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The Dual-System of Water Rights in Nebraska

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Comment

THE DUAL-SYSTEM OF WATER RIGHTS IN NEBRASKA

I. INTRODUCTION

In Nebraska, rights to waters in streams and lakes have been regulated through a dual-system which utilizes both the riparian doctrine of the common law and the statutory scheme of appropriative rights. Although the two doctrines are divergent in many instances, the judiciary has recognized this and attempted to maintain a balance between them. Despite these efforts, however, inconsistent principles of law developed over the years until finally in *Wasserburger v. Coffee*[1] the Nebraska Supreme Court attempted to reconcile the relative status of riparians and appropriators. In doing so the court prescribed a flexible method of equitable balance rather than a static formula of distribution. This article will give a brief introduction to some of the problems faced in distributing water rights under this dual-system, and will attempt to determine what effect *Wasserburger* may have on these rights that are so intimately linked with the prosperity of the state and all of its citizens.

II. COMMON-LAW RIPARIAN RIGHTS

At common law, those owning land contiguous to a stream or lake had certain rights in the use of the water flowing through or past their land. A right to the entire natural flow of a stream is valuable and beneficial, but an economy cannot profitably permit such a right unless there is an abundance of water.[2] For this reason,

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[1] 180 Neb. 149, 141 N.W.2d 738 (1966), *modified*, 180 Neb. 569, 144 N.W.2d 416 (1966).

[2] For example, the California Constitution expressly provides: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. . . ." CAL. CONST. art. XIV, § 3. The California court has upheld the constitutionality of this section in enforcing the doctrine of reasonable use. Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal. 2d 489, 45 P.2d 972 (1935); Peabody v. City of Vallejo, 2 Cal. 2d 351, 40 P.2d 486 (1936); Chow v. Santa Barbara, 217 Cal. 673, 22 P.2d 5 (1933).

the "natural flow" doctrine of the riparian system was adopted only in humid areas. But even with an abundance of water it was necessary to assure a supply of water for the basic sustenance of life. Therefore, domestic uses, which include water for drinking, cooking and watering livestock,[3] were considered paramount, and a riparian could divert all the water needed for such uses. As to all other uses, a riparian's rights were controlled by the doctrine of "reasonable use." Under this doctrine "the quantity taken by an individual riparian must be reasonable in relation to the needs of all other riparians on the stream."[4] "The riparian proprietor does not own the water. He has the right only to enjoy the advantage of a reasonable use of the stream as it flows by his land, subject to a like right belonging to all other riparian proprietors."[5]

Ownership of the waterflow of the stream remains with the state; the riparian obtains only a use of the flow. However, the Nebraska Supreme Court has recognized this usufructuary right as vested property:

> A riparian's right to the use of the flow of the stream passing through or by his land is a right inseparably annexed to the soil, not as an easement or appurtenance, but as a part and parcel of the land; such right being a property right, and entitled to protection as such, the same as private property rights generally.[6]

Thus, a riparian holds a right that can be destroyed only through the process of eminent domain, which necessitates that the taking be for a public purpose and just compensation be paid. The riparian can, of course, by his own act sever the water from the land.[7]

This system of reasonable use became the common law of Nebraska. The court in *Wasserburger* again affirmed the fact that riparian rights still exist in the state, and that, although they must be determined in relation to competing appropriative rights, the doctrine of reasonable use remains as one-half of the dual-system of water rights.

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[3] *See* Doyle, *Water Rights in Nebraska*, 20 NEB. L. REV. 1, 14 (1941).

[4] Yeutter, *A Legal-Economic Critique of Nebraska Watercourse Law*, 44 NEB. L. REV. 11, 12 (1965). *See also* Doyle, *Water Rights in Nebraska*, 20 NEB. L. REV. 1, 15 (1941); Meng v. Coffee, 67 Neb. 500, 504, 93 N.W. 713, 714 (1903).

[5] Crawford Co. v. Hathaway, 67 Neb. 325, 352, 93 N.W. 781, 790 (1903).

[6] City of Fairbury v. Fairbury Mill & Elevator Co., 123 Neb. 588, 592, 243 N.W. 774, 777 (1932).

[7] *See* text following note 40 *infra*.

