23).

190. *Id.* at 20.

191. *Id.* The three alternatives are to: (1) declare the use to be totally out-of-basin, (2) declare the use to be partially in and partially out of basin and divide the water accordingly, or (3) declare the use to be totally in-basin. *Id.*

192. *Id.* at 13.

193. *Id.* at 14.

use needs was not needed since the law requires Ada to supply domestic needs fully no matter what the order says about the amount of water Ada should place in Mill Creek.<sup>194</sup>

Ominously, the OWRB failed to address the riparian nature of Braly's minimum flow theory. Instead, it relied on an argument that the law of Oklahoma had not expressly provided authority for the recognition of instream flows benefitting fish and wildlife.<sup>195</sup> Relying on its expert's testimony about adequate run-off flows, the OWRB also denied that dry stream beds, the physical prerequisite to Braly's theory, would ever materialize.<sup>196</sup>

In the face of these arguments, George Braly's faith in Judge Fishel was richly rewarded. Although he was desperately ill, Judge Fishel issued a detailed opinion and order on October 15, 1982, finding for the Bralys and Coal County water users on every issue.<sup>197</sup> He died about two weeks later, going to his grave having provided the means for resurrecting the full-blooded common law riparian right from the dead.

It is debatable, however, whether Judge Fishel intended to be a miracle-maker, for his decision was much more modest in scope than that of the Oklahoma Supreme Court's final decision in *Franco*. Therefore, it is important to know just how Judge Fishel ruled on the important factual and legal issues of the appeal before him to understand the parameters of the case presented to the Oklahoma Supreme Court.

Judge Fishel made six critical findings of fact:

- (1) Ada has made application for considerable ground water rights, the status of which is unknown and likely not to be settled for a long time, that would if granted eliminate Ada's need for additional stream water;<sup>198</sup>
- (2) the OWRB neither made a concerted effort to calculate the downstream needs of domestic water users nor set forth on the

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194. *Id.*

195. *Id.* at 16.

196. *Id.* at 16-17.

197. Mr. Braly has been told, but not able to confirm, that Judge Fishel, fearing the end was near, had brought to his bed in the hospital two matters he felt were so important that he was obligated to finalize them even though he was in physical extremis. Interview with George Braly, in Ada, Oklahoma (March 14, 1983).

198. *Franco-American Charolaize, Ltd. v. Oklahoma Water Resources Bd.*, No. 81-23 at 2-3 (Okla. Dist. Ct., Coal County, Sept. 21, 1981), *aff'd in part, rev'd in part*, 58 OKLA. BAR J. 1406 (May 19, 1987), *rev'd*, 61 OKLA. BAR J. 1114 (Apr. 24, 1990), *readopted, reissued, and reh'g denied*, 855 P.2d 568, 571 (Okla. 1993).

record a factual basis for the estimate made by its expert staff.<sup>199</sup>

- (3) Mill Creek, and therefore Byrds Mill Spring, is the principle source of water in the Clear Boggy Creek during times of dry weather,<sup>200</sup>
- (4) in dry weather, the Clear Boggy Creek dries up if the stream flow in Mill Creek is less than one million gallons daily,<sup>201</sup>
- (5) if every one takes water to which he or she is entitled under the OWRB order there will be little or no stream flow in Mill and Clear Boggy Creeks where previously water flowed continuously even in dry weather;<sup>202</sup> and
- (6) at least eighty percent of Ada lies out of the Clear Boggy system's basin, so the record supports a finding that eighty percent of the water Ada seeks to appropriate will be taken for out-of-basin uses.<sup>203</sup>

From these factual findings, Judge Fishel ruled, without addressing any Constitutional issues, that the record of the OWRB proceedings failed to show that Ada satisfied the statutory prerequisites for receiving a stream water appropriation permit.<sup>204</sup>

Having found that the OWRB's domestic use estimates were not based on record evidence, he held invalid as a matter of law OWRB's water availability determination.<sup>205</sup> This was necessary, said the Judge, because the availability determination had been made without an accurate assessment of how much Spring water is needed to satisfy downstream domestic uses.<sup>206</sup>

Judge Fishel next held it was unlawful for the OWRB to conclude that Ada needed stream water without first knowing what water was available to Ada under its outstanding ground water application.<sup>207</sup> He felt this holding was necessary because otherwise water rights titles would be needlessly encumbered or clouded in a way that "could lead to a waste of the state's precious water resources."<sup>208</sup> He further suggested that if the OWRB did not want to delay its decision on Ada's stream water application until the lengthy ground water proceedings were over, it could grant water rights "determinable to the

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199. *Id.* at 4.

200. *Id.* at 4-5.

201. *Id.* at 5. The judge also noted parenthetically that Clear Boggy Creek might dry up in dry weather even if Mill Creek had a stream flow of two million gallons daily. *Id.*

202. *Id.*

203. *Id.* at 5-6.

204. *Id.*

205. *Id.* at 7.

206. *Id.*

207. *Id.* at 12.

208. *Id.*

extent that the city perfects any ground water rights" under its outstanding application.<sup>209</sup>

On the tricky recall issue, Judge Fishel straightforwardly held that by being eighty percent outside the Clear Boggy Creek system's basin, Ada would be acquiring water for an out-of-basin use within the meaning of the in-basin preference provision.<sup>210</sup> He then went on to rule that eighty percent of the water Ada might receive under its application was subject to a future recall if needed by in-basin users.<sup>211</sup> Significantly, he did not rule that water to which Ada is entitled under its earlier appropriation was subject to recalls.<sup>212</sup>

Finally, Judge Fishel held that the OWRB's failure to assess the needs of domestic users below the junction of the Buck and Clear Boggy Creeks invalidated its determination that granting Ada's stream water application would not harm other users.<sup>213</sup> This holding was based primarily on the finding that Byrds Mill Spring is the only source of water available in dry weather to users downstream from the junction of Buck and Clear Boggy Creeks.<sup>214</sup> In so doing, he expressly rejected the OWRB's contention that the law giving domestic users rights superior to appropriators was protection enough.<sup>215</sup> Here, the judge noted that such a position would strip away any incentive for downstream users to challenge an appropriation application.<sup>216</sup> He believed it would also increase the likelihood that downstream domestic users would have to resort to litigation to vindicate their rights, a remedy he characterized as often being too little, too late where volatile water conditions are involved.<sup>217</sup>

Had Judge Fishel stopped here and ruled directly on Braly's concern that the OWRB had erred in failing to consider the needs of senior appropriators downstream from the Buck Creek intersection, the case might not have gone further. Ada could have perfected its appropriation in another OWRB hearing by introducing evidence detailing the actual needs of downstream domestic users on the Clear Boggy Creek so they could be considered by the OWRB in determining water availability and structuring the permit to protect other users.

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209. *Id.*

210. *Id.* at 13.

211. *Id.*

212. *Id.*

213. *Id.* at 13-14.

214. *Id.* at 13.

215. *Id.* at 14.

216. *Id.*

217. *Id.*

While the ground water and in-basin preference rulings were troublesome, both Ada and the OWRB might not have wanted to assume the risk of the Oklahoma Supreme Court solidifying them on appeal. Having won most of his issues, Mr. Braly might also have been content to work things out in another OWRB hearing. But somehow Judge Fishel failed to rule on whether it was an error for the OWRB to have ignored the rights of senior appropriators on the Clear Boggy Creek in determining water availability and the needs of downstream users. Accordingly, Braly still had an incentive to carry on.

