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This article constitutes a comprehensive study of the rules that determine whether a particular tract of land or portion thereof is riparian. Based upon this analysis of the different rules, Professor Farnham recommends legislation for eastern jurisdictions which would designate as riparian those lands which are within the watershed and which abut and extend a reasonable distance from the particular body of water.

THE PERMISSIBLE EXTENT OF RIPARIAN LAND†

*William H. Farnham**

INTRODUCTION

ALTHOUGH the problems created in the eastern states by the pollution of their lakes and streams seem more urgent to and are presently receiving more attention from government and the general public than the problems with respect to the increase and allocation of water supplies, the problems last referred to are quietly but inexorably becoming more pressing because of the constantly increasing demand for water and will again become critical whenever another drought afflicts the East. After more than a decade of consideration of the question as to whether the problems of water supply and allocation could best be solved in the East by a shift from the riparian system of water law to the appropriative system, or by the creation of a hybrid system com-

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prising the best features of both, or by nothing more radical than a clarification and improvement of the riparian system, the water law of most of the eastern states is still predominantly riparian in character.¹ Knowledge of that law and awareness of its uncertainties and of the need for elimination of such uncertainties continues to be of importance in a majority of the eastern states. As long as uncertainties in riparian law exist, private persons contemplating embarkation on water-based enterprises in riparian doctrine states may be deterred from an affirmative decision,² and government officials of such states, charged with the formulation and execution of public water projects, may find their task more difficult than it should be.³

Since under the riparian system of water rights a person can acquire them only by becoming the owner of riparian land⁴ or by succeeding to the water rights of a person who acquired

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1. Trelease, *Legal Contributions to Water Resources Development*, U. CONN. INST. OF WATER RESOURCES, REPORT NO. 2, at 10 (1967); Maloney & Aussen, *A Modern Proposal for State Regulation of Consumptive Uses of Water*, 22 HAST. L.J. 523, 523-29 (1971).
 2. Farnham, *The Improvement and Modernization of New York Water Law Within the Framework of the Riparian System*, 3 LAND & WATER L. REV. 377-78 (1968). See in addition to the authorities therein cited, Ellis, *Developing Trends in Water Law in the Eastern States*, PROCEEDINGS, PA. STATE WATER RESOURCES LAW COLLOQUIUM 24, 27 (1967); Champion, *Prior Appropriation in Mississippi—A Statutory Analysis*, 39 MISS. L.J. 1 (1967); Plager, *Some Observations on the Law of Water Allocation as a Variable in Industrial Site Location*, 1968 WIS. L. REV. 678; Plager & Maloney, *Emerging Patterns for Regulation of Consumptive Use of Water in the Eastern United States*, 43 IND. L.J. 383-84 (1968); Davis, *Australian and American Water Allocation Systems Compared*, 9 B.C. IND. & COM. L. REV. 647-77 (1968); Rarick, *Oklahoma Water Law, Stream and Surface Under the 1963 Amendments*, 23 OKLA. L. REV. 19 (1970); Lauer, *Reflections on Riparianism*, 35 MO. L. REV. 1-15 (1970); *An Economic Evaluation of Connecticut Water Law*, U. CONN., INSTITUTE OF WATER RESOURCES, REPORT NO. 11 (1970).
 3. Farnham, *The Improvement and Modernization of New York Water Law Within the Framework of the Riparian System*, 3 LAND & WATER L. REV. 377, 378-381 (1968). See in addition to the authorities therein cited, Emery v. Knapp, 167 Kan. 546, 207 P.2d 440 (1949); *Petition of Clinton Water Dist. of Island County*, 36 Wash. 2d 284, 218 P.2d 309, 314 (1950); MANN, *THE POLITICS OF WATER IN ARIZONA* 16 (1963); Davidson, *Application of Limitations as to Damages Caused by Public Improvements*, 16 BAYLOR L. REV. 32 (1964); Johnson, *Condemnation of Water Rights*, 46 TEXAS L. INST. 473 (1968); statement of J. M. Kennedy, Chief, Northeastern U.S. Water Supply Study Group, Planning Division, North Atlantic Division, U.S. Army Corps of Engineers in PROCEEDINGS, FOURTH AMERICAN WATER RESOURCES CONFERENCE 150-51 (1968); 4 LAND & WATER L. REV. 193 (1969); Corker, *Book Review*, 4 LAND & WATER L. REV. 219 (1969); Lauer, *Reflections on Riparianism*, 35 MO. L. REV. 1 (1970).
 4. *United Paper Board Co. v. Iroquois Pulp & Paper Co.*, 226 N.Y. 38, 46, 123 N.E. 200, 203 (1919); LAUER, *The Riparian Right as Property*, in WATER RESOURCES AND THE LAW 131 (1958); Trelease, *Law, Water and People*, 18 WYO. L.J. 3 (1963); 5 POWELL, *REAL PROPERTY* ¶ 710, at 350 (1970).

them in that way,⁵ it is obvious that in many instances the success of a person's claim to the enjoyment of water rights still depends in a majority of the eastern states, and in such western states as recognize riparian as well as appropriative water rights,⁶ on whether a particular tract of land can be classified as riparian.⁷ Any uncertainty as to what land can qualify as riparian would be particularly undesirable.

It should be noted, moreover, that the adoption by a riparian doctrine state of a permit system⁸ would not necessarily eliminate the need for a satisfactory common law or statutory definition of riparian land. Thus under the Model Water Use Act, drafted at the University of Michigan Law School in 1958,⁹ and under the Model Water Code, recently drafted at the University of Florida Law School,¹⁰ the position of an applicant for a permit will in some instances depend on whether a certain water use which was being made when the permit legislation was enacted was lawful; this in turn might well depend on whether a certain tract of land was classifiable as riparian under the statutory or riparian common law of the state.

5. It has been held in some states that riparian rights are not transferable apart from the riparian land to which they are incident. See, e.g., Gould v. Eaton, 117 Cal. 539, 49 P. 577 (1897). This has been considered by many writers to be the majority view. See Trelease, *Coordination of Riparian and Appropriative Rights*, 33 TEXAS L. REV. 24, 56-57 (1954); Arens, *Michigan Law of Water Allocation*, in THE LAW OF WATER ALLOCATION IN THE EASTERN UNITED STATES 377, 401 (Haber & Bergen ed. 1958). There is authority for the contrary and preferable view. See Farnham, *The Improvement and Modernization of New York Water Law Within the Framework of the Riparian System*, 3 LAND & WATER L. REV. 377, 401-03 (1968).

6. As to the situation in these nine states see Trelease, *Coordination of Riparian and Appropriative Rights*, 33 TEXAS L. REV. 24 (1954); 5 POWELL, REAL PROPERTY ¶ 749-42 (1970).

7. ZIEGLER, *Water Use Under Common Law Doctrines*, in WATER RESOURCES AND THE LAW 49 (1958) says:

[T]he existence and extent of any right to use water largely depends upon a determination of what land is riparian. . . . For this reason any attempt to determine the rights to use water necessitates an examination of the issue, what is riparian land. *Id.* at 52.

In the preceding discussion, the distinction between riparian and non-riparian land was discussed in detail. This distinction is consistently used by the courts to determine the rights of individuals to the use of stream or lake water. *Id.* at 63.

See also KATES, GEORGIA WATER LAW 81 (1969).

8. A state can continue to adhere to the riparian doctrine despite adoption of an administratively enforced permit system. See Farnham, *The Improvement and Modernization of New York Water Law within the Framework of the Riparian System*, 3 LAND & WATER L. REV. 377, 566-67 (1968).

9. Model Water Use Act reported in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 178, 199 (1958).

10. See Maloney & Ausness, *A Modern Proposal for State Regulation of Consumptive Uses of Water*, 22 HAST. L.J. 523, 541, 544, 546-48 (1971).

But however desirable the existence of a complete and well established common law or statutory definition of riparian land may be from the standpoint of private persons and government officials concerned with water rights in the eastern states, no such definition can be found in their riparian common law, and only one of them has enacted a statutory definition.¹¹ The simple point that seems to be well settled is that to be riparian, land must border on a natural lake or stream.¹² Thus in many eastern states the important question regarding the permissible extent of riparian land—whether all of a tract of land bordering on a lake or stream is riparian regardless of the fact that much of it is far distant from the water—is still an open one to which a legislative answer would seem highly desirable.¹³ But what should this answer be? Should it codify the view that such part of a tract of land as lies outside the watershed¹⁴ of a body of water is not riparian to it, although one side of the tract borders on the water? This view seems to be well established in such of the western states as recognize riparian as well as appropriative rights;¹⁵ ap-