III. APPROPRIATIVE RIGHTS

In 1877 the Nebraska legislature gave corporations formed for the purpose of irrigation or use of waterpower the authority to acquire rights-of-way for canals, dams and reservoirs through the exercise of eminent domain.[8] The Nebraska Supreme Court held the statute impliedly gave individuals a right to acquire vested interests in the use of water by construction of diversion works and application of the water to a beneficial use.[9] It was uncertain, however, whether an individual appropriator could condemn the water rights of others in the way public corporations were permitted to do.[10] Regardless, this created a new system of water rights in Nebraska based upon first-in-time, first-in-right, and this prior appropriation doctrine henceforth would exist alongside the riparian system to give the state a new dual-system. Problems of meshing the two soon arose in those areas where water was inadequate, and incompatible uses and rights became readily evident.[11]

In 1889, twelve years after the first Act, the legislature enacted the Rayner Irrigation Law,[12] which expressly adopted the doctrine of prior appropriation. Anyone, not merely corporations, owning land contiguous to or in the vicinity of a stream could acquire appropriative rights by putting the water to beneficial use. The Nebraska Supreme Court held, in *Crawford Co. v. Hathaway*,[13] that subsequent to this Act no riparian rights could be acquired in the state:

> The irrigation act of 1889 abrogated in this state the common-law rule of riparian ownership in water, and substituted in lieu thereof the doctrine of prior appropriation. This legislation could not and did not have the effect of abolishing riparian rights which had already accrued, but only of preventing the acquisition of such rights in the future.[14]

It was apparent from the statute itself that existing riparian rights were not destroyed in view of the proviso "that in all streams not more than fifty feet in width the rights of the riparian proprietors are not affected . . . ."[15] This reference to riparian rights was

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8 Neb. Laws p. 168 (1877).

9 Kearney Water & Elec. Powers Co. v. Alfalfa Irr. Dist., 97 Neb. 139, 149 N.W. 363 (1914).

10 *See* text accompanying notes 44 & 45 *infra.*

11 Doyle, *Water Rights in Nebraska*, 29 NEB. L. REV. 385 (1950).

12 NEB. COMP. STAT., ch. 93a (1889).

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

14 *Id.* at 357, 93 N.W. at 792.

15 This width was reduced to twenty feet in 1893. NEB. COMP. STAT., ch. 93a, § 1 (1893).

declaratory of the common law;[16] therefore, it follows that common-law riparian right still existed.

Finally, on April 4, 1895, a comprehensive water code was enacted providing that "the water of every natural stream not heretofor appropriated . . . is hereby declared to be the property of the public, and is dedicated to the use of the people of the state . . . ."[17] Through this statute the legislature created the State Board of Irrigation, now the Department of Water Resources, to administer the appropriation of the state's water for beneficial uses.[18] This was the first clear evidence of legislative intent to abolish future vesting of riparian rights. Therefore, 1895 should be the cut-off date for the acquisition of riparian rights, and the court so held in *Wasserburger* when it said: "In respect to parcels which were severed from the public domain prior to April 4, 1895, plaintiffs [riparians] may possess a superior right. Decisions in conflict are overruled on this point."[19] Thus, *Crawford Co. v. Hathaway* was overruled on this point[20] and riparian rights obtained between 1889 and 1895 are now definitely a part of the dual appropriation-riparian system.

Since the statutory abrogation of riparian rights did not affect pre-1895 common-law riparians who held vested property rights, a taking of this right without just compensation would be "within the prohibition of the constitution."[21] The cases which provide the foundation for the judicial resolution of riparian-appropriative conflicts in Nebraska have clearly recognized that common-law riparian rights which vested before the statutory restraint to subsequent acquisition were still in force.[22] Thus, they continued in existence along with the newly created rights under the appropriation system.

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16 Wasserburger v. Coffee, 180 Neb. 149, 155, 141 N.W.2d 738, 743 (1966).

17 NEB. COMP. STAT., ch. 93a, § 5485 (1895). This same provision now appears in NEB. REV. STAT. § 46-202 (Reissue 1960).

18 For a listing of the agency's basic responsibilities *see* Yeutter, *A Legal-Economic Critique of Nebraska Watercourse Law*, 44 NEB. L. REV. 11, 19 (1965).