As important as they might have been to Braly, rulings on these issues would not have done any damage to the 1963 Water Reforms. That proved to be not true of Judge Fishel's constitutional ruling.<sup>218</sup> Yet, even here the Judge's ruling was narrow and strictly confined to the facts and arguments of the case. Had it been sustained as written, *Franco* would not be the object of concern it is today. For in expressing the strict holding of this case, Judge Fishel wrote that "this Court concludes that the right to *completely or substantially dry up a normally flowing stream*, in contravention of the long standing riparian law in Oklahoma, must be done by acquisition or condemnation."<sup>219</sup>

Judge Fishel's statement of his holding is somewhat general, but its scope can, and should be, narrowed by the way he characterized the Constitutional issue:

The Protestants have *not made a general challenge to the constitutionality of Oklahoma's stream water appropriations statutes*, but do however assert that whatever power the State may have under its inherent police power to protect its waters from waste and to protect the general public under such powers, *the exercise of such power cannot extend so far as to completely dry up what has historically been a substantial stream which flowed in dry weather, as well as in wet weather.*

. . . .

This Court at this time is not required to determine how much stream water is enough. *The Protestants have merely asserted that a mere trickle or zero stream flow is certainly not enough.* With this assertion the Court agrees.<sup>220</sup>

Framed in this manner, the riparian right recognized by Judge Fishel is not consumptive. Rather, it is protection from the consumption of others. As if to emphasize this point, Judge Fishel stated:

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218. *See id.* at 7-12 (stating the portions of Judge Fishel's opinion regarding Constitutional issues).

219. *Id.* at 11 (emphasis added).

220. *Id.* at 8 (emphasis added).

So far as this Court knows, in Oklahoma, unlike California, there has never been a riparian right to flood waters or waters in excess of normal or reasonable stream flows. Thus, the appropriation of such waters, which the Court denotes as surplus waters, is not restrained by such considerations. . . .

However, the riparian owner, because of the mutual and correlative nature of his ownership with other riparian owners, was actually prevented from diverting the very thing—a reasonable minimal stream flow—that the city of Ada now seeks to acquire.<sup>221</sup>

Unfortunately, Judge Fishel's case citations used to justify his minimum stream flow ruling contained language more expansive in scope than his own.

To support the theory that there is an Oklahoma riparian right to the maintenance of some kind of stream flow, Judge Fishel quoted general language from *Baker v. Ellis*,<sup>222</sup> to the effect that riparian rights included "the right of all to have the stream substantially preserved in its natural size, flow, and purity, and protected from material diversion."<sup>223</sup> Taken literally, this language implies that the riparian landowner is entitled to have maintained a stream flow that is much larger than the minimal one argued for by George Braly.<sup>224</sup> But, at least it is consistent with the idea of protecting riparian from excessive consumption of others rather than reviving a right of riparian to initiate prospective uses without an appropriation. Indeed, it is consistent with the language used to describe the Natural Flow Doctrine, which had been abandoned by judicial opinion in Oklahoma because it literally prevented all but a bare minimum amount of water from being taken from a stream.<sup>225</sup>

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221. *Id.* at 11.

222. 292 P.2d 1037 (Okla. 1956).

223. *Id.*

224. *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd.*, No. 81-23 at 11 (Okla. Dist. Ct., Coal County, Sept. 21, 1981), *aff'd in part, rev'd in part*, 58 OKLA. BAR J. 1406 (May 19, 1987), *rev'd*, 61 OKLA. BAR J. 1114 (Apr. 24, 1990), *readopted, reissued, and reh'g denied*, 855 P.2d 568, 571 (Okla. 1993). Reinforcing this implication was Judge Fishel's suggestion that:

the OWRB should consider making minimal provision for water flows that would be consistent with those times of little or no run-off during otherwise normal rainfall seasons, or possibly dryer than normal seasons, but excluding periods of drought. The OWRB, in order to apply Oklahoma's appropriation statutes without constitutional impairment of property rights, should make provision for stream flows in Mill Creek that approximate such amounts, which the Court, as a matter of convenience, can only describe as the normal flow or the normal underflow. . . .

*Id.*

225. *See Smith v. Stanolind Oil & Gas Co.*, 172 P.2d 1002, 1004-06 (Okla. 1946).



Two other cases Judge Fishel cited to support his Constitutional ruling can be read to stand for the proposition that appropriation statutes may not change or limit any pre-existing water rights obtained by riparian landowners. He cited *Wasserburger v. Coffee*<sup>226</sup> for the proposition that "riparian rights attached to private lands prior to the adoption of its appropriation statutes were valid and superior to later appropriations."<sup>227</sup> To illustrate this expansive point, Judge Fishel cited *United States v. Gerlach Livestock Co.*<sup>228</sup> wherein the United States Supreme Court followed California Supreme Court decisions holding that the wasteful common law riparian right to irrigate by flood inundation could not be limited without compensating the riparian landowner.<sup>229</sup> The United States Supreme Court issued this ruling even though the California Legislature had passed a Constitutional amendment forbidding riparians from engaging in unreasonable uses or methods of diversion.<sup>230</sup>

Judge Fishel made two important suggestions as to how this case could be resolved in a manner meeting most of the needs of all parties. The record revealed there were times when precipitation run-offs into Mill and Clear Boggy Creeks were quite high.<sup>231</sup> The Judge noted that these high run-offs could be captured and stored for use later during dry weather.<sup>232</sup> He also pointed out that the legislature had authorized the OWRB to issue seasonal or temporary permits when there was not sufficient water left to appropriate for purposes of granting a regulator permit.<sup>233</sup>

Considering its startling effects, Judge Fishel's decision was in many ways a model of restraint and common sense wisdom. He admonished the OWRB to make its findings of fact only from evidence placed on the record of the hearing, made good faith efforts to honor the plain meaning of the relevant statutes or at least the meaning placed on them by the parties, noted how the Oklahoma Water Code provided the OWRB with the tools necessary to tailor an appropriation permit that would truly give Ada all the water that was available

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226. 141 N.W.2d 738 (Neb. 1966).

227. *Franco*, No. 81-23 at 9.

228. 339 U.S. 725 (1950).

229. *Id.* at 753-755.

230. *Id.*

231. *See supra* note 151 and accompanying text.

232. *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd.*, No. 81-23 at 11 (Okla. Dist. Ct., Coal County, Sept. 21, 1981), *aff'd in part, rev'd in part*, 58 OKLA. BAR J. 1406 (May 19, 1987), *rev'd*, 61 OKLA. BAR J. 1114 (Apr. 24, 1990), *readopted, reissued, and reh'g denied*, 855 P.2d 568, 571 (Okla. 1993).

233. *Id.* at 12.

without damaging persons with superior rights, and confined the scope of his constitutional ruling to the facts of the case and the relief requested.<sup>234</sup>

As *Franco* left his Court on appeal to the Oklahoma Supreme Court, no one had yet asked for or received a ruling that any of the 1963 Amendments were unconstitutional. Nor had there been a request for or a grant of the revival of riparian landowners' rights to initiate prospective uses without obtaining an appropriation.