11. VA. CODE ANN. §§ 62.1-104(5) (1968). But it can be argued that this definition is not satisfactory. See note 101 *infra* and accompanying text.
12. Among the numerous authorities supporting this rule are the following: *Hudson v. West*, 47 Cal. 2d 823, 306 P.2d 807 (1957); *Harvey Realty Co. v. Borough of Wallingford*, 111 Conn. Supp. 352, 150 A. 60 (1930); *Peck v. Olson Construction Co.*, 216 Iowa 519, 245 N.W. 131 (1932); *Thompson v. Enz*, 379 Mich. 667, 154 N.W.2d 473 (1967); *Stratbucker v. Junge*, 153 Neb. 885, 46 N.W.2d 486 (1951); *United Paper Board Co. v. Iroquois Pulp and Paper Co.*, 226 N.Y. 38, 123 N.E. 200 (1919); *Young v. City of Asheville*, 241 N.C. 618, 86 S.E.2d 408 (1955); *Jones v. Conn.*, 39 Ore. 30, 64 P. 855 (1901); KINNEY, *THE LAW OF IRRIGATION* § 58 (1894); 2 FARNHAM, *THE LAW OF WATERS AND WATER RIGHTS* § 463(a) (1904); 3 TIFFANY, *REAL PROPERTY* § 727 (3rd. ed. 1939); 6A *AMERICAN LAW OF PROPERTY* § 28.55, at 160 (Casner ed. 1952); HUTCHINS, *CALIFORNIA LAW OF WATER RIGHTS* 197 (1956); ZIEGLER, *Water Use Under Common Law Doctrines*, in *WATER RESOURCES AND THE LAW* 49, 52 (1958); MANN, ELLIS & KRAUSZ, *WATER-USE LAW IN ILLINOIS* 16 (1964); 1 ROGERS & NICHOLS, *WATER FOR CALIFORNIA* 225 (1967); 5 POWELL, *REAL PROPERTY* ¶ 714, at 372 (1970).
13. For authority recommending legislation see CRIBBET, *ILLINOIS WATER RIGHTS LAW* 50 (1958); KATES, *GEORGIA WATER LAW* 82, 334 (1969); Lauer, *Reflections on Riparianism*, 35 Mo. L. Rev. 1, 23 (1970). Beyond the scope of this article is a discussion of the validity of the Torts Restatement position that if the bed of a body of water is in private ownership, a tract of land, though bordering on it, cannot be riparian unless it includes part of the bed of the body of water. See *RESTATEMENT OF TORTS* § 843, Comment f, at 329-30 (1939).
14. *E.g.*, 5 POWELL, *REAL PROPERTY* ¶ 714, n. 11 (1970). The term "watershed" is used herein to denote the drainage area contributing to the water found in the lake or stream involved.
15. See *Hudson v. West*, 47 Cal. 2d 823, 306 P.2d 807 (1957); *Clark v. Allaman*, 71 Kan. 206, 80 P. 571 (1905); *Sayles v. City of Mitchell*, 60 S.D. 592, 245 N.W. 390 (1932); *Watkins Land Co. v. Clements*, 98 Tex. 578, 86 S.W. 733 (1905). Treating this as the majority view are 1 WIEL, *WATER RIGHTS IN THE WESTERN STATES* §§ 773-75 (3d ed. 1911); Teass, *Water and Water Courses—Riparian Rights*, 18 VA. L. REV. 223, 224 (1932); 3

pears to have been accepted as a common law proposition in three eastern states;¹⁶ has been codified in Virginia;¹⁷ and is embodied in the Torts Restatement.¹⁸

THE WATERSHED LIMITATION

In support of this position it has been said that land beyond the watershed is outside the boundaries established by nature for riparian ownership;¹⁹ that adherence to it is convenient and practical;²⁰ that lake or stream water used on land within the watershed will, so far as it is not consumed, return to the parent body of water;²¹ and if use of water from stream X is permitted on land outside its watershed and within the watershed of stream Y, the reasonable and natural expectations of the lower riparian owners on stream X of benefit from the unconsumed part of the water will be disappointed.²² And it should be added that the riparian owners on stream Y, who might under some circumstances be in a position to complain of the addition of foreign water²³ to that stream,²⁴

TIFFANY, REAL PROPERTY § 727 (1939); 6A AMERICAN LAW OF PROPERTY § 28.55, at 160 (Casner ed. 1952); Davis, *Water Rights in Iowa*, 41 IOWA L. REV. 216, 220 (1956); 34 N.C. L. REV. 247, 248 (1956); ZIEGLER, *Water Use Under Common Law Doctrines*, in WATER RESOURCES AND THE LAW 49, 59 (1958); 5 POWELL, REAL PROPERTY ¶ 714, at 373 (1970).

16. See *McCarter v. Hudson County Water Co.*, 70 N.J. Eq. 695, 65 A. 489 (Err. & App., 1906); *Stratton v. Mt. Hermon Boys' School*, 216 Mass. 83, 103 N.E. 87 (1913); *Town of Gordonsville v. Zinn*, 129 Va. 542, 106 S.E. 508, 511 (1921).
17. VA. CODE ANN. §§ 62.1-104(5) (1968). If the watershed limitation ever existed in Iowa, it has been abolished by statute. See O'Connell, *Iowa's New Water Statute*, 47 IOWA L. REV. 627 (1962).
18. RESTATEMENT OF TORTS § 855, comment a, at 374 (1939).
19. 2 FARNHAM, THE LAW OF WATERS AND WATER RIGHTS 1571 (1904).
20. Wiel, *Origin and Comparative Development of The Law of Watercourses*, 6 CAL. L. REV. 245, 352 (1918).
21. *Anaheim Union Water Co. v. Fuller*, 150 Cal. 327, 88 P. 978 (1907).
22. See *Stratton v. Mt. Hermon Boys' School*, 216 Mass. 83, 86, 103 N.E. 87, 88 (1913) in which the court said:

A brook or river, so far as concerns surface indications, is inseparably connected with its watershed and owes the volume of current to its area. A definite and fixed channel is a part of the conception of a watercourse. To divert a substantial portion of its flow is the creation of a new and different channel, which to that extent defeats the reasonable and natural expectations of the owners lower down on the old channel. Abstractions for use elsewhere not only diminishes the flow of the particular stream but also increases that which drains the watershed into which the diversion is made, and thereby may injure riparian rights upon it.

23. Water from a source not naturally tributary to the body of water to which it is added.
24. Regarding the possible illegality of the addition of foreign water see the quotation from *Stratton* in note 22 *supra*; Farnham, *The Improvement and Modernization of New York Water Law Within the Framework of The Riparian System*, 3 LAND & WATER L. REV. 377, 393 (1968); *Fell v. M. & T., Inc.*, 73 Cal. App. 2d 692, 166 P.2d 642 (1946); *Barnard v. Sherley*,

might under other circumstances receive an unexpected benefit in the form of water from stream X on the availability of which they had never counted. Such an advantage was probably not reflected in the price which they paid for their riparian land on stream Y. Thus the riparians on stream X, who owned land below the point of diversion to stream Y, could argue with considerable force that the definition of riparian land should not be so broad as to include land on which water from stream X could not be used without depriving them of all possible benefit from the entire amount withdrawn and without creating a possibility of benefit from that water to riparian owners on stream Y, who had paid nothing for it and never expected to have it.

In support of the holding in *Jones v. Conn*²⁵ that land can be riparian to a body of water although not within its watershed, provided it is part of a tract bordering on a stream,²⁶ it has been suggested that such a rule would give no riparian owner just ground for complaint because it would increase rather than diminish the quantum of all riparian interests.²⁷ It is not certain, however, that the benefit which

135 Ind. 547, 35 N.E. 117 (1893); *Leitch v. Sanitary District of Chicago*, 369 Ill. 469, 17 N.E.2d 34, 36 (1938); *Barrington Hills Country Club v. Village of Barrington*, 357 Ill. 11, 191 N.E. 239 (1934); *Jackman v. Arlington Mills*, 137 Mass. 227, 284 (1884); *Mayor of Baltimore v. Appold*, 42 Md. 442, 457 (1895); *Tollotson v. Smith*, 32 N.H. 90 (1855); *Merritt v. Parker*, 1 N.J.L. 460 (Sup. Ct. 1795); *Matter of Gillespie*, 247 App. Div. 228, 288 N.Y.S. 49 *rev'd on other grounds*, 272 N.Y. 18, 3 N.E.2d 618 (1936); *Miller v. Wheeler*, 54 Wash. 429, 103 P. 641, 643 (1909).

25. 39 Ore. 30, 64 P. 855, 858 (1901).

26. Although in *Standen v. New Rochelle Water Co.*, 91 Hun. 272, 36 N.Y.S. 92, 94 (Sup. Ct. 1895) the court said:

We also think that the extent of watershed of the two parties to this suit was not material evidence upon the issues in this case, and that its admission was error. The plaintiff was not limited in her use of the water by the fact that the defendant owned a larger watershed than she did. She was entitled to the beneficial use of all the water that flowed in the stream, except such as was reasonably used by the defendant. The rights of the parties did not at all depend upon the extent of the watershed owned by them.

Although attention was called to the last sentence quoted in 2 FARNHAM, *THE LAW OF WATERS AND WATER RIGHTS* 1572 (1904) and 1 WIEL, *WATER RIGHTS IN THE WESTERN UNITED STATES* 744 (3rd ed. 1911) as relevant to the question as to whether land outside the watershed can be riparian, the case does not appear to be authority indicating that the New York courts have answered this question. When read in the light of the first and second sentences, the last sentence appears to use "watershed" to denote riparian land within the watershed rather than land beyond it. Another state which has not yet answered the question is South Carolina. See *Guerard, The Riparian Rights Doctrine in South Carolina*, 21 S.C. L. REV. 757, 762 (1969).

27. See *O'Connell, Iowa's New Water Statute*, 47 IOWA L. REV. 549, 627-28 (1962).

would accrue to most riparians from a rejection of the watershed limitation on the permissible extent of riparian land would be actual rather than merely theoretical. No riparian owner could actually benefit from it unless he owned land beyond the watershed which qualified as riparian by virtue of the adoption of the suggestion. Moreover, it is doubtful that a significant number of tracts bordering on a stream would extend so far inland as to include an area beyond the watershed.²⁸

It can also be argued in support of the rule of *Jones v. Conn* that, if a use of water is being made outside the watershed, the location of the use will be taken into account when passing on its reasonableness and legality²⁹ and that the interests of riparian owners downstream from the use in question will therefore be adequately protected. It must be admitted that this argument has considerable force and that in many cases the answer to the question as to whether the use beyond the watershed was lawful would be the same, regardless of whether the rule applied was that having majority support or that laid down in *Jones v. Conn*. If A is claiming the privilege of using the water on a part of his land which lies beyond the watershed, his claim might well be denied, even by a court following *Jones v. Conn*, on the ground that under all the circumstances in the case A's use beyond the watershed would be unreasonable. Nevertheless, it would seem clear that the lower riparians can be more sure of protection from use outside the watershed in a state in which the rule in force was that land could not qualify as riparian unless it lay within the watershed. And it could be argued that, since most riparian owners would expect that they would be required to share the water only with such other persons as wished to use it on land within the watershed and since such an exception is natural and reasonable,³⁰ they are entitled to

28. As to the possibilities under Iowa's topographical conditions see *id.* at 627, n. 480.

29. *Jones v. Conn*, 39 Ore. 30, 64 P. 855, 858 (1901), *rehearing denied*, 39 Ore. 46, 65 P. 1068 (1901). See the quotation from the opinion in this case in note 48 *infra*.