19 180 Neb. at 155, 141 N.W.2d at 743.

20 Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903). *See* text accompanying note 14 *supra*.

21 Clark v. Cambridge & Arapahoe Irr. & Improvement Co., 45 Neb. 798, 807, 64 N.W. 239, 241 (1895).

22 Meng v. Coffee, 67 Neb. 500, 512, 93 N.W. 713, 717 (1903); Crawford Co. v. Hathaway, 67 Neb. 325, 343, 93 N.W. 781, 787 (1903) (although holding that 1889 was the cut-off date). It has also been argued that NEB. CONST. art. XV, §§ 4-6, adopted in 1920, abolished all riparian rights. This contention is answered in Wasserburger v. Coffee, 180 Neb. 149, 155, 141 N.W.2d 738, 744 (1966); and Brief for Appellee at 43, Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966).

IV. PRESENT RESTRICTIONS ON RIPARIAN LANDS

One requirement of pristine riparianism is that the water must be used on riparian land. The Nebraska Supreme Court has discussed, at various times, the restrictions limiting the nature and quantity of this land.[23] In *Wasserburger v. Coffee*, Judge Smith stated that riparian land has two characteristics. "The parcel must include a part of the bed of a watercourse or lake, and no part of the parcel is separted from the rest by intervening land in another's possession."[24] For this proposition the court cited the *Restatement of Torts*, which appears to be the only prior authority expressly indicating such requirements. It is reasoned, in the *Restatement*, that a riparian must have access to the stream in order to utilize his water. In a state vesting ownership of the beds in private individuals, such access could exist only if the individual had title to the bed.[25] Thus, if the *Restatement* rule is followed in Nebraska, where title to the beds of non-navigable streams are held in private ownership,[26] a conveyance of land adjacent to a stream or lake would have to specifically include title to the bed in order for riparian rights to vest.

In most instances, however, the ownership of the bed is acquired upon conveyance of the bank. Grants of land on non-navigable streams carry with them the grantee's exclusive right and title of the bed to the center of the stream unless the terms of the grant denote an intention that the conveyance terminate at the bank.[27] Even when the land is platted with a meander line on the bank by the federal government, it has been held that ownership of the bed still extends to the thread line.[28] So there could be a conveyance of the bed without a specific declaration of such intent. However, not even this ownership of the bed to the thread line was necessary for riparian rights to vest. In *Crawford Co. v. Hathaway* it was held that: "Land, to be riparian, must have the stream flowing over it or along its borders."[29] This is all that was required because

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[23] For a list of holdings prior to *Wasserburger* see Yeutter, *A Legal-Economic Critique of Nebraska Watercourse Law*, 44 NEB. L. REV. 11, 15-17 (1966).

[24] 180 Neb. at 156, 141 N.W.2d at 744. The court cited Krimlofski v. Matters, 174 Neb. 774, 119 N.W.2d 50 (1963), as the Nebraska case supporting this rule.

[25] RESTATEMENT OF TORTS § 843 (1939).

[26] Thies v. Platte Valley Public Power & Irr. Dist., 137 Neb. 344, 289 N.W. 386 (1939).

[27] McBride v. Whitaker, 65 Neb. 137, 90 N.W. 966 (1902), *aff'd*, 197 U.S. 510 (1904).

[28] Higgins v. Addsen, 131 Neb. 820, 270 N.W. 502 (1936).

[29] Crawford Co. v. Hathaway, 67 Neb. 325, 354, 93 N.W. 781, 790 (1903).

"riparian rights are a result of the possession of riparian land; that is, land *adjacent* to water, not land underlying water."[30] "The ownership of the river is not the foundation of 'riparian rights' properly so called, because the word 'riparian' is relative to the bank, and not to the bed, of the stream. . . ."[31] Therefore, riparian rights have existed with ownership of the bank alone.[32] In fact, riparian land was capable of having its boundaries extended by accretion or reliction, or contracted by submersion,[33] without there being any title to the bed. Thus it seems, dictum by the court in *Wasserburger* would add a requirement for riparian rights to vest that had never before been recognized in Nebraska.