#### D. *Before the Oklahoma Supreme Court*

##### 1. The Arguments

Both Ada and the OWRB appealed Judge Fishel's decision. Ada briefed only those issues that most threatened its water supplies: the Constitutional right of riparians to minimum flow,<sup>235</sup> the in-basin preference recall;<sup>236</sup> and the requirement that Ada's alternative ground water sources, if any, be considered when determining its need for water.<sup>237</sup> Perhaps because Judge Fishel had quoted his articles in ways he found offensive, Professor Rarick entered the case as an attorney of record on Ada's brief.<sup>238</sup> The OWRB, on the other hand, briefed the groundwater and recall issues,<sup>239</sup> continuing to protest Judge Fishel's holding which failed to consider the needs of downstream domestic users when determining the availability of water and potential harm to other users.<sup>240</sup>

After the briefs were submitted, and after the Oklahoma Supreme Court had issued then withheld its first decision, the Oklahoma legislature enacted amendments to the water code that significantly altered the outcome of the recall and groundwater issues.<sup>241</sup>

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234. *Id.* at 11.

235. Brief of City of Ada at 2-14, *Franco-American Charolaise v. Oklahoma Water Resources Bd.*, 58 OKLA. BAR J. 1406 (May 19, 1987) (No. 59,310) [hereinafter *Franco I*], *rev'd*, 61 OKLA. BAR J. 1114 (Apr. 24, 1990), *readopted, reissued, and reh'g denied*, 855 P.2d 568, 571 (Okla. 1993); Reply Brief of City of Ada at 10-51, 61-63, *Franco I* (No. 59,310).

236. Brief of City of Ada at 15-23, *Franco I* (No. 59,310); Reply Brief of City of Ada at 55-60, *Franco I* (No. 59,310).

237. Brief of City of Ada at 24-27, *Franco I* (No. 59,310); Reply Brief of City of Ada at 52-60, *Franco I* (No. 59,310).

238. Brief of City of Ada, *Franco I* (No. 59,310).

239. Brief of the OWRB at 12-26, 26-40, *Franco I* (No. 59,310); Reply Brief of the OWRB at 2-20, *Franco I* (No. 59,310).

240. Brief of the OWRB at 41-63, *Franco I* (No. 59,310); Reply Brief of the OWRB at 41-63, *Franco I* (No. 59,310).

241. 1988 Okla. Sess. Laws, ch. 203, §§ 2, 3.

Consequently, this article will only address the parties' arguments concerning the constitutional rights of riparian landowners.

Stung by Judge Fishel's announcement that riparians have retained the right to some minimal flow, Ada sought to demonstrate that riparian rights in Oklahoma have always been associated with a right of use, not a right to a flow.<sup>242</sup> The key to Ada's strategy was showing that Oklahoma's riparian law was based on a right of reasonable use, not natural flow. The right of reasonable use was explicitly recognized as early as 1946 in *Smith v. Stanolind*.<sup>243</sup> Ada used *Smith* for its recognition that riparians have a protected interest in their use of a stream, not in its flow.<sup>244</sup> From this proposition, Ada argued that the 1963 reforms were constitutional because they preserved a riparian domestic use and gave riparians exercising non-domestic riparian reasonable uses the opportunity to convert them into vested rights in the nature of appropriation rights.<sup>245</sup> Accordingly, the reforms protected riparians who had actually been using their rights as riparian landowners for beneficial purposes in the only aspect of their rights that Oklahoma law had historically protected: use of the stream.<sup>246</sup>

Ada also attacked the three cases Judge Fishel used to build his argument for a minimal riparian flow right. First, Ada argued that despite the natural flow language used by the Oklahoma Supreme Court in *Baker v. Ellis*,<sup>247</sup> the Court's ultimate concern was to protect the plaintiff's ability to use the stream, not just have its flow.<sup>248</sup> Second, Ada interpreted *United States v. Gerlach Livestock Co.*<sup>249</sup> as requiring the government to compensate the landowner plaintiff, whose ability to engage in wasteful flood irrigation was curtailed by a federal dam project, for the value of the use of the water and not for the loss of the flow itself.<sup>250</sup> Finally, in its attempt to confine *Wasserburger v. Coffee*<sup>251</sup> to a holding that protected a flow for purposes of watering cattle,<sup>252</sup> Ada noted that this type of use was preserved as a part of the riparian domestic use right defined by the 1963 Amendments.<sup>253</sup> Ada

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242. Brief of City of Ada at 3-5, *Franco I* (No. 59,310).

243. 172 P.2d 1004-06 (Okla. 1946).

244. Brief of City of Ada at 4, *Franco I* (No. 59,310).

245. *Id.* at 5-7.

246. *Id.*

247. 292 P.2d 1037 (Okla. 1956).

248. *Id.* at 1040; Brief of City of Ada at 5, *Franco I* (No. 59,310).

249. 339 U.S. 725 (1950).

250. *Id.* at 751-52; Brief of City of Ada at 8-10, *Franco I* (No. 59,310).

251. 141 N.W.2d 738 (Neb. 1966).

252. *Id.* at 474; Brief of City of Ada at 11, *Franco I* (No. 59,310).

253. *Id.*

cited the Nebraska Supreme Court for the proposition that flows essential for actual use may deserve protection while unused flows may not.<sup>254</sup>

Having obtained from Judge Fishel a "victory" based on a partial revival of riparianism, George Braly, who initiated this case to protect his appropriation rights, submitted his Answer Brief to the Oklahoma Supreme Court in the name of riparian landowners.<sup>255</sup> Braly opened his defense of riparianism by noting that the first appropriation laws required appropriators to condemn any riparian rights their diversions harm.<sup>256</sup> These laws also contained a permissive condemnation provision which allowed persons seeking to perfect an appropriation the power to condemn water belonging to riparian owners when necessary to perfect an appropriation.<sup>257</sup> As Braly noted, the permissive condemnation provision continued in several different versions until 1972.<sup>258</sup> Failing to note that the mandatory condemnation provision did not survive long after statehood,<sup>259</sup> and admitting that the language of the permissive provision was changed to eliminate direct reference to riparian rights in favor of right to acquire "any right to use the water for beneficial purposes,"<sup>260</sup> Braly nevertheless claimed that the legislature intended later versions of the permissive provision to cover vested riparian rights.<sup>261</sup> To Braly, this protective cover was a declaration by the state that riparian landowners should "be compensated for any loss of [the] right to use water in a stream on his property."<sup>262</sup>

Braly also defended the notion that riparian landowners retained vested flow rights that cannot be taken without just compensation. After noting that riparianism was the common law in the Ada area prior to statehood, Braly relied on *Gerlach* for the proposition that all aspects of common law riparian rights form a property interest that cannot be taken without compensation, no matter how wasteful they

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254. *Id.*

255. Brief of the Riparian Landowners, *Franco I* (No. 59,310).

256. Answer Brief of the Riparian Landowners at 82, *Franco I* (No. 59,310) (citing 1897 Okla. Terr. Sess. Laws, ch. XIX, art. I, § 3).

257. *Id.* at 82-85.

258. *Id.*

259. See Reply Brief of City of Ada at 43-44, *Franco I* (No. 59,310).

260. Answer Brief of the Riparian Landowners at 83-85, *Franco I* (No. 59,310).

261. *Id.* at 85.