30. "[O]ne of the expectations of the riparian owner is freedom from competition from any source other than co-riparians, who are subject to the restrictions of the reasonable use doctrine." Note, *The Constitutional Sanctity of a Property Interest in a Riparian Right*, 1969 WASH. U.L.Q. 327, 337-38. See also the quotation from *Stratton* in note 22 *supra*.

have their use protected³¹ by giving them an absolute preference over users beyond the watershed, unless made by persons who had acquired riparian rights from a riparian owner by transfer, the extent of which would be measured by the extent in the hands of the transferor.³²

But is the enforcement of the watershed limitation on the permissible extent of riparian land unwise in view of the virtually unanimous opinion that the restrictions imposed by the unmodified common law riparian doctrine on non-riparian use should considerably relaxed?³³ Would adherence to such a limitation put too much of an obstacle in the path of the interbasin water transfers which are believed by many to be

31. The courts, when passing on the validity of a statute as a police power measure, carefully consider the question of the extent to which it would disappoint the reasonable expectations of property owners by making unforeseeable changes in the common law. *Hughes v. State of Washington*, 389 U.S. 290, 296-97 (1967); O'Connell, *supra* note 27, at 583; Plager & Maloney, *Emerging Patterns for Regulation of Consumptive Use of Water in the Eastern United States*, 43 IND. L.J. 383, 386 (1968); FISHER, *Due Process and the Effect of Eastern Appropriation Proposals on Existing Rights, With Special Emphasis on the Michigan Proposal*, in THE LAW OF WATER ALLOCATION IN THE EASTERN UNITED STATES 441, 448 (Haber & Bergen ed. 1958). It would seem entirely reasonable to offer the importance of protecting such expectations as one of the bases for adherence to or adoption of the watershed limitation on the permissible extent of riparian land. Water law should be consistent with "an ethical commitment to the concept of fairplay." Carver, *A Federal Policy for Development of Western Water*, 14 ROCKY MT. MINERAL L. INST. 473, 474 (1968). This would seem to involve consideration for the reasonable expectations of the buyers of riparian land.
32. In states that permit the transfer of riparian rights, the interests of riparians not parties to the transfer are protected by a rule that the transferee acquires water use privileges no greater than those possessed by his transferor. Farnham, *The Improvement and Modernization of New York Water Law Within the Framework of the Riparian System*, 3 LAND & WATER L. REV. 377, 401-02 (1968). This position is consistent with the well established general rule that a grantor can convey no more than he has. 1 AMERICAN LAW OF PROPERTY § 217, at 160 (Casner ed. 1952); *Duckworth v. Watsonville Water & Light Co.*, 150 Cal. 520, 89 P. 338 (1907); *Taylor v. Armiger Body Shop*, 40 Del. Ch. 22, 172 A.2d 572, 573 (1961). This position is also consistent with the equally well established rule that the power of the owner of a *profit a prendre* to take water is subject to the same limitation. See *Loch Sheldrake Associates v. Evans*, 306 N.Y. 297, 118 N.E.2d 444 (1954). Regarding the close relationship which sometimes exists between easements and profits, on the one hand, and riparian privileges and rights, on the other see Beck, *Governmental Refilling of Lakes and Ponds*, 46 TEXAS L. REV. 180, 185 (1967). This relationship was not, however, referred to in *Loch Sheldrake*.
33. In addition to the authorities cited in Farnham, *The Improvement and Modernization of New York Water Law Within the Framework of the Riparian System*, 3 LAND & WATER L. REV. 377, 413 (1968), see 38 B.U.L. REV. 207, 240-41 (1958); ABA SECTION OF MINERAL AND NATURAL RESOURCES LAW 22 (1959); 62 W. VA. L. REV. 1, 11 (1959); 47 IOWA L. REV. 549, 557 (1962); ABA SECTION OF MINERAL AND NATURAL RESOURCES LAW 13, 20 (1964); Davis, *Australian and American Water Allocation Systems Compared*, 9 B.C. IND. & COM. L. REV. 647, 700 (1968); Guerand, *The Riparian Rights Doctrine in South Carolina*, 21 S.C. L. REV. 759, 769 (1969).

essential to the satisfactory solution to some of our water supply problems? Arguments in favor of affirmative answers to these questions are supplied by the following statements:

[T]he most effective development, management and protection of water resources is most readily achieved when the broadest areas of land are eligible to receive the water. . . .

Assuming that the greatest number of beneficial water uses today require the water to be removed from the water course in which it is found, the broadest definition of riparian land would . . . maximize the number of landowners eligible to use water found in a watercourse, thereby increasing both the chance that the resource would be actually used and that the uses made would be those most beneficial.³⁴

It could be pointed out, however, that the first statement quoted seems to amount in substance to an assertion that it is easier to achieve the most effective development, management and protection of water resources under the prior appropriation system, which does not discriminate against non-riparian use, than under the riparian system which does. That this opinion is entertained by many cannot be denied; but it is equally true that there are many others who do not. It seems unlikely that either group will ever be able to make a conclusive case for its position.³⁵ Since the problem under consideration is not as to which of these two systems is the better,³⁶ it can be laid aside and attention can be fixed on the question as to what should be done about the watershed limitation on the permissible extent of riparian land in states which have

34. Waite, *Beneficial Use of Water in a Riparian Jurisdiction*, 1969 WIS. L. REV. 864, 874-75.

35. Pertinent in this connection is the following statement from TRELEASE, *New Water Laws for Old and New Countries*, UNIV. OF TEXAS WATER LAW CONFERENCE (1969):

When I was young and innocent, I used to think that the western American invention of prior appropriation was the best of water use laws, a model which had failed to blanket the earth only because of the ignorance of those who had not yet adopted it. . . . But finding out how the other half lives, how other people have solved problems similar to ours, has some value for us. . . . One thing I have learned from my comparative study is humility. I no longer believe that western prior appropriation is the panacea for all of the world's ills.

36. Even a superficial discussion of the question would require far more space than has been allotted to this article.

not elected to abandon the riparian system and are trying to improve it by clarification and modification.

It must be conceded, of course, that the second statement quoted, viz., that the broadest definition of riparian land would maximize the number of landowners eligible to use the water, is true if the assumption on which it is based is valid—that the greatest number of beneficial water uses today require the water to be removed from the watercourse in which it is found. This assumption, however, seems to be a debatable one.³⁷ Moreover, it is conceivable, though far from certain even if the debatable assumption be accepted, that, as alleged in the second statement quoted, the broadest definition of riparian land would increase the chance that the water would actually be used and that the uses made would be the most beneficial.

But assuming the truth of both statements and of the assumption on which the second was based, should not the reasonable expectations of the buyers of riparian land, to which reference has already been made³⁸—that they would not have to share the water from their source of supply with owners of land outside its watershed—be given the protection which would be jeopardized, even if not completely denied, by a definition of riparian land which would enable areas beyond the watershed to qualify as riparian? For reasons previously stated the general riparian rule that every use, wherever located, must be reasonable if it is to be lawful, clearly would not guarantee the riparian owners the protection against use outside the watershed which they reasonably expected.³⁹

Happily, however, it would seem that even if the watershed limitation were adopted to protect these expectations, the public interest in the optimum use of water could be sufficiently served in any state which would (1) enact a statute providing in substance that a riparian owner could substitute his non-riparian land for his riparian land as the beneficiary

37. Although uttered in another context, the following statement has relevance here: "[I]t is very often the case with natural resources that they have their broadest uses when they are left essentially in their natural state." Sax, *The Public Trust Doctrine in Natural Resource Law*, 68 MICH. L. REV. 471, 565 (1970).

38. See notes 22 and 30 *supra* and accompanying text.

39. See note 30 *supra* and accompanying text.

of his riparian privileges of user, provided the amount used on his non-riparian land did not exceed that which he could lawfully have used on his riparian land⁴⁰ and that such non-riparian use was not more harmful to other riparians than his use on his riparian land would have been; and (2) if its courts had not already so held,⁴¹ enact a statute providing that riparian rights are transferable to non-riparians and that the extent of the transferee's privileges of user would be determined by the extent of those possessed by the riparian transferor. While under such legislation there could be a technical disappointment of the expectation of the buyers of riparian land in that use outside the watershed would in some cases be permitted, it would be a harmless disappointment because, in view of the limitations on the extent of the non-riparian use, no riparian would have to submit to greater harm from a use of water by others than he would have been bound to accept if the water had been used only on riparian land. Moreover, the riparian owner, who for some reason could not or did not wish to make use of his riparian privileges, would benefit by his ability to turn them into money; and since riparian rights, if transferable, would normally be available to the highest bidder and since when they are so available they are likely to be employed in the most productive activity,⁴² the public interest in achieving that result would be sufficiently furthered.

40. Partial precedent for such a statute is furnished by WIS. STAT. ANN. § 30.18(5) (1971) which provides *inter alia*: "When it is determined that a riparian permittee is authorized to withdraw a stated flow of water, he may use that water on any other land contiguous to his riparian land, but he may not withdraw more water than he did prior to August 1, 1957."

41. The Oklahoma Supreme Court has so held. *Smith v. Stanolind Oil & Gas Co.*, 179 Okla. 488, 172 P.2d 1002 (1946). Inferences consistent with the Oklahoma court's holding can be drawn from the following cases: *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1953); *United Paper Board Co. v. Iroquois Pulp & Paper Co.*, 226 N.Y. 38, 123 N.E. 200 (1919).

42. "Where there is competition for water, it is doubtful that there is a better way of determining the most productive use than through the willingness of a prospective user to pay as much for a water right as a current user considers he must receive to relinquish it." Fox, *Water: Supply, Demand and the Law*, 32 ROCKY MT. L. REV. 452, 462 (1960). In Levi, *Highest and Best Use: An Economic Goal for Water Law*, 34 MO. L. REV. 165, 174 (1969) it is said that "those who can use the water more profitably will be willing to pay more for the water right." Trelease, *Policies for Water*, 5 NATURAL RESOURCES J. 1, 6 (1965) says:

Decisions as to the most productive or wisest use of property can be made by private persons. . . . The maximization principle is generally believed to be achieved, or approached by free men in a capitalistic society when they make decisions on where and how they will employ their labor and capital.