This added requirement of bed ownership would be especially significant if a riparian owner intended, for example, to continue irrigation but conveyed away his title to the bed to another person who wished to purchase title to the bed in order to obtain fishing,[34] hunting or recreational rights, or for other such purposes. "[I]f these parcels [bank and bed] are in separate ownership, it would seem doubtful that the bed owner would acquire any 'riparian' rights, such as the right to use the surface, or to allow his licensees to use the surface, in common with other riparians. . . ."[35] This would follow from the fact that riparian rights exist to benefit the land adjacent to the water. Therefore, when the bed is conveyed away without the land, riparian rights would not follow since the underlying purpose of benefit to land could not be achieved.[36] Also, under *Wasserburger*, since the bed has been

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30 Johnson & Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NAT. RES. J. 1, 6 (1967) (hereinafter cited as Johnson & Austin).

31 Indianapolis Water Co. v. American Strawboard Co., 53 F. 970, 974 (C.C.D. Ind. 1893). "It must be remembered that riparian rights in no way depend upon the ownership of the soil over which the water flows, *but upon the bank or banks down to the very edge of the water itself.*" 1 C. S. KINNEY, A TREATISE ON THE LAW OF IRRIGATION AND WATER RIGHTS 775 (2d ed. 1912).

32 It doesn't even make any difference as to how much of the riparian's land is in contact with the stream. Joerger v. Mt. Shasta Power Corp., 314 Cal. 630, 7 P.2d 706 (1932); Santos Omnes v. Crawford, 202 Cal. 766, 262 P. 722 (1922).

33 Yearsley v. Gipple, 104 Neb. 88, 175 N.W. 641 (1919).

34 The public does not have a right to fish in a private lake or stream. NEB. OP. ATT'Y GEN. 224 (1930); NEB. OP. ATT'Y GEN. 400 (1942).

35 Johnson & Austin, *supra* note 30, at 6.

36 "The bed of the stream is not riparian land, nor is one owning only the bed a riparian proprietor." S. C. WIEL, WATER RIGHTS IN THE WESTERN STATES 836 (3d ed. 1911). Wiel also makes the argument that the land must be contiguous in order to have access to the water, so the bank is determinative. *Id.* at 837.

severed from the bank, the land would lose its riparian status. Thus, a logical result would be that no one would acquire or retain riparian rights to that part of the stream or lake. Even if a clause were included in the conveyance specifically stating that the riparian rights were to be retained on the land, this would not be effective if the requirement of bed ownership were strictly enforced. Such an outcome would be defeating the purpose of the riparian doctrine; that is, to benefit that land remaining contiguous to the stream or lake.

The Nebraska Supreme Court also has attempted to define the physical boundaries of land capable of acquiring riparian rights. For example, in *Crawford v. Hathaway*, the court determined that the riparian land should be limited to a single entry, which was usually a government unit of forty acres, or in the case of an irregular tract, a lot number from the government survey.[37] The basic rules governing riparian land, as enumerated in *Wasserburger*, are: 1) the "source of title" rule, by which riparian land is limited to the smallest piece or parcel bordering on the stream in the history of title of all the land; 2) the "unity of title" rule, by which riparian rights extend to the entire tract held in common ownership, no matter how acquired, at the time of the claim; and 3) that rule by which riparian land terminates at the outermost edge of land described in a single entry.[38] Judge Smith considered all these tests arbitrary in a contest between a riparian and an appropriator because "they ignore the historical development of the two doctrines in Nebraska."[39] Instead, he formulated two requirements that must be met in order for the land to achieve riparian status. First, it must have been, by common-law standards, riparian prior to 1895. And second, it must not have subsequently lost its riparian status by severance.[40] In other words, riparian rights would extend only to the smallest tract held in one chain of

[37] 67 Neb. 325, 354, 93 N.W. 781, 791 (1903). In McGinley v. Platte Valley Public Power & Irr. Dist., 133 Neb. 420, 275 N.W. 593 (1937), it was held: "In a proceeding to condemn riparian land for public use, consequential damages to other land of the owner in the same tract are not limited to governmental sections a part of which is included in the land actually taken, where depreciation in the value of the remainder extends beyond those sections." *Id.* at 423, 275 N.W. at 595. From this holding, it may be implied that the riparian lands would extend beyond the government unit.