262. *Id.*

might be.<sup>263</sup> According to Braly, the right to the minimal flow as revived by Judge Fishel is one aspect of common law riparian rights.<sup>264</sup>

Taking Ada at its word that use, not flow, is protected, Braly then argued that the flow right Judge Fishel revived was the means of carrying out many non-consumptive instream beneficial uses.<sup>265</sup> Braly cited an OWRB rule for the proposition that the uses Judge Fishel contemplated for the minimal instream flow are deemed beneficial uses under Oklahoma law.<sup>266</sup> From this, he noted that the 1963 Amendments took these existing uses away without providing riparian landowners with compensation.<sup>267</sup>

Braly argued to the end for a revival of only the minimal flows necessary to promote a few non-consumptive instream uses rather than a restoration of riparianism in its entirety. Perhaps angry at what he viewed as a lack of generosity toward riparians by the state, Braly invited the Court to see these issues with a broader scope than did Judge Fishel.<sup>268</sup>

In its Reply Brief, Ada restated more thoroughly and elegantly many of the themes raised in its Brief in Chief. However, Ada opened up one major new front by defending the constitutionality of cutting off unused riparian rights by citing similar actions in other states which cut off these rights without their Courts pronouncing such action to be unconstitutional.<sup>269</sup> As to Braly's argument that the instream flow was for vested, not prospective uses, Ada replied that these uses are beneficial but should have been permitted during either

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263. *Id.* at 92-94.

264. *Id.* 99-100.

265. *Id.* at 95, 97-99, 106-08, 109. Such uses include fishing, swimming, water for fish and wildlife, general recreational use. *Id.*

266. *Id.* Braly cited the proposition that, "Beneficial uses include, but are not limited to municipal, industrial, agricultural, irrigation, recreation, fish and wildlife, etc." *Id.* at 109 (quoting O.W.R.B. Rule No. 125, in REGULATIONS AND MODES OF PROCEDURE, Pub. No. 107, at 5. (1982)).

267. *Id.* at 95-97. Braly also noted bitterly that California had preserved riparian landowners' rights totally, Texas continued to provide for condemnation rights, and Kansas extended to riparian landowners a right of damages if appropriators harmed their right of use. *Id.* at 96-97.

268. *Id.* at 111 n.66. "This court may see these issues with a broader scope and certainly the adoption of Judge Fishel's definition on a broader scale would, in this writer's opinion, do much to settle the law relating to what is the absolute minimum that must be left for the riparian. . . ." *Id.*

269. Reply Brief of the City of Ada at 25-35, *Franco I* (No. 59,310) (citing *State ex. rel Emery v. Knapp*, 207 P.2d 440 (Kan. 1949); *Baeth v. Hoisveen*, 157 N.W.2d 728 (N.D. 1968); *Belle Fourche Irrigation District v. Smiley*, 204 N.W.2d 105 (S.D. 1973); *Brown v. Chase*, 60 P. 403 (Wash. 1900); *In re Adjudication of the Upper Guadalupe Segment of the Upper Guadalupe River Basin*, 642 S.W.2d 446 (Tex. 1982); *In Re Willow Creek*, 144 P. 505 (Ore. 1914)).

the vested rights proceedings established by the 1963 Amendments or later stream appropriation proceedings.<sup>270</sup>

## 2. Round One

On May 19, 1987, the Oklahoma Supreme Court issued a six to three decision per an opinion written by Justice Kauger that gave both sides partial victories.<sup>271</sup> The Court held that:

- (1) Ada's application was for an out-of-basin use subject to recall if needed by in-basin users;<sup>272</sup>
- (2) the OWRB had to consider the extent of Ada's groundwater rights, if any, in determining if Ada had a need for more stream water;<sup>273</sup> and
- (3) the OWRB had to consider the needs of all users with superior rights, including domestic users, vested riparian landowners, and prior appropriators, located on the Clear Boggy Creek in places reachable by water from Byrds Mill Spring.<sup>274</sup>

However, the Court finessed the constitutional issue with a discussion so limited and indirect that it was difficult to find. Basically, the Court held that the only vested riparian uses entitled to water were the non-domestic riparian uses that had been preserved through the vested rights proceedings established by the 1963 Amendments.<sup>275</sup>

This opinion was soon withdrawn pursuant to petitions for re-hearing and much of its reasoning was affected by 1988 statutory amendments. However, if the opinion had been finalized, it would have provided George Braly nearly all the relief he originally requested as an appropriator, denied him the resurrected riparian rights he won from Judge Fishel, and preserved the unitary water rights system created by the 1963 Water Code Amendments.

## 3. Final Decision

In 1988, the Legislature modified the Water Code which significantly impacted *Franco*. Section 60 of the Property Code was changed to inform riparian landowners more specifically that the duty to release the natural flow of stream water entering their property could be

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270. *Id.* at 61-63.

271. *Franco I* at 1406 (No. 59,310).

272. *Id.* at 1409-10, 1412-13 n.6-23.

273. *Id.* at 1408-09, 1411-12 n.2-5.

274. *Id.* at 1410-11, 1413-14 n.24-32.

275. *Id.* at 1407, 1411, 1414 n.30-32.

reduced by amounts needed for "domestic uses and for valid appropriations made pursuant to Title 82."<sup>276</sup> A new subsection was also added to inform riparian landowners that, "All rights to the use of water in a definite stream in this state are governed by this section and other law in Title 82 of the Oklahoma Statutes, *which laws are exclusive and supersede the common law.*"<sup>277</sup> These changes were complemented by a new subsection to Section 105.2 of the Water Code, which states:

From and after June 10, 1963, the only riparian rights to the use of water in a definite stream, except water taken for domestic use, are those which have been adjudicated and recognized as vested through the proceedings under 82 O.S. Supp. 1963, Sections 5 and 6, orders of the Oklahoma Water Resources Board entered thereunder which became final, and those decreed to exist in the Spavinaw, Grand, North Canadian, and Blue and North Boggy adjudications, all to the extent such rights have not been lost, in whole or in part, due to nonuse, forfeiture or abandonment.<sup>278</sup>

Taken together, these amendments appeared to be legislative endorsements of Ada's position and Judge Kauger's opinion concerning which non-domestic riparian rights vested in Oklahoma after the 1963 Water Code Amendments. In the hands of Justice Opala, however, they were held to have quite the opposite effect.

The Oklahoma Legislature also addressed *Franco's* recall and groundwater issues. It amended the standards used by the OWRB to judge the merits of stream water appropriation applications.<sup>279</sup> With respect to determining the needs of the applicant, the Legislature added a sentence stating:

In making this determination, the Board shall consider the availability of all stream water sources and such other relevant matters as the Board deems appropriate, and *may consider the availability of groundwater as an alternative source.*<sup>280</sup>

The in-basin preference provision was also amended so that no out-of-basin appropriation granted prior to any five year in-basin needs assessment could be recalled to satisfy in-basin needs.<sup>281</sup> Moreover, the

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276. 1988 Okla. Sess. Laws, ch. 203, § 1 (amending OKLA. STAT. tit. 60 § 60(A)).