If it be objected that a watershed limitation on the permissible extent of riparian land is undesirable because satisfactory solutions to some of the water supply problems which have arisen in the East may depend on arranging for the transfer of water from one watershed to another, it can be pointed out that such a limitation would as a practical matter seldom constitute the primary obstacle to the execution of an interbasin transfer of the public project type. Most such projects would involve the use of water from a lake or stream not merely beyond its watershed, on the rear part of a tract of land in contact with the lake or stream, but would be intended to supply water for use on land, no part of which has any contact with the source lake or stream and so has no basis whatever for a claim to riparian relation with the water source.⁴³ In other words, unless the governmental body which was engaged in the project had obtained the water rights of the riparian owners on the source lake or stream by purchase or eminent domain, the rule against harmful non-riparian use⁴⁴ would block such an interbasin transfer⁴⁵ even though there were no rule that land outside the watershed of a lake or stream could not qualify as riparian to the lake or stream.

A watershed limitation on the permissible extent of riparian rights would, however, be a primary obstacle in the

43. Land must have contact with a body of water in order to be held to be riparian to it. See note 12 *supra* and accompanying text.

44. See 3 TIFFANY, REAL PROPERTY § 725, at 124 (3rd ed. 1939); 6A AMERICAN LAW OF PROPERTY § 28.55, at 162, 164 (Casner ed. 1952); 34 N.C. L. REV. 247 (1956); Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams*, 12 WYO. L.J. 1, 2 (1957); 5 POWELL, REAL PROPERTY ¶ 714, at 375-76 (1970).

45. This would not, however, be unqualifiedly true in all eastern states. Thus it has been held that Minnesota can take water from navigable streams for municipal supply, which is usually classified as a non-riparian use. Annot., 141 A.L.R. 639 (1942); 2 NICHOLS, EMINENT DOMAIN § 5.795 (3rd ed. 1950); Johnson, *Riparian and Public Rights to Lakes and Streams*, 35 WASH. L. REV. 580, 610-11, n. 141 (1960); ABA SECTION OF MINERAL AND NATURAL RESOURCES LAW 13, 15, 20 (1964); Aycock, *Introduction to Water Use Law in North Carolina*, 46 N.C. L. REV. 1, 4, 8 (1967). No financial obligation is thereby incurred. See *St. Anthony Falls Water Co. v. St. Paul Water Comm'r*, 168 U.S. 349 (1897); *Minneapolis Mill Co. v. Board of Water Comm'rs*, 56 Minn. 485, 58 N.W. 33 (1894); *Power Co. v. St. Paul Water Comm'r*, 168 U.S. 349 (1897). In New York, if the state owns the bed of a lake or stream, it may, by the exercise of a sovereign or reserve power, devote the water to a public purpose without compensating riparian owners harmed by its act. See *Hackensack Water Co. v. Village of Nyack*, 289 F. Supp. 671, 683 (S.D.N.Y. 1968); *New York v. System Properties, Inc.*, 2 N.Y.2d 330, 141 N.W.2d 429, 160 N.Y.S.2d 859 (1953); *Niagara Falls Power Co. v. Duryea*, 185 Misc. 696, 57 N.Y.S.2d 777 (Sup. Ct., 1945). Regarding the situation in Pennsylvania see *Rundie v. Delaware & Raritan Canal Co.*, 55 U.S. 80 (1852); *Fulmer v. Williams*, 122 Pa. 191, 15 A. 726 (1888).

way of a private interbasin transfer, such as would be involved if a man who owned a tract of land in contact with a stream wanted to use some of the water on a part of the tract which lay outside the stream's watershed. But it is far from certain that this fact affords a sufficient reason for rejecting the watershed limitation. It is rather unlikely that the owner of such a tract expected when he bought it that he could use the stream water beyond the watershed. He would probably realize that such a use would deprive the lower riparian owners of all possible benefit from the unconsumed part of the withdrawn water and that the law could not be expected to allow him to make any use which would have such an effect. In short, a statute adopting the watershed limitation would not disappoint any reasonable and natural expectation of such an owner. It is submitted, therefore, that he should be content with the legislation above proposed, which would enable him to buy the water right of a riparian owner for use outside the watershed without having to tie up any money in the purchase of riparian land for which he might not have any real use.

RULES REGARDING EXTENT OF RIPARIAN LAND WITHIN THE WATERSHED

Another important question concerning the permissible extent of riparian land which stands virtually unanswered in the East and for which an answer should be supplied by statute is the following: Assuming that a large tract of land borders on a body of water and is entirely within its watershed, can all of such tract qualify as riparian even if it extends inland for a considerable distance? The following four views have been expressed as to what answer should be given to this question; no one of them has sufficient legislative or judicial support to justify the statement that it is the one entertained by the weight of authority.

1. "[R]iparian land stops at the outermost edge of the land away from the stream as described by a single original entry of the land in the acquisition of title from the

government.”⁴⁶ (Hereinafter referred to as the government survey rule.)

2. Riparian status can be accorded only to “the smallest separate piece or parcel of land bordering upon the stream in the history of the title of all of the land of the riparian owner at the time that the claim is made or at the time of use.”⁴⁷ (Hereinafter referred to as the smallest tract rule.)

3. The area or size of the parcel is immaterial insofar as its character as riparian land is concerned.⁴⁸ (Hereinafter referred to as the no limit rule.)

46. 1 KINNEY, THE LAW OF IRRIGATION AND WATER RIGHTS 789 (2d ed. 1912). For a substantially similar statement see 1 WIEL, WATER RIGHTS IN THE WESTERN UNITED STATES 838-39 (3rd ed. 1911). One case supporting this view is *Watkins Land Co. v. Clements*, 98 Tex. 578, 86 S.W. 733, 735 (1905) in which it was said: “Riparian rights arise out of the ownership of land through or by which a stream of water flows, which rights cannot extend beyond the original survey as granted by the government.” As recognizing the prevalence of the government survey rule in Texas see *Sun Co. v. Gibson*, 295 F. 118 (1923); *American Cyanamid Co. v. Sparto*, 267 F.2d 425, 428 (1959). Also apparently supporting this view is the concurring opinion of McFadden, J. in *Harrell v. City of Conway*, 224 Ark. 100, 271 S.W.2d 924, 929 (1954). While this position was also taken in *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N.W. 781, 790-91 (1903) and in *re Platte Valley Pub. Power & Irrigation Dist.*, 132 Neb. 292, 271 N.W. 864, 867 (1937), it was substantially qualified in *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738, 745 (1966). This rule has also been administratively applied in Minnesota without either a legislative or judicial mandate for such application. ELLIS, *Water Rights and Regulations in the Eastern United States*, in 5 WATER FOR PEACE 649, 657 (1967).
47. 1 KINNEY, THE LAW OF IRRIGATION AND WATER RIGHTS 789 (2d ed. 1912). See also HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 46 (1942). This view now prevails in California. Although in *Title Insurance Co. v. Miller & Lux*, 183 Cal. 71, 190 P. 433, 437 (1920) the court said that the “single conveyance from the state” principle was “well settled” in California, the opinion in *Rancho Santa Margarita v. Vail*, 11 Cal. 2d 501, 81 P.2d 533, 547 (1938) declares that “[t]he riparian right extends only to the smallest tract held under one title in the chain of title leading to the present owner, that is that the land’s riparian status has not been lost by severance.” In neither *Vail* nor *Hudson* was *Title Insurance Company* cited on the issue as to the permissible extent of riparian land or was any reference made to the government survey limitation. Nor did either the *Vail* or *Hudson* opinion advert in this connection to the statement in *Alta Land & Water Co. v. Hancock*, 85 Cal. 219, 24 P. 645 (1890) that the occupants of every tract, held as an entirety and bordering on the stream, whatever its extent have riparian rights. This statement is interpreted in 1 WIEL, WATER RIGHTS IN THE WESTERN UNITED STATES 840 (3rd ed. 1911) as giving support to the view that the area of a parcel of land is immaterial insofar as its character as riparian land is concerned. This rule has also been administratively applied in Wisconsin without either a legislative or judicial mandate for such application. ELLIS, *Water Rights and Regulations in the Eastern United States*, in 5 WATER FOR PEACE 649, 657 (1967).
48. 1 WIEL, WATER RIGHTS IN THE WESTERN UNITED STATES 836-37 (3rd ed. 1911); RESTATEMENT OF TORTS § 843, comment c, at 327 (1939). This view is clearly supported by the following statements appearing in the court’s opinion in *Jones v. Conn*, 39 Ore. 30, 64 P. 855, 858, rehearing denied, 39 Ore. 46, 65 P. 1068 (1901):

4. "[T]he land for which riparian rights are claimed . . . must be reasonable in extent."⁴⁹ (Hereinafter referred to as the reasonable limit rule.)

[L]ands bordering on a stream are riparian, without regard to their extent. . . . [W]e are unable to find any rule determining when part of an entire tract owned by one person ceases to be riparian. . . . [A]ny person owning land which abuts upon or through which a natural stream of water flows is a riparian proprietor, entitled to the rights of such, without regard to the extent of his land, or from whom or when he acquired his title. . . . By virtue of the ownership of land in proximity to the stream, he is entitled to a reasonable use of the water. . . . In the determination of what will be considered such a use in a particular case, the character and extent of the land, its location, and the time of acquiring the title may all become, and are, no doubt, important factors to be considered; but they are not controlling, and each case must depend entirely on its own facts and circumstances.

In *Clark v. Allaman*, 71 Kan. 206, 80 P. 571, 585 (1905) the court quoted a substantial part of the above extract from the Jones opinion to support its rejection of the government survey rule. Whether *State Hospital for Criminal Insane v. Consolidated Water Supply Co.*, 267 Pa. 29, 110 A. 281 (1920) supports the no limit rule as suggested in MANN, ELLIS & KRAUSZ, *WATER-USE LAW IN ILLINOIS* 16 (1964) is not entirely clear. The water in this case was being used on land apparently contiguous to a riparian tract but beyond the watershed of the stream and about a mile and a half from the stream. The court apparently considered the question as to whether such use was on riparian land, but the opinion contained no clear statement in this regard. It is conceivable that the case might be interpreted as standing for the proposition that use on non-riparian land is lawful unless harmful, a view which has considerable support. See authorities cited note 44 *supra*; FISHER, *Due Process and the Effect of Eastern Appropriation Proposals on Existing Rights, With Special Emphasis on the Michigan Proposal*, in *THE LAW OF WATER ALLOCATION IN THE EASTERN UNITED STATES* 441, 481 (Haber & Bergen ed, 1958); Hanks, *The Law of Water in New Jersey*, 22 *RUTGERS L. REV.* 621, 630 (1968).