[38] 180 Neb. at 157, 141 N.W.2d at 744.

[39] This criticism is taken from the impropriety of such tests in a litigation between two riparian proprietors. "The area or size of the parcel is immaterial insofar as its character as riparian land is concerned." RESTATEMENT OF TORTS § 843, comment c at 326 (1939).

[40] 180 Neb. at 158, 144 N.W.2d at 745.

title since 1895; and if the land loses its status subsequently by severance, it cannot then be regained by reacquisition. Therefore, to determine what is riparian land, examination of the complete abstract of title is necessary.

V. BALANCING OF EQUITIES BETWEEN A RIPARIAN AND AN APPROPRIATOR UNDER THE WASSERBURGER DOCTRINE

Because basic conflicts are bound to arise in any jurisdiction adopting the dual-system of riparian and appropriative rights, it is essential to work out a method for deciding competing claims. In *Wasserburger v. Coffee*,[41] the conflicting claims were decided by balancing the equities between the parties rather than preferring appropriators *vis-a-vis* riparians, which had been the court's basic prior philosophy.

In *Wasserburger*, plaintiffs were lower riparians using the stream for watering their livestock; defendants were upstream appropriators whose earliest appropriations were prior to any of the plaintiffs' patents. Defendants' uses included irrigation of hay meadows, and they had expended approximately $250,000 for construction and improvement of their irrigation facilities. By utilization of water for hay production they were able to support a cattle herd of more than 5,000 head in winter pasture. The evidence showed that without irrigation of the meadows defendants would have been forced to reduce their herds by one-third to one-half.

Until 1959 the water either had been sufficient for both defendants and plaintiffs, or defendants released water upon request whenever plaintiffs experienced any shortages downstream. However, there eventually occurred a substantial diminution of the water supply, arising from a reduced waterflow and diversions by the defendants. Consequently, the plaintiff-riparians, below, were unable to support their livestock from the stream, and they then brought an action to enjoin defendants from appropriating water to their injury.

Plaintiffs had vested riparian rights to use the water because their predecessors in title had acquired their patents prior to 1895. These rights were in direct conflict with defendants' appropriations, which were, according to prior decisions also vested rights superior to subsequent riparian rights because of their priority in time.[42]

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[41] 180 Neb. 149, 141 N.W.2d 738 (1966).

[42] "[T]he conclusion appears to us irresistible that *every* appropriator of water who has applied it to the beneficial uses contemplated by these several acts has acquired a vested interest therein, which gives

The fact that a riparian's rights are vested does not mean they cannot be destroyed in certain instances. For instance, the court in *Crawford Co. v. Hathaway*,[43] which involved a plaintiff-appropriator, implied that such an appropriator (irrigation company) could destroy vested riparian rights through the power of eminent domain:

> What the legislature has done with a view of promoting irrigation, as we understand and construe the different laws enacted on the subject, is to . . . authorize the condemnation of the property in and to the use of the waters belonging to riparian proprietors whenever required in order that the whole of the waters of a natural stream, when found necessary, may be used for irrigation purposes.[44]

However, in a later case, *Vetter v. Broadhurst*,[45] the court restricted this broad statement by limiting the power of condemnation to those entities operating for a "public purpose".

> It may be thought to be rather an artificial distinction to say that an irrigation district, or a canal company created to furnish water to the landowners for agricultural purposes for compensation, may exercise the right of eminent domain, but that a private owner of a single tract of land may not have such a privilege. . . . Such agencies are in a sense common carriers of water, and the right of control and of regulation of rates exists in the public, so that all courts would agree that such agencies are formed for a public purpose.[46]

This "public purpose" was defined as an appropriation by an entity which was established and operated so that the public actually shared in the use of the water rather than merely incurring an indirect benefit therefrom.[47]

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him a superior title to the use of the water over the riparian proprietor whose right has been acquired subsequent thereto. . . ." Crawford Co. v. Hathaway, 67 Neb. 325, 364, 93 N.W. 781, 794 (1903). "The two doctrines stand side by side. They do not necessarily overthrow each other, but one supplements the other. The riparian owner acquires title to his usufructuary interest in the water when he appropriates the land to which it is an incident, and when the right is once vested it can not be divested except by some established rule of law. The appropriator acquires title by appropriation and application to some beneficial use, of which he can not be deprived except in some of the modes prescribed by law. The time when either right accrues must determine the superiority of title as between conflicting claimants." *Id.* at 357, 93 N.W. at 792.