277. OKLA. STAT. tit. 60, § 60(B) (1991) (emphasis added).

278. OKLA. STAT. tit. 82, § 105(2)(D) (1991).

279. OKLA. STAT. tit. 82, § 105.12(A)(2) (1991).

280. OKLA. STAT., tit. 82, § 105.12 A.2. (1991) (emphasis added).

281. OKLA. STAT. tit. 82, § 105.12(A)(4)(B)-(C) (1991).

preference only applied when the Board was considering contemporaneous in-basin and out-of-basin applications.<sup>282</sup>

Two years later, on April 24, 1990, the Court handed down its second *Franco* decision, a five to four opinion written by Justice Opala.<sup>283</sup> As was the first opinion, it was promptly withdrawn pursuant to a petition for rehearing.<sup>284</sup> This time, however, the Court finalized the decision without further changes, reissuing the opinion on April 13, 1993.<sup>285</sup>

The Court sustained Judge Fishel's findings of fact in all respects affirmed his rulings on the non-constitutional issues except those addressed by the legislature 1988.<sup>286</sup> Thus, the Court directed the OWRB to consider the needs of all downstream users with superior rights when assessing the availability of water.<sup>287</sup> These users were to include the last riparian landowner and last appropriator on the stream as well as domestic users below the junction of the Buck and Boggy Creeks and above the junction of the Clear Boggy and Muddy Boggy Creeks.<sup>288</sup>

Since the Legislature said the 1983 amendments were clarifying rather than amending, the Court believed they should be applied retroactively and reversed its previous holdings concerning the groundwater and recall issues.<sup>289</sup> It noted that not requiring groundwater sources to be considered when determining the needs of an applicant for stream water was consistent with two major Oklahoma water policies: (1) "recognizing groundwater as a limited and dwindling supply which should not be depleted needlessly;"<sup>290</sup> and (2) "preventing the escape of surplus stream water into an adjacent state."<sup>291</sup> While implementing legislative will directly on the recall issue, the Court

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282. *Id.*

283. *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd.*, 61 OKLA. BAR J. 1114 (Apr. 24, 1990) (No. 59,310), *rev'g* 58 OKLA. BAR J. 1406 (May 19, 1987), *readopted, reissued, and reh'g denied*, 855 P.2d 568 (Okla. 1993).

284. *Id.*

285. *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd.*, 855 P.2d 568 (Okla. 1993), *readopting, reissuing, and denying reh'g*, 61 OKLA. BAR J. 1114 (Apr. 24, 1990), *rev'g*, 58 OKLA. BAR J. 1406 (May 19, 1987).

286. *Id.* at 569-70.

287. *Id.* at 578-79.

288. *Id.*

289. *Id.* at 579-80, 580-82.

290. *Id.* at 580 (citing *Okla. Water Resources Bd. v. Texas County Irrigation and Water Resource Ass'n*, 711 P.2d 38, 56 (Okla. 1984) (Kauger, J., concurring)).

291. *Id.*; *See also* OKLA. STAT. tit. 82, § 1086.1 A.(3) (1991).



opined that the outcome was not changed by the amendments.<sup>292</sup> Apparently, the Court believed that a recall of water under an existing appropriation would unconstitutionally violate the appropriator's common law right to not have the right to take water reduced except under the appropriation doctrine's "use-it-or-lose-it" and "first in right, first in time" principles.<sup>293</sup>

Turning to the Constitutional issue, the Court carefully described the nature of the common law riparian right.<sup>294</sup> It noted that the common law riparian right was the right of owners of land abutting a stream to use the stream's flow for reasonable uses on their riparian lands; a right that is neither constant nor subject to judicial quantification.<sup>295</sup> The Court also noted that the reasonable use doctrine directly contravened the natural flow rationale on which Judge Fishel's minimum flow holding was based.<sup>296</sup> Accordingly, the Court reversed Judge Fishel's minimum flow holding.<sup>297</sup>

The Court then examined whether the legislature could strip riparian landowners of the right to initiate prospective uses without securing an appropriation permit. Defining a vested right as including the power to perform certain acts, the Court observed that "the common-law riparian right to use stream water. . .has been long recognized. . .as a private property right."<sup>298</sup> While recognizing that the state may validly exercise its police powers to restrict the use of property to promote public welfare, the Court found that the 1963 Amendments took, rather than restricted, the riparian landowners' rights to use stream water.<sup>299</sup> Specifically, the Court found that limiting riparian landowners to initiating domestic uses or obtaining appropriations negates important aspects of the common-law riparian right, including:

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292. *Franco*, 855 P.2d at 580.

293. This brings to mind Professor Rarick's comments concerning his study of *Gates v. Settlers' Milling, Canal & Reservoir Co.*, 91 P. 856 (Okla. 1907). *Gates* was the first appropriation case heard by the Court after the 1905 Appropriation Amendments were made. *Id.* Observing that it is "the most extensive judicial examination of the appropriation principles existing in Oklahoma" (at the time he wrote the article), he then stated: "The question which haunts me each time I examine the case is: To what extent was it a recognition of the existence of non-statutory appropriation? More pertinently, when, if ever did non-statutory appropriation come to an end in Oklahoma." Rarick, *Oklahoma Water Law, Stream and Surface in the Pre-1963 Period*, 22 OKLA. L. REV. 1, 29 (1969). This is an excellent and chilling question, given Justice Opala's seemingly inexhaustible enthusiasm for preserving common law rights.

294. *Franco*, 855 P.2d at 573-76.

295. *Id.* at 573-74.

296. *See id.* at 572, 578 n.56.

297. *See id.* at 575-76.

298. *Id.* at 576.

299. *Id.* at 577.

(1) the right to initiate a use at any time as long as it does not harm other riparian uses; and (2) the right to have the validity of riparian uses judged by their reasonableness rather than their priority in time.<sup>300</sup>

Moreover, a riparian landowner seeking an appropriation permit will either be rejected, if prior users have claimed all the water, or will obtain a permit entitling him or her to have water only if senior appropriators are fully satisfied.<sup>301</sup> Either result is contrary to the nature of the common-law riparian right.<sup>302</sup>

Finally, the Court expressed serious doubts as to whether the 1963 Amendments fairly put riparian landowners on notice that their water use rights were being curtailed and could be preserved only by participating in a vested rights proceeding.<sup>303</sup> The Court was concerned that until the 1988 Amendments were enacted, long after the vested rights proceedings had ended, the statutes never directly stated that the common-law riparian right was being reduced.<sup>304</sup>

Thus, the Court gave George Braly what he never requested, and in a sense what is not in his best interest as an appropriator: the Court revived the full-blooded common-law riparian water right.<sup>305</sup> As a consequence, the Court also made Oklahoma a dual rights state once again.

Recognizing the immense coordination problems presented by a dual system comprised of incompatible doctrines, the Court proceeded to do what it had just prohibited the Legislature from doing: attempt to expressly reconcile riparianism and the appropriation doctrine.<sup>306</sup> Specifically, the Court promulgated the following rules:

- (1) the reasonableness of a prospective riparian use shall be judged by its merits as compared to those of other uses, existing or prospective, riparian or appropriative;<sup>307</sup>
- (2) when a new reasonable riparian use commences at a time when there is not enough water available to cover it and all existing uses, water will be made available at the expense of junior appropriators;<sup>308</sup> and

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300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.* at 578.

308. *Id.* at 582.