49. 1 KINNEY, *THE LAW OF IRRIGATION AND WATER RIGHTS* 789 (2d ed. 1912). See also 6A *AMERICAN LAW OF PROPERTY* § 28.55, at 162 (Casner ed. 1952). Among the cases supporting this view is *Sparks Mfg. Co. v. Town of Newton*, 57 N.J. Eq. 367, 392, 41 A. 385 (1898), *rev'd on other grounds*, 60 N.J. Eq. 399, 45 A. 596 (Err. & App. 1900) in which the court said:

The courts have been unable to define the distance to which a riparian proprietor's right of user for domestic and such purposes extends; nor have they been able to say what proportion of the stream might be used for such purposes. These questions depend upon the circumstances of each case as they present themselves, and the only rule which has or can be laid down is that both the distance and the use must be reasonable. Applying that rule here, we find, as a matter of fact, that the ownership of a portion of the banks of the stream by the Town of Newton gives it no right to divert the water.

Also supporting the reasonable limit rule is *McCartney v. Londonderry & Lough Swilly Ry. Co., Ltd.*, [1904] A.C. 301, 311. The court held that a railway which owned a small tract on the bank of a stream was not entitled to carry water taken from it along its own land to a tank half a mile off and to consume it in their locomotives and in explanation of its holding said:

[I]t would be extravagant to suggest that the system of the . . . Railway company and the lines of other companies over which they have running powers form a single riparian tenement, or that the railway company, by virtue of contact with the stream at one point, possess throughout their system, and all through the lines of other companies over which they have running powers, rights analogous to those possessed by persons who dwell on the banks of a river in respect of their riverside property. It may be difficult to say how far the rights of the railway company as riparian owners extend, but they can hardly go to such a length as that.

A. Government Survey Rule

For several reasons it would seem inadvisable for the eastern states to choose the first of these rules: viz., that the boundaries of a riparian tract cannot extend beyond those fixed in the original government grant of a parcel of land bordering on the water. Even in the few states approving that rule, the courts have, as in *Crawford Co. v. Hathaway*,⁵⁰ offered no reason for doing so other than that its adoption would be consistent with the federal practice of restricting the amount of public land which a settler could acquire from the federal government by perfecting an entry and with the state practice of disposing of school lands in limited quantities; practices apparently adopted as tending to implement a policy against concentration of land ownership in the hands of a few and in favor of the distribution of small quantities of land among a large number of citizens, who could be expected to support themselves and their families by engaging thereon in agricultural pursuits.⁵¹

See also *McCarter v. Hudson County Water Co.*, 70 N.J. Eq. 695, 708, 65 A. 489 (Err. & App. 1906), *aff'd* U.S. 349 (1908) in which the court held that the water company was not entitled at common law to take water from a stream and export it to another state, and that a New Jersey statute forbidding the transportation of water from New Jersey lakes and streams into another state was constitutional; and said *inter alia* in support of such holdings: "By the common law of England the right of diversion appears to have been confined to lands of the riparian proprietor, extending a reasonable distance from the bed of the stream." The decision was affirmed on the ground that the statute constituted a valid exercise of the police power rather than on the proposition as to the extent of riparian land. *See also* *Attwood v. Llay Main Collieries, Ltd.*, [1926] 1 Ch. 444, 459-60 in which the court said:

The proposition that every piece of land in the same occupation which includes a portion of the river bank and therefore affords access to the river is a riparian tenement is, in my opinion, far too wide. In order to test it, let me take an extreme case: nobody in their senses would seriously suggest that the site of Paddington Station and Hotel is a riparian tenement, although it is connected with the river Thames by a strip of land many miles long, nor could it reasonably be suggested that the whole of a large estate of, say 2000 acres was a riparian tenement, because a small portion of it was bounded by a stream. Yet, if the argument submitted in the present case on behalf of the defendant company were carried to its logical conclusion, both Paddington Station and Hotel and the hypothetical estate would be riparian tenements. In the present case the site of the defendants' works is, in my opinion, too far away from the river bank to sustain the character of a riparian tenement, and I find as a fact that it is not such a tenement.

50. 67 Neb. 325, 93 N.W. 781, 791 (1903).

51. As to this policy see Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 Yale L.J. 477 (1955); GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 656 (1968).

This reason should not be enough, however, to induce an eastern legislature to adopt the government survey rule by statute for, although land development policy should be taken into account when determining water development policy,⁵² the land development policy in aid of which the Nebraska court in *Crawford Co. v. Hathaway* apparently applied the government survey rule no longer enjoys the amount of support which it formerly had.⁵³ In the opinion of some, experience with that policy has shown that the interests of the farmer and of the public could be better served in the long run by leaving the farmer free to base his decision as to the size of his farm on economic and scientific factors rather than by enacting statutes and developing common law rules designed to make it difficult to embark upon large scale agricultural operations.⁵⁴

Although in the later case of *Wasserburger v. Coffee* the Nebraska court did not advert to the policy just referred to or call attention to its declining influence, the court may well have had that decline in mind when it substantially curtailed the scope of applicability of the government survey rule, which it had previously adopted in *Crawford Co. v. Hathaway*, by declaring that “[b]etween riparian proprietors restrictions to original entries or to government subdivisions are clearly arbitrary”⁵⁵ when determining the permissible extent

52. Carver, *A Federal Policy for Development of Western Water*, 14 ROCKY MT. MINERAL L. INST. 473, 494 (1968).

53. At any rate the policy has not been sufficiently influential to attract any substantial amount of support for the government survey rule. Indeed, the omission by several leading scholars of any reference to the rule in their recent writings on the permissible extent of riparian land suggests that in their opinion it has become moribund. See, e.g., Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water*, 33 TEXAS L. REV. 24, 41 (1954); ZIEGLER, *Water Use Under Common Law Doctrines*, in WATER RESOURCES AND THE LAW 49, 51-61 (1958); 5 POWELL, REAL PROPERTY ¶ 714 (1920); Bartke & Callahan, *1968 Annual Survey of Michigan Law, Real and Personal Property*, 15 WAYNE L. REV. 397, 402 (1968).

54. Support for this position was given by the Interstate Conference on Water Problems in Sept., 1969 when it adopted a resolution that the 160 acre limitation on interest free money for irrigation projects under the Reclamation Acts be modified to apply to an acreage considered to be an economic unit which may be determined from time to time to be justified by economic and technological changes affecting agriculture in order to promote efficient and profitable agricultural production. See NEWSLETTER OF THE UNIVERSITIES COUNCIL ON WATER RESOURCES 17 (Nov. 1969). For statistics affording support for this position see Meyers, Book Review, 77 YALE L.J. 1036 (1968). As to Congressional recognition of the validity of this position in some situations see Trelease, *Reclamation Water Rights*, 32 ROCKY MT. L. REV. 464, 491 (1960).

55. 180 Neb. 149, 141 N.W.2d 738, 745 (1966).

of riparian land and that they disapproved of them. Substantial basis for speculation that doubts regarding the wisdom of the policy against large landholdings may have accounted at least in part for the way in which the court dealt in *Wasserburger* with the government survey rule seems to be afforded by the strong opposition shown in the western states to federal enforcement of the provisions in the Reclamation Acts forbidding the use of reclamation project water on more than 160 acres of land held by one owner;⁵⁶ an opposition which would probably have been less determined if the policy against large landholdings had the support of majority opinion in the western states.⁵⁷ But regardless of the validity of this speculation, if the reason given for the government survey rule in *Crawford v. Hathaway* was not sufficiently persuasive to deter the Nebraska court from substantially limiting the scope of the rule by its declaration in *Wasserburger*, that reason should not be accepted as an adequate basis for the adoption in the eastern states of the government survey rule as to the permissible extent of riparian land in view of the undesirable results to which that rule might lead if adopted in the East; results which, if they came to pass, would fully justify the characterization of that rule in *Wasserburger* as arbitrary.

Since in some of the eastern states private owners trace their titles back to England, Holland or the state rather than to the federal government⁵⁸ and since many of the grants by these governments were not controlled with respect to permissible shapes and sizes by statutory specifications, the dimensions of riparian tracts conveyed by original government grants in the East were far from uniform. In some cases the acreage may have been quite small. In others it certainly was very large.⁵⁹ If the original grant were of a small riparian

56. As to this opposition see Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 YALE L.J. 477 (1955); Meyers, Book Review, 77 YALE L.J. 1036, 1040-41 (1968).

57. The 160-acre limitation in the Reclamation Acts has, however, the support of at least one western state. See *Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy Dist.*, 57 N.M. 287, 258 P.2d 391 (1953); Trelease, *Reclamation Water Rights*, 32 ROCKY MT. L. REV. 464, 492 (1960).

58. 4 AMERICAN LAW OF PROPERTY §§ 18.17, 18.18 (Casner ed. 1952).

59. In *Ledyard v. Ten Eyck*, 36 Barb. 102, 103 (N.Y. Sup. Ct. 1862) reference was made to the receipt by one Edwards in 1794 of a New York State patent for 15,000 acres of land which on their northern side had contact with Cazenovia Lake. Massachusetts conveyed to Gorham and Phelps 2 million acres of the land which it had acquired by cession from New

tract and if the government survey rule were in force, the riparian owner could not increase the size of his riparian holding by acquiring land abutting on one of its borders because it is an unavoidable consequence of the government survey rule that the original area of a riparian tract cannot be increased by the acquisition of contiguous land⁶⁰ which, because it had no contact with the water at the time of its acquisition, is non-riparian at that time.⁶¹ This would be so even if the acquired land had once been riparian (because included in the original government grant)⁶² and had lost that status by a conveyance severing it from the original riparian tract.⁶³ In other words, under the government survey rule the area of a riparian tract can be decreased but never increased.⁶⁴ Thus, if a contest arises as to how much of the land belonging to a riparian owner can qualify as riparian, a court which is bound by that rule would have to hold that A could not exercise his riparian privileges for the benefit of another tract acquired by him or enforce riparian rights for the protection of such a tract unless he could show that such exercise or en-

York under the Treaty of Hartford. This tract contained many lakes. See Andrews, *Lands Under Water in New York*, 16 CORNELL L.Q. 277, 279 (1931).