[43] 67 Neb. 325, 93 N.W. 781 (1903).

[44] *Id.* at 342, 93 N.W. at 786.

[45] 100 Neb. 356, 160 N.W. 109 (1916).

[46] *Id.* at 363, 160 N.W. at 112.

[47] Public purpose has no fixed definition; however, it is held that a mere public interest does not constitute a public purpose. Burger v. City of Beatrice, 181 Neb. 213, 147 N.W.2d 784 (1967).

The court in *Wasserburger* seemed, at first, to disregard the rationale of the *Vetter* decision in so far as it limited an individual appropriator's power of condemnation. In the opinion, Judge Smith stated the governing rule for determining whether the riparian should be awarded a remedy for injury to his rights to be:

> An appropriator who, in using water pursuant to a statutory permit, intentionally causes substantial harm to a riparian proprietor, through invasion of the proprietor's interest in the use of the water, is liable to the proprietor in an action for damages *if, but only if,* the harmful appropriation is unreasonable in respect to the proprietor. The appropriation is unreasonable unless its utility outweighs the gravity of the harm.[48]

Two sections of the *Restatement of Torts* were cited as authority for this proposition. However, the sections referred to refer to actions between riparians;[49] they are inapplicable to a dispute between a riparian and an appropriator. If *Wasserburger* had involved only riparians, the *Restatement* rule would be consistent with the riparian doctrine since riparian rights are necessarily flexible enough to conform to the doctrine of reasonable use, whereas the quantity of water under appropriative rights remains fixed under a statutory permit.[50] In *Wasserburger*, however, both parties were not riparians. Invoking equitable principles in such a situation is highly questionable because, of course, the parties do not have equal rights.

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[48] 180 Neb. at 159, 141 N.W.2d at 745 (emphasis added). The rule for damages prior to *Wasserburger* was as follows: "In order to entitle the riparian owner to compensation, he must suffer an actual loss or injury to the use of the water which the law recognizes as belonging to him, and to deprive him of which is to take from him a substantial property right. It is for an interference with or injury to his usufructuary estate in the water for which compensation may rightfully be claimed where the water of the stream is diverted and appropriated for the use of irrigation. . . ." Crawford Co. v. Hathaway, 67 Neb. 325, 353, 93 N.W. 781, 790 (1903).

[49] RESTATEMENT OF TORTS §§ 851-852 (1939). The gravity of the harm by the appropriator is measured as follows: 1) The extent of harm; 2) the social value of the riparian use; 3) the time of initiation of the riparian use; 4) the suitability of the riparian use; and 5) the burden upon the riparian in avoiding the harm. The utility of the appropriation is measured as follows: 1) The social value attached to the appropriated use; 2) the priority of the appropriation; and 3) the impracticability of avoiding the harm. Wasserburger v. Coffee, 180 Neb. 149, 159, 141 N.W.2d 738, 746 (1966).

[50] "The flexibility of the one test opposes the rigidity of the other." Wasserburger v. Coffee, 180 Neb. 149, 159, 141 N.W.2d 738, 746 (1966).

In a changing dual-system of water rights, in which a judicial balancing of interests is essential when the basic doctrines are in conflict, a utility rule as set forth by Judge Smith may be suitable. But reading the rule apart from the actual holding of the case might imply that an appropriator may condemn, by taking, a riparian's rights without having to pay just compensation. If he is liable in damages "*if, but only if*," his appropriation is unreasonable, then he would be free from having to pay compensation whenever a court would declare his use reasonable. This was not the law before *Wasserburger*, and it probably is not now because if a riparian's rights are vested property rights, then a taking, reasonable or unreasonable, without compensation violates due process. It is true that the riparian must suffer an actual loss to be entitled to damages,[51] but this would only seem to go to show that there was in fact a taking. And it is entirely possible that even though a riparian could show actual damage, the appropriator's use would still be reasonable. But if a taking can be shown, the riparian should be entitled to damages whether the taking was reasonable or unreasonable.