- (3) in times of shortage, all riparian uses have priority over all appropriative uses.<sup>309</sup>

Surprisingly, the Court did revoke one option riparian landowners had always enjoyed in theory, if not in fact, prior to the 1963 Amendments: the right to secure a parallel appropriation covering an existing riparian use was not extended.<sup>310</sup> This was accomplished by ruling that a riparian landowner's riparian water rights will be extinguished if he or she perfects an appropriation right.<sup>311</sup> In revoking this right, the Court commented that this would end the riparian landowners' nearly century old option "to have their cake and eat it too."<sup>312</sup>

Having decided all constitutional, statutory, and case law issues, the Court remanded the case back to the trial court with instructions to determine whether any claimed riparian uses were reasonable by comparing the merits of other uses, existing appropriative uses, and Ada's proposed appropriative use.<sup>313</sup> The Court also directed the OWRB to use the trial court's reasonableness determinations in deciding whether water was available to satisfy Ada's appropriation application and whether granting Ada's new appropriation would interfere with existing uses.<sup>314</sup> Finally, the Court instructed the OWRB that it could not consider any outstanding groundwater rights Ada might possess in determining Ada's need for water,<sup>315</sup> but that it would have to subordinate Ada's request for water to any contemporaneous application by an in-basin user if a five-year projection of in-basin needs revealed that there would not be enough water to accommodate both.<sup>316</sup>

#### IV. CRITIQUE

*Franco* obviously is a very important case since it affects Oklahoma's ability to use a natural resource critical to a thriving economy and to civilization itself. Unfortunately, *Franco* is terribly deficient when evaluated in terms of whether the decision: (1) provided the state with the means for handling well difficult water policy

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309. *Id.* at 571.

310. *Id.* at 580.

311. *Id.*

312. *Id.* at 580.

313. *Id.* at 578.

314. *Id.* at 578-79.

315. *Id.* at 578, 580.

316. *Id.* at 578, 581-82.

choices; (2) involved fundamental rights of a party that could be vindicated only by the Court overturning legislative policy choices; and (3) produced a stable holding in terms of the strength of the Court's commitment, the soundness of Court's legal justifications, and the likelihood that those most affected, including government officials who must implement it, will accept or subvert it.

A. *Franco Leaves Oklahoma with a Chaotic Water Rights Regime*

Any critique of *Franco* starts with the observation that the decision brings back to Oklahoma the chaos inherent in a dual water rights system that the Legislature sought to eliminate thirty years ago. Moreover, by declaring that any legislative alteration of common law riparian rights constitutes a taking, the Court excised any means for Oklahoma to end the chaos other than by condemning every riparian landowner's unexercised common law riparian right. Naturally, extinguishing all unexercised common law riparian water rights through condemnation is likely to be expensive, time consuming and involve innumerable judicial proceedings.

In the meantime, all Oklahoma water uses other than domestic riparian uses have been put at risk. Anytime a water source does not contain enough water to satisfy all prospective and existing water uses, and at least when riparian non-domestic use is involved, expensive judicial proceedings will be triggered to determine whether prospective and existing riparian uses are reasonable by comparative evaluation of their merits against each other and against all prospective and existing appropriative uses. All riparian uses judged to be reasonable will have priority over all appropriation uses. However, riparian uses once deemed reasonable may be declared unreasonable, causing the unlucky riparians to suffer uncompensated losses of investments made in reliance on their riparian rights.<sup>317</sup>

The resulting uncertainties are likely to discourage new investments that depend upon availability of secure water rights. On the other hand, they provide incentives for unscrupulous entrepreneurs to threaten the initiation of large new water uses as a means of getting existing water users to "buy" them out in order to avoid forced participation in reasonableness determinations.

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317. Thus, *Franco* may provide more protection of investments in Riparian land to Riparians that have yet to use water than those who might have made investments around non-domestic uses of water in reliance on their riparian rights. Note also that *Franco* makes existing riparian users more insecure than they would have been at common law, because at common law riparian uses are evaluated only against each other in determining their reasonableness.

*Franco* also diminishes the OWRB's jurisdiction to regulate new uses. Obviously, the Board will have no jurisdiction over the legality of new uses initiated by riparian landowners, since new riparian uses are not subject to any scrutiny other than that provided by judicial reasonableness proceedings. However, the Board will also lose control over new uses initiated by prospective appropriators on a water source already supporting existing riparian uses when the availability of water will be a close issue of fact. In such cases the issue of water availability for the new appropriator cannot be decided without prior judicial proceedings to determine if the existing riparian uses are still reasonable. Worse yet, stripping the OWRB of much of its jurisdiction over new uses takes complex decision-making away from an expert body and thrusts it upon courts of general jurisdiction staffed with judges who are unlikely to possess any expertise in the technical and legal aspects of water resource allocation issues.

B. *Franco Could Have Been Resolved Without Any Constitutional Holding*

The Bralys asserted the interests of senior appropriators whose existence had been ignored by the OWRB in determining whether Ada's application could be satisfied by the water available without interfering with the needs of existing riparian domestic users.<sup>318</sup> The record of the OWRB proceedings clearly indicates that the OWRB arbitrarily refused to consider the needs of appropriators past a certain point downstream from Byrds Mill Spring even though water from the spring would reach the appropriators absent Ada diverting it.<sup>319</sup> Water flows in Byrds Mill Spring and the streams it feeds are subject to sharp decline in some, but not most, summers.<sup>320</sup>

Under these circumstances, the Bralys' interests could have been fully satisfied by rulings on the non-constitutional issues presented in this case, especially with respect to instructing the OWRB to consider the needs of appropriators further downstream in judging the merits of Ada's appropriation application. The OWRB also had the option of granting Ada a seasonal water permit that would not permit it to appropriate water during critical summer months if the risks of summer shortages were so frequent as to be deemed a pattern of the

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318. *Franco*, 855 P.2d at 4; see *supra* notes 133, 159-61, 187-88 and accompanying text.

319. *Franco*, 855 P.2d at 4; see *supra* notes 148-151, 187-88 and accompanying text.

320. See *supra* notes 148-151 and accompanying text.

streams involved.<sup>321</sup> This option certainly would have provided the Bralys with stream flows more than adequate to protect their interests.

Thus, it was not necessary for the trial court or the Supreme Court to entertain any riparian rights issue. In this respect, Justice Kauger's 1987 opinion, possibly altered in light of the 1988 Water Code Amendments, and Justice Lavender's dissent in the final *Franco* decision, were the models of proper judicial response to this matter.

Riparian issues could have been deferred to the day when a riparian landowner without appropriation rights attempted to initiate a non-domestic riparian water use. Such a riparian may indeed have a legitimate constitutional issue regarding whether riparian landowners received proper notice of the vested rights proceedings authorized by the 1963 Water Code Amendments for purposes of converting existing riparian uses into vested riparian rights in the nature of appropriative rights.<sup>322</sup> As previously noted, the Amendments did not provide a method of notice reasonably calculated to provide riparian landowners making current uses of state water with actual notice of the vested rights proceedings.<sup>323</sup> However, this problem could have been cured by simply requiring the state to hold new vested rights proceedings after providing riparian landowners with actual notice of them.<sup>324</sup>

### C. *The Franco Holding is Extremely Fragile and Unlikely to Last*

It is a gross understatement to say that the Court did not make a strong commitment to its holding in *Franco*. It took the Court an unconscionable eleven years to release a final decision.<sup>325</sup> The Court issued two distinctly different decisions concerning the riparian constitutional issues and conducted two lengthy rehearings.<sup>326</sup> Its final decision was supported by only five Justices, down from the six Justices who at least supported the result of, if not the justifications

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321. OKLA. STAT. tit. 82, §§ 105.1(D), 105.13 (1981). This was even suggested in an indirect way in Justice Opala's opinion. *Franco*, 855 P.2d at 582.

322. *See id.* at 593 n.56 (Lavender, J., dissenting).

323. *See supra* notes 91-94 and accompanying text.

324. *Franco*, 855 P.2d at 593 n.56 (Lavender, J., dissenting).