60. 1 WIEL, *WATER RIGHTS IN THE WESTERN UNITED STATES* 838 (3rd ed. 1911); 1 KINNEY, *THE LAW OF IRRIGATION AND WATER RIGHTS* 789, 791 (2d ed. 1912); *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N.W. 781, 790 (1903).
61. See note 12 *supra* and accompanying text.
62. 6A AMERICAN LAW OF PROPERTY § 28.65, at 160 (Casner ed. 1952); *Wasserbarger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738, 745 (1966); Bartke & Callahan, *1968 Annual Survey of Michigan Law, Real and Personal Property*, 15 WAYNE L. REV. 397, 402 (1968).
63. When a riparian tract is severed by a conveyance of less than all of it, the part of the tract which after the conveyance has no contact with the water no longer qualifies as riparian land unless the severing deed provides to the contrary. See 5 S.C.L.Q. 178 (1952); ZIEGLER, *Water Use Under Common Law Doctrines*, in *WATER RESOURCES AND THE LAW* 49, 60 (1958); MANN, ELLIS & KRAUSZ, *WATER-USE LAW IN ILLINOIS* 17 (1964); Davis, *Australian and American Water Allocation Systems Compared*, 9 B.C. IND. & COM. L. REV. 647, 681 (1968). As to the possibility that the provision to the contrary may be applied from the circumstances see *Hudson v. Dailey*, 156 Cal. 617, 105 P. 748 (1909); HUTCHINS, *CALIFORNIA LAW OF WATER RIGHTS* 195 (1956); *Rancho Santa Margarita v. Vail*, 11 Cal. 2d 501, 81 P.2d 533, 552 (1938); 1 ROGERS & NICHOLS, 9 *WATER FOR CALIFORNIA* 249-50 (1967); HUTCHINS, *Irrigation Water Rights in California*, in 452 *CALIFORNIA AGRICULTURE EXPERIMENTAL STATION CIRCULAR (REVISED)* 21 (1967).
64. 1 KINNEY, *THE LAW OF IRRIGATION AND WATER RIGHTS* § 46(a) (2d ed. 1912); *Harrell v. City of Conway*, 224 Ark. 100, 271 S.W.2d 924, 929 (1954) (concurring opinion); Waite, *Beneficial Use of Water in a Riparian Jurisdiction*, 1969 WIS. L. REV. 864, 872.

forcement would not harm other riparian owners;⁶⁵ such a holding would be required even though the acquired tract were contiguous to the part of A's land conceded to be riparian, even though the area of that part was small, and even though it appeared that under the conditions then prevailing in the watershed it would clearly be to A's advantage to have the added land classified as riparian and that he could enjoy riparian privileges and rights in connection with his entire holding without unreasonably reducing the extent to which other riparian owners could enjoy their riparian privilege and rights and without conflicting with the public interest in the optimum use of water resources.⁶⁶

Since such a holding would deny riparian status to land from which the water could be reached without commission of a trespass,⁶⁷ since in accordance with the variability principle

65. Under the reasonable use version of the riparian doctrine harmless uses are lawful. See the authorities cited in Farnham, *The Improvement and Modernization of New York Water Law Within the Framework of the Riparian System*, 3 LAND & WATER L. REV. 377, 384, n. 27 (1968).

66. In 1 WIEL, WATER RIGHTS IN THE WESTERN UNITED STATES § 772, at 842-43 (3rd ed. 1911) it is said:

For example, an apportionment may have been made between riparian owners where one riparian owner owns fifty acres and another five hundred acres, all irrigable, and, other things being equal, the latter was given 50 inches of water and the former 50. A year later the former buys 450 acres adjoining and both now own the same amount of land and have the same needs. Is it in consonance with the principle of equality to permit the one to practically monopolize the whole stream, when their needs are now equal? It would clearly not be reasonable in all cases to redivide the stream by halves, for expenditures or change of position in reliance upon the former division become an important factor in deciding what is reasonable under the new conditions. But that is a matter for the trial judge or jury to consider, and if he is still convinced on all the facts that a larger area without doing unreasonable detriment, then, if we are correct, both justice and the law require that he should so adjudge.

As to the attention which should be paid and is paid to this public interest see notes 95, 96 *infra* and accompanying text.

67. The government survey rule is said to be "indefensible on principle" because the controlling factor when determining whether land is riparian is whether access to the water can be had from it without committing a trespass. This author also asserted that *Lux v. Haggin*, 63 Cal. 255, 10 P. 674 (1884), which was cited in *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N.W. 781, 790 (1903) as having laid down the government survey rule, deciding "nothing as to the extent of riparian land at common law, but only enforces the right of the prior appropriator on public land against later entries of the land." 1 WIEL, WATER RIGHTS IN THE WESTERN UNITED STATES §§ 769, 770 (3rd ed. 1911). Although the question as to whether Wiel was justified in rejecting the Nebraska court's interpretation of the ambiguous opinion in *Lux* is interesting as well as difficult, it need not be discussed at this point; for the question under consideration here is not as to the original source of the government survey rule, but rather as to the advisability of adopting it in the eastern states.

of the reasonable use version of the riparian doctrine⁶⁸ the extent of the interests of a riparian owner ought to be determined by conditions existing when such interests come in question rather than by conditions which prevailed at an earlier time, and since the choice of the latter alternative would interfere with the maintenance of a desirable flexibility in the pattern of water use,⁶⁹ it seems clear that a fear that the operation of the government survey rule in cases involving small riparian tracts might lead to indisputably arbitrary results is well founded.⁷⁰ While they might be tolerated in a state in which appropriative as well as riparian water rights are recognized and in jurisdictions where the conclusion has been reached that the public interest requires appropriative water rights to supplant riparian rights to the greatest extent constitutionally permissible,⁷¹ such results should not be accepted

68. At common law the reasonable use version of the riparian doctrine includes the variability principle by virtue of which a use which is reasonable today may become unreasonable when conditions change. See Farnham, *The Improvement and Modernization of New York Water Law Within the Framework of the Riparian System*, 3 LAND & WATER L. REV. 377, 391 and authorities in n. 53 (1968). For a discussion of the extent to which this principle should be preserved in riparian doctrine states see *id.* at 405-11.

69. As to the desirability of avoiding rigidity and maintaining flexibility in the pattern of water use see *id.* at 409 and authorities in n.126; Maloney & Ausness, *A Modern Proposal for State Regulation of Consumptive Uses of Water*, 22 HASTINGS L.J. 523, 537 (1971).

70. Thus in 36 MICH. L. REV. 346-48 (1937) the government survey rule is attacked as "too narrow and quite unrealistic," and because under it the use of water "would be absurdly limited and much land rendered almost useless". Relevant in this connection is the following passage from BEUSCHER, WATER RIGHTS 137-38 (1967), as quoted in 1969 WIS. L. REV. 873-74 n.43:

Suppose two cases. Each involves a 160-acre farm in an entire rectangular parcel—two forties on the river, two forties back from the river. Both farmers apply for permits to take water from the river to irrigate for potatoes. The first farmer is told he can have a permit to irrigate only the two forties on the river; the second is given a permit to irrigate his entire 160-acre tract. Why: Because the grandfather of the first farmer had sold off the two rear forties years ago only to buy them back later. This broke the chain of title. Riparian rights could not be restored as to those forties. But no one had ever sold off the rear forties on the second farm so they continued to be riparian land! Compare *Application of Gorell*, 2 W.P. 1105, 41 Wis. Pub. Serv. Comm. Rep. 354 (1956) and *Application of Luther*, 2 W.P. 1120, 41 Wis. Pub. Serv. Comm. Rep. 467 (1956).

71. Thus although the court in *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738, 745 (1966) rejected the government survey rule as arbitrary when applied to a contest between riparian owners, it followed this rejection with language which could conceivably be interpreted as indicating that it might be necessary to apply a modified form of the rule in contests between claimants of riparian interests and claimants of appropriative interests in order to facilitate accomplishments of the legislature's intention to abolish unused riparian rights. Dean Trelease, who has made no secret of his preference for the prior appropriation system of water rights, is apparently satisfied with the California rule that the riparian right extends only to the smallest tract held under one title in the chain of title leading to

in most of the eastern states which, as already indicated, have elected to continue to operate under the riparian system.⁷²

It is also possible that results which could fairly be characterized as arbitrary might be reached under the government survey rule if a very large tract of land had been conveyed by the original government grant. For example, 100,000 acres of land situated in a wide valley and covered by one government patent would have to be regarded as riparian, even though much of it lay several miles from the river flowing through the valley. In sum, since application of the government survey rule might in some cases result in the denial of riparian status to land sufficiently close to the water to deserve it, as pointed out above, and since it might in other cases lead to the accord of that status to land which is too far from the water to be entitled to it, it is submitted that, while legislation is needed to clarify the existing uncertainty as to the permissible extent of riparian land in the East, the legislation when enacted should not codify the government survey rule.

B. Smallest Tract Rule

If the smallest tract rule⁷³ is the substantial equivalent of the government survey rule as the treatment of these rules by some courts and authors tend to indicate,⁷⁴ it obviously

present owner—a rule which is basically similar to the government survey rule—because the California rule tends to increase the amount of water available for appropriation. Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water*, 33 TEXAS L. REV. 24, 41 (1954). Worthy of note in this connection, however, is the statement of R. W. Johnson that “[t]he case law announced immediately after the enactment of the 1917 code indicated that the appropriation system had gained ground. . . . Cases of more recent vintage seem to indicate that [in Washington] the pendulum has edged back in some areas toward riparianism.” Johnson, *Riparian and Public Rights to Lakes and Streams* 35 WASH. L. REV. 580, 590 (1960).