Judge Smith perhaps foresaw such problems with the *Restatement's* rule and made certain there would be no broad misconstruction of the rule when he stated:

> We cannot synthesize the two doctrines in one decision. Facts are so important that in the absence of legislation a viable system ought to be evolved by the process of inclusion and exclusion, case by case. Here the conflicting claims are claims of private right to uses for purposes of livestock water and of irrigation. We limit our broad outline of a system to the specific facts before us.[52]

Upon the facts, the court found the appropriator-defendants' use was unreasonable. This gave rise to a cause of action for damages which, as shown, existed under prior law. But it seems only fortuitous that the outcome of the case would meet the requirements of both prior law and the *Restatement's* rule. The court enumerated this rule of balanced equities, or utility of harm, in order to initiate a "viable" dual-system. However, since the court recognizes the riparian right as property the rule cannot be invoked as stated. Rather, damages will have to be awarded for any interference which amounts to a taking of those rights by an appropriator.

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[51] Crawford Co. v. Hathaway, 67 Neb. 325, 353, 93 N.W. 781, 790 (1903). *See* note 48 *supra*.

[52] 180 Neb. at 159, 141 N.W.2d at 745.

VI. THE INJUNCTION AS A REMEDY FOR RIPARIANS

When vested riparian rights are destroyed or impaired by an appropriation, the injured riparian is entitled to some remedy. The distinction between the remedies of damages and injunction, as applied to water rights, has not been based upon the common doctrine that equity will enjoin only if there is no adequate remedy at law. The Nebraska Supreme Court has centered its past decisions on the overall benefit to the state in deciding whether to grant an injunction or to limit relief to damages. Under this "beneficial purpose" rationale it is conceivable that riparian land could have been rendered worthless by an appropriation and yet only damages would issue. *Wasserburger* has changed this so that now it depends solely upon the equities of the parties as the court sees them.

The first case in which a riparian owner was denied the remedy of an injunction against an appropriator was *Clark v. Cambridge & Arapahoe Irr. & Improvement Co.*[53] In that case, a lower-riparian-mill operator, prior in time, sought to enjoin an upper-appropriator-irrigator from diverted water according to his appropriation. The court refused the injunction, but did so on the theory that the plaintiff was barred by laches. This was said to be an even stronger defense when the defendant was engaged in a work of public interest.

In *Crawford Co. v. Hathaway,*[54] where a subsequent upper-appropriator brought an action to enjoin a prior lower-riparian from tearing down a diversion dam, the court discussed at great length the rights and remedies available in conflicts between riparians and appropriators. The court allowed an injunction to issue against the riparian. On the riparian's cross-petition, however, the appropriator's irrigation was prohibited until adequate damages were paid to the riparian owner by the appropriator. The court felt that damages were an adequate remedy for the riparian, and that by only allowing damages, the state would still benefit by the appropriation for irrigation. Such a taking, by appropriation, was held to be contemplated by the enabling statutes. This interpretation of the appropriation acts provided a method to develop arid or semiarid land by applying stream waters "to the more useful and beneficial purposes of fructifying the soil for the comfort and blessing of mankind."[55]

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[53] 45 Neb. 798, 64 N.W. 239 (1895).

[54] 67 Neb. 325, 93 N.W. 781 (1903).

[55] *Id.* at 350, 93 N.W. at 789.

The next important case was *McCook Irr. & Water Power Co. v. Crews*,[56] in which a prior lower-appropriator was granted an injunction against a subsequent upper-riparian-irrigator. The court stated that such a holding did not mean that the riparian's right to irrigate was destroyed. It simply meant that this private right should be subordinated, and, when required for public use, taken by eminent domain.[57] Riparian rights were subject to condemnation for the purpose of appropriating water for irrigation, a public use by an irrigation company. Therefore, since the appropriator's rights were superior to the riparian's,[58] it could enjoin the riparian; or, in a suit by the riparian, the appropriator could resist an injunction. The *Crews* case was clear since, under the priority of time test, the appropriator's rights were superior.