325. Calculated from the date of the OWRB hearings in 1982 to the date of the final *Franco* ruling. *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd.*, 855 P.2d 568 (Okla. 1993), *readopting, reissuing, and denying reh'g*, 61 OKLA. BAR J. 1114 (Apr. 24, 1990), *rev'g*, 58 OKLA. BAR J. 1406 (May 19, 1987).

326. *Id.*

for, the 1987 decision.<sup>327</sup> Justice Simms stayed on the sidelines because of an unexplained self-disqualification, so the Court operated with only eight of its members fully participating.<sup>328</sup>

The Court's weak support for its final decision is attributable to its unsound holding that any legislative alteration of common law riparian rights constitutes a taking.<sup>329</sup> This unsoundness is underscored by the fact that *Franco* placed Oklahoma with only Nebraska among the dual rights states that have come to such a conclusion.<sup>330</sup> The highest courts of Kansas, North Dakota, Oregon, South Dakota, Texas and Washington all concluded that unexercised riparian rights may be extinguished and riparian landowners may be subjected to a unitary water rights system based on the appropriation system.<sup>331</sup> In addition, the California Supreme Court has held that prospective riparian rights are subject to review during stream-wide adjudications and can result in prospective riparian rights being quantified, limited, and given very low priorities relative to existing uses in order to provide certainty to present and future users.<sup>332</sup> Furthermore, dicta from various United States Supreme Court decisions reinforce the notion that state legislatures have the right to change the rules as to how rights to use public water resources may be obtained and maintained.<sup>333</sup>

The reasoning supporting this "majority" view was laid out clearly in Justice Lavender's dissent on riparian rights.<sup>334</sup> The logical starting point for this analysis is Oklahoma's Water Rights statutes which operate on the public waters of the state, which are owned by

327. *Id.*

328. *Id.*

329. *Id.*

330. 1 WATERS AND WATER RIGHTS, *supra* note 6, § 8.03(b)(1).

331. *F. Arthur Stone & Sons v. Gibson*, 630 P.2d 1164, 1173 (Kan. 1981); *Williams v. City of Wichita*, 374 P.2d 578, 589-90, 593-95 (Kan. 1962); *State v. Knapp*, 207 P.2d 440, 445, 447-48 (Kan. 1949); *Baeth v. Hoisveen*, 157 N.W.2d 728, 731-33 (N.D. 1968); *In re Hood*, 227 P. 1065, 1085-87 (Or. 1924); *In re Willow Creek*, 144 P. 505, 514, 517 (Or. 1914); *Belle Fourche Irrigation District v. Smiley (II)*, 204 N.W.2d 105, 107 (S.D. 1973), *rev'g*, 176 N.W.2d 239, 245 (S.D. 1970); *In re Adjudication of Water Rights (Medina)*, 670 S.W.2d 250, 252, 254-55 (Tex. 1984); *In re Adjudication of Water Rights (Guadalupe)*, 642 S.W.2d 438, 444-46 (Tex. 1982); *Matter of Deadman Creek Drainage Basin*, 694 P.2d 1071, 1072, 1076-77 (Wash. 1985); *Brown v. Chase*, 217 P. 23, 24, 26-27 (Wash. 1923).

332. *In re Waters of Long Valley Creek Stream System*, 599 P.2d 656, 663-69 (Cal. 1979).

333. *See California v. United States*, 438 U.S. 645, 662-63 (1977); *see also Kansas v. Colorado*, 206 U.S. 46, 94 (1907); *see also United States v. Rio Grande*, 174 U.S. 690, 702-03 (1899). However, the U.S. Supreme Court avoided the issue in the only case where it was presented directly. *California Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 153, 165 (1935).

334. *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd.*, 855 P.2d 568, 583 (Okla. 1993) (Lavender, J., dissenting), *readopting, reissuing, and denying reh'g*, 61 OKLA. BAR J. 1114 (Apr. 24, 1990), *rev'g*, 58 OKLA. BAR J. 1406 (May 19, 1987).

the state for the benefit of its citizens.<sup>335</sup> States possess plenary power to determine rules by which rights to use public waters may be obtained and maintained.<sup>336</sup> These rules may differ from those at common-law and may be changed as the legislature deems necessary to protect the public interest in having water resources fairly and efficiently used.<sup>337</sup> Given that individual users do not own the water sources in which they obtain a right of use, it is only when a right of use is obtained under state water laws and ripens into actual use that a property interest is vested that cannot be taken without just compensation.<sup>338</sup> Even then, the state may declare a forfeiture of a vested right should it become dormant through lack of use.<sup>339</sup>

The more formal takings analysis provided by cases interpreting takings under the 5th and 14th Amendments of the United States Constitution further reveals how *Franco's* takings holding is truly bankrupt. In *Pennsylvania Coal Co. v. Mahon*,<sup>340</sup> the U.S. Supreme Court recognized for the first time that regulation of property could effect a taking, stating that:

Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most, if not all cases there must be an exercise of eminent domain and compensation to sustain the act.<sup>341</sup>

The magnitude of diminution necessary to invalidate a law on its face, as was done in this case, is a regulatory denial of "all economically beneficial or productive use" of the property.<sup>342</sup> Indeed, government regulation to prohibit a harm rising to the level of a common law nuisance will be sustained even if it strips the private owner's property of

335. *Id.*

336. *Id.* at 584, 589-91; *accord* *Baeth v. Hoisveen*, 157 N.W.2d 728, 733 (N.D. 1968); *accord In re Adjudication of Water Rights (Guadalupe)*, 642 S.W.2d 438, 444 (Tex. 1982).

337. *Franco*, 855 P.2d at 584, 588-91; *accord* *Williams v. City of Wichita*, 374 P.2d 578, 589, 593 (Kan. 1962); *accord In re Hood*, 227 P. 1065, 1086-87 (Ore. 1924); *accord* *Matter of Deadman Creek Drainage Basin*, 694 P.2d 1071, 1077 (Wash. 1985).

338. *Franco*, 855 P.2d at 584; *see supra* note 322.

339. *Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982); *In re Adjudication of Water Rights (Guadalupe)*, 642 S.W.2d 438, 444-46 (Tex. 1982).

340. 260 U.S. 393 (1922).

341. *Id.* at 413.

342. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992).



all value.<sup>343</sup> Property often comes in the form of a bundle of entitlements, but "the destruction of one strand of the bundle is not viewed as a taking because the aggregate must be viewed in its entirety."<sup>344</sup>

Oklahoma's 1963 Water Law reforms stripped from owners of riparian lands an entitlement to initiate at any time new water uses free from quantification, temporal priority, and adjudication as to their merits other than reasonableness inquiries by state courts. Although this may have somewhat diminished the value of riparian lands, it did not deny riparian landowners all "economically beneficial or productive use" of their riparian lands.<sup>345</sup> This was ignored by the *Franco* majority, which treated the riparian right to use water as the sole property interest affected rather than the riparian land as a whole.<sup>346</sup> Thus, the *Franco* majority effectively found that the destruction of a single strand of the bundle of rights inherent in riparian landownership constitutes a taking.