72. See note 1 *supra* and accompanying text.

73. See note 47 *supra* and accompanying text.

74. Thus *Boehmer v. Big Rock Irrig. Dist.*, 117 Cal. 19, 48 P. 980 (1897), the opinion which does not contain a statement of either rule, is cited in *Title Ins. & Trust Co. v. Miller & Lux*, 183 Cal. 71, 190 P. 433, 467 (1920) as establishing the government survey rule, whereas in *Rancho Santa Margarita v. Vail*, 11 Cal. 2d 501, 81 P.2d 533, 547 (1938) and in *Hudson v. West*, 47 Cal. 2d 823, 306 P.2d 807, 810 (1957) *Boehmer* is cited as supporting the smallest tract rule. Some writers apply the name “source of title test” to the smallest tract rule. See DAVIS, *Australian and American Water Allocation Systems Compared*, 9 B.C. IND. & COM. L. REV. 647, 680-81 (1968). Others apply it to the government survey rule. See Waite, *Beneficial Use of Water in a Riparian Jurisdiction*, 1969 WIS. L. REV. 864, 872.

follows that if, as already contended, it would be inadvisable for an eastern state to adopt the government survey rule, it would be inadvisable for such a state to adopt the smallest tract rule. But even if the two rules are separate and distinct as some authorities have assumed,⁷⁵ it is submitted that the smallest tract rule should not be selected for codification because it is open to the same objections to which the government survey rule is subject.

As in the case of the government survey rule,⁷⁶ it seems to be impossible to find an affirmative reason for choosing the smallest tract rule which should have any cogency in the East. One argument which was advanced in *Boehmer v. Big Rock Irrigation District*⁷⁷ for its adoption is substantially the same as that offered in *Crawford Co. v. Hathaway*⁷⁸ in support of the government survey rule: viz., that it is consistent

This affords further evidence of a tendency to treat the two rules as one and the same. See also 5 S.C.L.Q. 178 (1952); 1 ROGER & NICHOLS, WATER FOR CALIFORNIA 164 (1967) in which the two rules seem to be treated as equivalents. Moreover, the decision of some writers to make no reference to the government survey rule, although they are no doubt aware that some courts had affirmed its existence, may have been based on the unexpressed belief that the two rules constituted but one, and that it was necessary to refer only to the later version of that single rule—the smallest tract rule.

75. See 1 WIEL, WATER RIGHTS IN THE UNITED STATES §§ 770-71 (3rd ed. 1911); 1 KINNEY, THE LAW OF IRRIGATION AND WATER RIGHTS § 464 (2d ed. 1912). This section of Kinney is cited in *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738, 744-45 (1966) as setting forth "recognized tests", including the government and smallest tract rules, and these rules are referred to by the court itself as "tests" rather than as "a test". But neither these textwriters nor the court in *Wasserburger* indicate to what extent the rules are different or point out any situations in which the results which would be reached under one rule would be different from those which would be arrived at under the other; and apparently no other textwriter, commentator or court has done so. In all states most landowners trace their titles back to some governmental grant. 3 AMERICAN LAW OF PROPERTY §§ 12.15-12.18 (Casner ed. 1952); 4 AMERICAN LAW OF PROPERTY §§ 18.17-20 (Casner ed. 1952). Under the smallest tract rule as under the governmental survey rule the permissible area of riparian land could not exceed that covered by the original governmental grant, and land severed from a riparian tract by conveyance could never regain its riparian status. See authorities cited in notes 62-65 *supra*, note 87 *infra*. It would seem safe to assume, therefore, that except in a most unusual case, which apparently has not yet arisen, the same result would be arrived at under both rules. The probability that this assumption is correct is increased by the failure of the courts and textwriters to point out any distinction between the two rules other than that arising from the difference in the language used to state them.
76. See notes 50-56 *supra* and accompanying text.
77. 117 Cal. 19, 48 P. 980 (1897).
78. 67 Neb. 325, 93 N.W. 781, 791 (1903). Since for the reasons pointed out in note 74 *supra* it is not clear whether *Boehmer* established the government survey rule or the smallest tract rule, there is room for doubt as to whether the reason referred to in the text above was actually offered in support of the smallest tract rule or as a basis for the government survey rule.

with the federal practice of restricting the right of entry under the homestead and pre-emption laws to 160 acres and with similar practices followed by the states when disposing of their lands. But, for reasons already stated, the policy in aid of which these practises were inaugurated—the policy against concentration of land ownership in too few hands—should not now be pursued in the East in view of the economic and scientific factors currently affecting agriculture.⁷⁹ While one additional argument in support of the smallest tract rule was made in *Boehmer*: viz., that in the absence of the rule a riparian owner could expand his riparian holdings to an unlimited extent by purchases of contiguous non-riparian land,⁸⁰ the answer is that any state which wishes to avoid such occurrences can do so by adopting the reasonable limit rule, previously referred to⁸¹ and discussed hereinafter.⁸²

It is true that one textwriter has expressed approval of the smallest tract rule, apparently on the ground that it provides a satisfactory measure of the permissible extent of riparian land because the amount of land in contact with the water which a man will buy is normally governed by the requirements of the use which he intends to make of it and because his decision in this regard will usually be sufficiently judicious to serve not only his advantage but that of the public as well.⁸³ If this brief paraphrase of the textwriter's statements summarizes them with substantial accuracy,⁸⁴ it would seem clear that his defense of the smallest tract rule should not prevail for it appears to commend the rule for what should be recognized as a vice rather than a virtue: viz., a tendency to rigidify a pattern of water use once established and to make it difficult either to expand original uses or to begin new ones in response to changed conditions.⁸⁵

79. See notes 50-57 *supra* and accompanying text.

80. 117 Cal. 19, 26-27, 48 P. 908 (1897).

81. See note 49 *supra* and accompanying text.

82. See note 102 *infra* and accompanying text.

83. See 2 FARNHAM, THE LAW OF WATER AND WATER RIGHTS 1571 (1904).

84. The author confesses that he finds the statements of the earlier Farnham difficult to interpret.

85. As to the desirability of avoiding rigidity and maintaining flexibility in the pattern of water use see the authorities referred to in note 69 *supra*. Also relevant at this juncture is the statement in Davis, *Australian and American Water Allocation Systems Compared*, 9 B.C. IND. & COM. L. REV. 647, 681 (1968), "that most farms today have different boundaries than the original farms."

Like the government survey rule, the smallest tract rule is not only open to the objection that no currently cogent reasons have been offered for its adoption in a riparian doctrine state, but it is also open to the objection that the consequences of such a step would be undesirable. Regardless of whether the smallest riparian tract in the latest owner's chain of title comprises scanty or extensive acreage, the application of the smallest tract rule, for the reasons given when discussing the government survey rule,⁸⁶ might lead to clearly arbitrary decisions by which the permissible extent of riparian land would be too severely restricted in some cases and too leniently expanded in others.⁸⁷ It would seem clear, therefore, that the legislation needed to remove the uncertainty existing in the East as to what land can qualify as riparian should not codify the smallest tract rule.

C. No Limit Rule

Would it be advisable for a riparian doctrine state to adopt the no limit rule: viz., that the size of a tract of land is immaterial insofar as its character as riparian land is concerned?⁸⁸ A presumption in favor of this rule is created by the support given it in the Torts Restatement,⁸⁹ by Wiel,⁹⁰ and by the well reasoned and often cited case of *Jones v. Conn.*⁹¹ Furthermore, the rule is deserving of support insofar as it permits the increase in the size of a riparian tract by the ac-

86. See notes 60-73 *supra* and accompanying text.

87. It is a consequence of the smallest tract rule as well as of the government survey rule that the size of a riparian tract can never be increased and that the smallest tract rule will therefore often prove highly restrictive in operation. 1 KINNEY, *THE LAW OF IRRIGATION AND WATER RIGHTS* 790 (2d ed. 1912); 1 WIEL, *WATER RIGHTS IN THE WESTERN UNITED STATES* 771 (3rd ed. 1911); Davis, *Australian and American Water Allocation Systems Compared*, 9 B.C. IND. & COM. L. REV. 647, 681 (1968); 5 POWELL, *REAL PROPERTY* ¶ 714, at 371-74 (1920); 36 MICH. L. REV. 346-48 (1937); 1966 WIS. L. REV. 172, 182. Even if the smallest tract in the chain of title comprises thousands of acres, all of it that lies within the watershed must be recognized as riparian. See 1 KINNEY, *THE LAW OF IRRIGATION AND WATER RIGHTS* 790 (2d ed. 1912). Thus in *Alta Land & Water Co. v. Hancock*, 85 Cal. 219, 229-30, 24 P. 645 (1890), the court said that "the occupants of each and every tract held as an entirety, bordering on the stream, whatever its extent" have riparian rights, and held that land over a half a mile from a stream was riparian. See also *Rancho Santa Margarita v. Vail*, 11 Cal. 2d 501, 81 P.2d 533 (1938).

88. See note 48 *supra* and accompanying text.

89. RESTATEMENT OF TORTS § 843, comment c, at 327 (1939).

90. 1 WIEL, *WATER RIGHTS IN THE WESTERN UNITED STATES* 836-37 (3rd ed. 1911).

91. 39 Ore. 30, 64 P. 855, rehearing denied 39 Ore. 46, 65 P. 1068 (1901).

quisition of additional land contiguous to it, even though the added land had been non-riparian ever since its passage from governmental to private ownership.⁹² Moreover, it precludes prevalence of the doctrine that the total area of riparian land can decrease but never increase, a doctrine which, as already noted, is an undesirable consequence of both the government survey and smallest tract rules.⁹³ There undoubtedly will be situations in which riparian owner A can claim water for land added to his riparian tract without unreasonably curtailing the amount of water available for riparian owners B and C and without prejudice to the public interest in the optimum use of water resources;⁹⁴ an interest which some states have already held must be taken into account when passing on the reasonableness and legality of a water use⁹⁵ and to which other riparian doctrine states should accord the same importance.⁹⁶ If the situation prevailing in northwestern Wisconsin is typical of that existing elsewhere in that state and in other states, the adoption of this rule would substantially increase the amount of land which could qualify as riparian.⁹⁷

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92. See quotation from *Jones v. Conn*, *supra* note 48; 1 KINNEY, *THE LAW OF IRRIGATION AND WATER RIGHTS* 465 (2d ed. 1912); ZIEGLER, *Water Use Under Common Law Doctrines*, in *WATER RESOURCES AND THE LAW* 49, 60 (1958); Davis, *Australian and American Water Allocation Systems Compared*, 9 B.C. IND. & COM. L. REV. 647, 681 (1968); 36 MICH. L. REV. 346-48 (1937).
93. See note 64 *supra* and accompanying text; note 87 *supra*.
94. See notes 66, 70 *supra*.
95. See Farnham, *The Improvement and Modernization of New York Water Law Within the Framework of the Riparian System*, 3 LAND & WATER L. REV. 377, 394-95 (1968).
96. *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45, 47 (1968); HOLMES, *THE COMMON LAW* 35-36 (1881); RESTATEMENT OF TORTS §§ 347-50, 827-28 (1939); PROSSER, *TORTS* 618, 622 (3rd ed. 1964); 5 POWELL, *REAL PROPERTY* ¶ 713, at 369 (1920); Lauer, *Reflections on Riparianism*, 35 MO. L. REV. 1, 24-25 (1970); Levi, *Highest and Best Use: An Economic Goal for Water Law*, 34 MO. L. REV. 165, 168 (1969); Maloney, Plager & Baldwin, *Water Pollution*, 20 U. FLA. L. REV. 131, 136 (1967); 84 U. PA. L. REV. 630-37 (1936). Of course the determination as to whether a particular use of a lake or stream is in the public interest is a difficult task. A court's conclusion in this regard will not always win unanimous approval, particularly when consideration of the public interest results in serious harm to a valuable water-based business as it did in *Joslin v. Marin Municipal Water Dist.*, 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967). The emphasis put in this case on the public interest at the expense of the complaining riparian is deplored in Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HAST. L.J. 431, 472 (1969).
97. Thus in Davis, *Australian and American Water Allocation Systems Compared*, 9 B.C. IND. & COM. L. REV. 647, 681 (1968), it is pointed out that a recent study of the situation in northwestern Wisconsin indicates that the no limit rule would allow 64% more land to qualify as riparian than would the government survey and smallest tract rules.