Finally, in *Cline v. Stock*[59] a prior riparian-manufacturer was denied an injunction against diversions by subsequent appropriator-irrigators. The court decided that the appropriator had acquired superior rights. If the appropriator carried out his permit in the manner allowed "a lower riparian owner could not enjoin the continued use of such water, but must rely upon his action at law to recover such damages, if any, as he might sustain. . . ."[60]

Nevertheless, riparians argue that *Vetter v. Broadhurst*[61] gives them a right to an injunction against private appropriators. *Vetter* was an eminent domain proceeding in which the plaintiff, an individual farmer, sought to condemn defendant's land for a reservoir to be used for irrigation purposes under his appropriation permit. The court denied the condemnation on the ground that it was not for a public purpose because the plaintiff was an individual rather than an irrigation company, and a private individual is incapable of appropriating for a public purpose.[62] However, one could imply, as it seems the court in *Wasserburger* did, that if the plaintiff had gone ahead with the reservoir, the defendant could have enjoined him from inundating his land.

The court, in *Wasserburger*, used the rationale of the *Vetter* case to distinguish the prior cases, *Clark*, *McCook* and *Cline*, from the facts present in *Wasserburger*: "We think that these cases have

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[56] 70 Neb. 115, 102 N.W. 249 (1905), *rev'g. on rehearing*, 70 Neb. 109, 96 N.W. 996 (1903).
[57] *Id.* at 121, 102 N.W. at 251.
[58] *Id.* at 118, 102 N.W. at 251.
[59] 71 Neb. 79, 102 N.W. 265 (1904).
[60] *Id.* at 81, 102 N.W. at 266.
[61] 100 Neb. 356, 160 N.W. 109 (1916).
[62] *See* text accompanying note 46 *supra*.

been misread. . . . Defendants are private appropriators—not champions of the public interest."[63] The court said that the appropriators in *Clark, McCook* and *Cline* were irrigation companies offering a public service, in good faith and at great cost. It might be noted, however, that in the *Cline* case some of the appropriators were private individuals, not public corporations.[64] Therefore, the court has been ignoring a fact directly bearing upon the distinguishing factor in the case.

It was argued in *Wasserburger* that the appropriators made their appropriations at great expense without the riparians bringing any action, when they surely should have realized that a water shortage would leave them without an adequate supply. But laches were never referred to in the opinion. This may have been because the court felt that, as with a prescriptive right, the riparians did not need to commence an action until there was a use so adverse to their own as to deprive them of vested rights. It is unknown whether the court took all this into consideration in its balancing of the equities; however, it may be irrelevant in light of the free discretion left to the court in determining priorities in the dual-system. In fact, under the broad powers of equity, the court allowed the injunction "without approving any interpretation of the permits or defining domestic use under the Constitution and the common law."[65]

The test formulated for the determination of the suitability of an injunction was that used in enjoining an ordinary tort. It is submitted that it is illogical to speak in terms of tort when dealing with a system of water rights such as regulated judicially in Nebraska. Except in extremely patent situations, one would have great difficulty knowing whether he were committing a tort against another party without having his uses adjudicated under the tests set forth in *Wasserburger*. This situation gives rise to the dominant problem of unpredictability, and irrigator-private-appropriators may be unwilling to expend large sums of money to divert water in reliance upon a Department of Water Resources' permit if there is any possibility of detriment to riparian owners. Appropriators may be willing to compensate riparians for damages to vested rights, but injunctions against large diversions could be disastrous. In a specific case, the court would probably take this into consideration, but *Wasserburger* does not make it absolutely clear that it would do so.

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[63] Wasserburger v. Coffee, 180 Neb. 149, 162, 141 N.W.2d 738, 747 (1966).

[64] *See* Brief for Appellant for Rehearing at 13, Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966).

[65] 180 Neb. at 164, 141 N.W.2d at 748.

VII. CONCLUSION

Some of the problems that may arise because of the decision in *Wasserburger* have been shown. What the ideal distribution of rights under this dual-system is, while it remains judicially regulated, is unanswerable. It may be that the court in *Wasserburger* approached the best method of distributing water rights under this system. The fact remains that there are problems created which must be faced in the future. One solution may be an appropriation of the water of the state by the state itself. It seems certain the state would be constitutionally required to compensate riparian owners, who would have no right to injunctive relief. But until the legislature enacts total regulation of water development, allocation and use, the court will continue to struggle with problems of distribution under Nebraska's dual-system.

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