Factually, however, it is difficult to sustain the *Franco* majority's view that the riparian landowner's rights to use water was destroyed. Riparians are still entitled to take water at any time for domestic uses free from quantification, temporal priority, or administrative regulation.<sup>347</sup> They are also free to acquire water for non-domestic use on their riparian land, albeit under different rules than those provided by the Riparian Doctrine.<sup>348</sup> Therefore, the 1963 Water Law reforms did not completely destroy even a single strand of the bundle of rights inherent in riparian land ownership and riparian landowners still receive fair opportunities to acquire water for use upon their riparian lands.<sup>349</sup>

In *Pennsylvania Coal*, Justice Holmes suggested that in making a takings determination courts should consider whether the regulatory restriction "secured an average reciprocity of advantage," by which he meant that the Court was to determine whether the restriction gave both the public and the person restricted some benefits.<sup>350</sup> Much

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343. *Id.* at 2899-2901; see *Pennsylvania Central Transp. Co. v. New York City*, 438 U.S. 104, 125-26 (1978); see also *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) (upholding a Kansas law outlawing the manufacture and sale of intoxicating liquors against a takings allegation).

344. *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497 (1987); accord, *Pennsylvania Central Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978).

345. *Id.* at 583, 589, 594.

346. See *supra* notes 292-96 and accompanying text.

347. *Supra* note 86 and accompanying text.

348. Their ability to acquire and maintain water rights will depend upon the rules of Appropriation. See *supra* notes 104-08 and accompanying text.

349. See *supra* note 86 and accompanying text.

350. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 414 (1922).

later, the Court spoke of the reciprocity of advantage by noting that, "While each of us is burdened somewhat by [government] restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. . . . These restrictions are properly treated as part of the burden of common citizenship."<sup>351</sup> Given that the appropriation doctrine provides water users with fixed entitlements of known dimensions and secure priorities, it is easy to make the case that riparian land owners received an average reciprocity of advantage from the extinguishment of the riparian doctrine in favor of the appropriation doctrine.

In short, Oklahoma's 1963 Water Rights Reforms neither deprived riparian landowners of all beneficial uses of their riparian lands nor destroyed their rights to use the waters owned by the State. All water users, including riparian landowners, received a reciprocity of advantage from the 1963 Water Law reforms. Therefore, it was improper for the Court to invalidate the 1963 Water Law Reforms on their face as effecting a taking of property interests for which compensation must be paid.

*Franco's* weakness and unsoundness certainly has not been lost on the City of Ada, the OWRB and the Legislature, each of which has taken action hostile to *Franco* since April, 1993.<sup>352</sup> As if *Franco* never occurred, the City of Ada refiled its original appropriation application with the OWRB and the OWRB was prepared to act upon it until George Braly secured a writ of prohibition from the Coal County District Court.<sup>353</sup> Insecure as to his ability to make the reasonableness determinations called for by *Franco*, in the same writ the district judge remanded the proceedings back to the OWRB, while instructing it to use a hearing examiner as a master to make findings of fact and recommended conclusions of law on an evaluation of Ada's appropriation application using the standards laid down in *Franco*.<sup>354</sup>

Meanwhile, late in its 1993 session the Legislature enacted a new statute disavowing *Franco's* constitutional holding by stating that the legislature had abolished non-domestic riparian rights and created a unified water rights system.<sup>355</sup> In a pre-hearing conference before the

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351. *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491 (1987).

352. *See infra* notes 353-61 and accompanying text.

353. Order of February 23, 1994, *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd.*, No. 81-23 (Dist. Ct., Coal County 1994) (granting Writ of Prohibition and Remanding Proceedings to the OWRB for the Hearings on the Appropriation Application of the City of Ada in Light of the *Franco* Decision).

354. *Id.*

355. OKLA. STAT. tit. 82, § 105.1(A) (Supp. 1994).

hearing examiner, Ada invoked this statute, contending that it abolished riparian rights.<sup>356</sup> George Braly protested that the statute was unconstitutional because it directly violated the holding in *Franco*.<sup>357</sup> In reply, the City invoked the case of *Dow Jones & Co., Inc. v. State ex rel. Oklahoma Tax Commission*<sup>358</sup> for the proposition that Oklahoma administrative agencies may not question the constitutionality of state statutes.<sup>359</sup> Relying on *Dow*, the hearing examiner effectively terminated the OWRB proceedings, remanding the matter back to the District Court of Coal County.<sup>360</sup> That same day, the City of Ada filed in the District Court of Coal County a Motion for Briefing Schedule and Hearing on the Hearing Examiner's Report. Should such a hearing take place, it will undoubtedly revolve around the issue of whether the legislature's new attempt to abolish riparian rights is unconstitutional under *Franco*.<sup>361</sup>

## V. CONCLUSION

Fourteen years after the events that spawned the *Franco* case, things are back pretty much where they began. Ada has no additional appropriation rights in Byrds Mill Springs and downstream users still do not have any protection for their superior rights. The legislature has purported to abolish riparian rights and the OWRB refuses to recognize them. An appropriator whose interests could be vindicated by non-constitutional means is still doggedly pursuing the matter because neither the City of Ada nor the OWRB will work out a settlement that avoids the pitfalls of the *Franco* holding.

What has changed is the prestige of the Court. Its holding in *Franco* has not been accepted by either the legislative or executive branches of government in Oklahoma. Indeed, the District Court of Coal County has exhibited extreme discomfort in trying to carry out the judicial duties required under *Franco*. The *Franco* decision has subjected Oklahoma water law to chaos and created a true constitutional crisis which is unlikely to disappear anytime soon. The Legislature seems willing to enact legislation year after year that rejects any Supreme Court decision attempting to revive riparian rights.

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356. Hearing Examiner's Prehearing Findings of Fact, Conclusions of Law and Report to the District Court at 4-5, O.W.R.B. (Aug. 2, 1994).

357. *Id.*

358. 787 P.2d 843 (Okla. 1990).

359. *Id.*

360. *Id.*

361. Telephone Interview with George Braly (August 8, 1994).

Only one thing is clear: *Franco* will be reconsidered by the Oklahoma Supreme Court before the rights of the parties involved will be settled. Unfortunately, this reconsideration will take place without three key players to this drama, for Judge Fishel, Mack Braly, and Professor Rarick have gone to their graves without knowing whose visions of a just and efficient water allocation system will prevail. Given the stubbornness of the players and the penchant of the Supreme Court for delay in this matter, it is unclear whether this drama will close, or whether the water resource allocation chaos facing Oklahoma will be finally put to rest, before another generation passes away.<sup>362</sup>

Yet, the Oklahoma Supreme Court and the Legislature have the means to end this story in a way that restores to Oklahoma an effective and fair water rights system. Should the Court have *Franco* before it again, it should proceed quickly to reverse its 1990 constitutional holdings and direct the OWRB to conduct hearings on Ada's applications that give due consideration to all water rights that might be negatively affected by Ada's proposed new appropriation from Byrds Mill Spring. In its next session, the Legislature should re-enact the 1963 Water Rights Reforms with two major modifications: first, a directive that new vested rights proceedings be held under circumstances providing riparian landowners with actual notice and an opportunity to establish vested rights with a fair priority date based on actual water uses by them or their grantors; and second, provisions making it clear that certain non-consumptive minimum flow uses on perpetually flowing streams may be considered domestic riparian uses. By so doing, the Legislature will remove any due process objections to the original implementation of the 1963 Water Rights Reforms and preserve for Oklahoma important aesthetic and recreational values associated with maintaining minimum flows in perpetually flowing streams.

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362. The author of this article has followed this case since 1980, when he was a vigorous lad in his early thirties. He is now a more cynical and time worn middle-ager about to pass into his fifties. He fervently hopes this never-ending story does have a happy ending while he is still around to see it.