But granting that the no limit rule is free from one of the two serious objections to the government survey and smallest tract rules—that in some cases they would arbitrarily lead to the denial of riparian privileges and rights to land which ought to enjoy them⁹⁸—can it not be argued that the no limit rule is open to the second serious objection to which the government survey and smallest tract rules are subject, i.e., that it would in some cases arbitrarily lead to the recognition of riparian privileges and rights in land which did not deserve them in view of its distance from the stream?⁹⁹ Furthermore, is it not arguable that the failure of the no limit rule to impose any restriction on the amount of added land which can become riparian when acquired by riparian owner A poses too much of a threat to the interests of riparian owners B and C? It was this threat which the English courts may have had in mind when they denied riparian status to land areas far distant from the stream, although they were parts of tracts bordering upon it and held by one owner.¹⁰⁰

D. Reasonable Limit Rule

To be weighed against this objection to the no limit rule is an argument substantially similar to the one which, as previously noted, can be argued against enforcement of a watershed limitation on the permissible extent of riparian land: viz., that riparians B and C need not fear that they will be unfairly prejudiced under the no limit rule if A, an upper riparian owner, wishes to use water on the rear part of a riparian tract of great acreage because under the riparian system no use of water, even if on land classified as riparian, can be legal unless it is reasonable under all the circumstances and because one of the circumstances which would certainly be taken into account when deciding the reasonableness issue would be the distance from the lake or stream of the area on which A proposed to use the water. That these rules would afford B and C considerable protection against monopolization of the water by A is clear; it can be argued, nevertheless,

98. See notes 67-70 *supra* and accompanying text; note 87 *supra*.

99. See notes 72-73 *supra* and accompanying text; note 87 *supra*.

100. See the quotations from the opinions in the *McCartney* and *Attwood* cases note 49 *supra*.

that in a case in which the question regarding the legality of A's intended use is a close one, B's and C's chances of persuading the court that A should be enjoined from harming them by withdrawing enough water to supply distant parts of his large tract would be greater if the court were faced with two questions: (1) whether all of A's large tract could qualify as riparian under the reasonable limit rule and (2) whether, if all his land was riparian, his use on its rear areas would be reasonable. If the court were confronted only with the question regarding the reasonableness of A's use, as would be the case if it were operating under the no limit rule, certainly B's and C's chances of success would be lessened.

While acceptance of this line of thought would seem to involve a willingness to load the dice somewhat in favor of riparians B and C and their riparian tracts of normal size, it could be argued that in a state in which riparian rights have been recognized from its earliest days B and C are entitled to this advantage because their possession of it is necessary to give adequate protection in close cases to their natural and reasonable expectations when they bought their land, i.e., the acreage of a tract bordering on a body of water which could qualify as riparian would not be unlimited, even though all of it were in the watershed of the lake or stream involved. Elementary fairness requires adequate protection for such reasonable and natural expectations on the strength of which men have invested their labor and capital. A, on the other hand, would have little basis for objecting to protection for B and C to this extent because it is doubtful that he expected when he acquired his large tract that all of it would qualify as riparian simply because one side of it bordered on a lake or stream and because, if he had entertained such an expectation, it would not have been a natural and reasonable one.

RECOMMENDATIONS

Precedent for legislation permitting increase in the size of a riparian tract by the acquisition of contiguous non-riparian land is afforded by a Virginia statute reading as follows:

Real property under common ownership and which is not separated from riparian land by land of any other ownership shall likewise be deemed riparian land notwithstanding that such real property is divided into tracts and parcels which may not bound upon the watercourse.¹⁰¹

While it is to be hoped that the other eastern states will follow Virginia's example by enacting legislation which will prevent their courts and administrative agencies from following either the government survey or smallest tract rule, it is also to be hoped that any new legislation will make it clear that no land can qualify as riparian to a lake or stream unless it lies not only within the watershed of the lake or stream but also within a reasonable distance therefrom, regardless of whether the question as to the permissible extent of riparian land arises because of the inclusion of many square miles of land in an original government patent or because an owner of a conceded-ly riparian parcel acquires a contiguous non-riparian tract.

Would legislation of this sort be upheld against challenge on constitutional grounds? It seems clear that this question could be answered in the affirmative in any eastern state which now lacks a definition of riparian land or has one which is uncertain, as most of them do.¹⁰² Surely the courts have power to fill gaps in the common law or to clarify rules which have been troublesome because of doubt as to their exact content; no constitutionally protectible property rights can be based on a non-existent rule or even on an uncertain one. And it would also seem clear that if an eastern state should enact such legislation, its courts would not have to strike it down as unconstitutional on the ground that either the government survey rule prevailing in Texas,¹⁰³ the smallest tract rule in force in California,¹⁰⁴ or the no limit rule established in Oregon¹⁰⁵ had become part of the common law binding on the courts of the eastern state and that interests arising from these definitions in the body of water involved had vested and could not be impaired without compensation. Because of the objectionable

101. VA. CODE ANN. §§ 62.1-104(5) (1968).

102. See notes 11, 12 *supra* and accompanying text.

103. See note 46 *supra*.

104. See note 47 *supra*.

105. See note 48 *supra*.

consequences of these rules and because they would not be adapted to the needs and conditions in the eastern state,¹⁰⁶ its courts could and should hold that the decisions adopting them in other states had not become part of the common law of the eastern state.¹⁰⁷

Whether the Virginia statutory definition of riparian land, which is silent with respect to both the watershed limitation and the reasonable limit rule,¹⁰⁸ could constitutionally be amended so as to include them is perhaps a more debatable question. Nevertheless, in view of the public interest in preventing friction between neighboring landowners and of cases upholding as valid exercises of the police power statutes designed to preclude such friction by effecting an equitable adjustment of property rights and privileges as between the neighbors,¹⁰⁹ it seems likely that legislation containing a definition of riparian land which included the watershed and

106. See notes 86, 87, 100, 101 *supra* and accompanying text.

107. Tending to support these conclusions is *Duval v. Thomas*, 114 So.2d 791, 795 (Fla. 1959) in which the court rejected the contention that a Florida statute adopting the English common law in effect in 1776 precluded it from holding that it was lawful for the riparian owners on a non-navigable lake, each of whom owned a part of its bed, to pass in boats over the entire lake and said:

[O]ur own research has not divulged the clear, unambiguous pronouncement of the common law in effect 4 July 1776, that would leave us no room but to adopt it in this case. . . . [W]hen grave doubt exists of a true common law doctrine such as would govern dual or multiple ownership of property like Lake Calm, we may . . . exercise a 'broad discretion' taking 'into account the changes in our social and economic customs and present day conceptions of right and justice.'

It is . . . only when the common law is plain that we must observe it. In making the observation that the common law relating to the question involved is unclear, we have not disregarded decisions of the courts of other states. . . . But we have not found cases from the English courts . . . fixing the relative rights of owners of the bed of a lake of the nature of Lake Calm.

Also pertinent in this connection is the following passage from O'Connell, *Iowa's New Water Statute*, 47 IOWA L. REV. 549, 595 (1962): "To the extent that they [water rights] are uncertain, logically a reasonable change under the police power alter expectations less, and arguably thereby does not deprive a riparian of property without due process of law.

108. See note 101 *supra* and accompanying text. It apparently has not yet been decided whether this statute, by its failure to include the watershed limitation, supercedes *Town of Gordonsville v. Zinn*, *supra* note 16 which supports that limitation, or whether that case still controls this point because of the failure of the statute to contradict the case expressly.

109. *Camfield v. United States*, 167 U.S. 518, 523-24 (1896); *Hathorn v. Nat'l Carbonic Gas Co.*, 194 N.Y. 326, 87 N.E. 504 (1909); *Nelson v. DeLong*, 213 Minn. 425, 7 N.W.2d 342, 348 (1942); *People v. N.Y. Carbonic Acid Gas Co.*, 196 N.Y. 421, 90 N.E. 441 (1909); *Riteout v. Knox*, 148 Mass. 368, 19 N.E. 390 (1809); *Dunham, A Legal and Economic Basis for City Planning*, 58 COL. L. REV. 650, 666-67 (1958); *Ellis, Modification of the Riparian Theory and Due Process in Missouri*, 34 MO. L. REV. 562, 572 (1969); *Sax, Takings and the Police Power*, 74 YALE L.J. 36, 67 (1964).

reasonable limit rules, and so provided protection for the natural and reasonable expectations of owners of land bordering on lakes and streams,¹¹⁰ and which would therefore tend toward a distribution of privileges and rights with respect to the water which such owners would view as equitable, would be upheld as a valid exercise of the police power, even though its application would involve the infliction of some uncompensated diminution in the extent or value of the water privileges and rights of part of the members of the group.

110. See notes 29-32, 38-39 *supra* and accompanying text.