Land & Water Law Review

Volume 17 | Issue 2 Article 1

1982

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John C. Cabaniss

University of Wyoming
College of Law

LAND AND WATER
LAW REVIEW

VOLUME XVII 1982 NUMBER 2

In this article the author explains the choice of law rules that affect riparian rights following changes in water boundaries due to accretion or avulsion. The article examines the current use of federal common law to determine riparian rights in various contexts. It also considers the use of state law as the appropriate rule of decision. Finally, the article suggests that federal protection of riparian rights should be based on the fifth and fourteenth amendments' prohibition against taking without just compensation.

FEDERAL COMMON LAW AND ITS APPLICATION TO DISPUTES INVOLVING ACCRETIVE AND AVULSIVE CHANGES IN THE BOUNDS OF NAVIGABLE WATERS

*By John C. Cabaniss**

This article will explore the need and basis for applying a uniform federal common law of riparian rights[1] to determine property ownership when a change occurs in the bounds of a navigable watercourse. The declaration of a uniform federal rule is one of two alternatives open to a federal court once it has been established that federal interests re-

*Associate, Quarles & Brady, Milwaukee, Wisconsin; J.D., Wayne State University, 1981; B.S.M.E. Michigan Technological University, 1977; Member, Wisconsin State Bar.

The author gratefully acknowledges the editorial assistance of Professor Robert Abrams and William Frey, Esq.

1. Riparian rights arise from ownership of land adjoining or underlying a stream. These rights relate to use of the water and ownership of the soils beneath the waters. J. SAX, WATER LAW PLANNING AND POLICY 1 (1968); Mobile Transp. Co. v. Mobile, 128 Ala. 335, 30 So. 645 (1900). *See generally* Hanks, *The Law of Water in New Jersey*, 22 RUT. L. REV. 621, 627 (1968); Hilt v. Weber, 252 Mich. 198, 233 N.W. 159 (1930).

quire the use of federal common law.[2] The other available alternative is the adoption of state law as the federal rule of decision.[3]

Several areas of potential federal interest will be discussed after the current state of the law in each area is set forth. The proper choice of law for establishing the initial boundary of a federal patent will first be addressed. This will be followed by a review of whether federal or state law governs the riparian rights possessed by one whose property was the subject of a prestatehood federal patent when that property has been affected by a poststatehood accretive[4] or avulsive[5] change. Then, a portion of this note will focus on

2. Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979); United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 471-72 (1942).

3. The Court stated that "[a]lthough we have determined that federal law ultimately controls the issue in this case, it is still true that '[c]ontroversies . . . governed by federal law, do not inevitably require resort to uniform federal rules. . . . Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy. . . .'" Wilson v. Omaha Indian Tribe, *supra* note 2, at 671-72. *See also* C. WRIGHT, LAW OF FEDERAL COURTS § 60, at 278-86 (3d ed. 1976); Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966); United States v. Yazell, 382 U.S. 341, 356-57 (1966).

4. The United States Supreme Court has stated that an accretion is an addition to land bounded by water which forms so slowly that it cannot be perceived. Jefferis v. East Omaha Land Co., 134 U.S. 178, 193 (1890). The accretion doctrine is used to maintain the riparian character of land by granting soil accumulations to riparian owners. Just as riparian owners stand to gain property if soil is deposited on their property, they also stand to lose title to soil which is gradually eroded into the water. United States v. Claridge, 416 F.2d 933 (9th Cir. 1969), *cert. denied*, 397 U.S. 961 (1970); Peterson v. Morton, 465 F. Supp. 986 (D. Nev. 1979). For a discussion of the accretion and avulsion doctrines, see Note, *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion*, 14 ARIZ. L. REV. 315 (1972). *See also infra* note 45.

5. A change in the bounds of a waterbody is deemed avulsive when there is a drastic change which occurs rapidly and is easily perceived. It usually results from a violent shift of water during a flood, storm or channel breakthrough and when the doctrine applies, boundaries are held to be where they were prior to the sudden change. *See* Bauman v. Choctaw-Chickasaw Nations, 333 F.2d 785, 789 (10th Cir. 1964), *cert. denied*, 379 U.S. 965 (1965). *See also* Arkansas v. Tennessee, 246 U.S. 158, 169-77 (1918); Nebraska v. Iowa, 143 U.S. 359, 361 (1892). In Smith v. United States, 593 F.2d 982 (10th Cir. 1979), the court quoted from *Bauman*, *supra*, as follows:

> "Accretion" denotes the process by which the area of owned land is increased by the gradual deposit of soil due to the action of a bounding river or other body of water. Accretion occurs when the change in the river is gradual and imperceptible. The gradualness of the process distinguishes accretion from the more rapid, easily perceived, and sometimes violent, shifts of land incident to floods, storms or channel breakthroughs known as "avulsion." A sudden change in the channel of a river, as occurs in the case of avulsion, does not affect title to the lands thus transferred from one side of the river to the other.

593 F.2d at 984.

the similar but distinct issue of what federal interests are present in determining the type and scope of title acquired by the public land states upon their admission to statehood under the equal footing doctrine.[6] This topic is one of recent inconsistent decisions by the United States Supreme Court. Also, the choice of law rule for locating an interstate boundary which has been affected by an accretive or avulsive change will be set forth. Finally, this note will consider what law should be employed when an accretive or avulsive change affects property held in trust by the federal government for an Indian tribe.

I. HISTORY OF LAND AND WATER RIGHTS IN THE UNITED STATES

When the colonies achieved independence from British rule, each of the thirteen original states, as a sovereign, succeeded to all interests in title previously held by the Crown in the waters and riverbeds within their boundaries.[7] In comparison, most of the western states were formed out of land that had been held by the federal government in trust for the establishment of future states.[8] These western states are termed the "public land states" as a consequence of the federal government's role as sovereign prior to formation of the states.[9]

Because the public land states were once governed only by the federal government, resolution of certain disputes which might adversely affect the scope of title conveyed by the federal government prior to statehood must be examined

6. The constitutional basis of the equal footing doctrine was explained by the Court in Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845), where the Court concluded that: "The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively. Secondly, the new States have the same rights, sovereignty, and jurisdiction over this subject as the original States." *Id.* at 230.
7. In Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842), the Court stated that "when the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution." *See also* Pollard's Lessee v. Hagan, *supra* note 6, at 229; Mobile Transp. Co. v. Mobile, 187 U.S. 479 (1903).
8. The only states not formed out of the public domain other than the original 13 states were Texas, Vermont, Maine, West Virginia and Kentucky. *See* 1 R. CLARK, WATERS AND WATER RIGHTS § 40.2, at 248 n.19 (1967).
9. Newhall v. Sanger, 92 U.S. 761, 763 (1875).

pursuant to federal law.[10] In contrast, states without a history of federal land ownership do not have this federal involvement. This disparity in treatment accorded to various states has resulted from the diversity of state title histories. Additionally, the varied history of land titles among the states has resulted in a diversity of legal rules for determining ownership of the land beneath the high-water mark of the water in each state.[11] In most states, ownership of such land depends upon whether or not the water is classified as navigable.[12] If the water is deemed non-navigable, generally, the title to the beds can be held by a private party.[13] However, if the water is classified as navigable, then the land is held by most states in their sovereign capacity in order to further the public need associated with navigation and fishery.[14]

Within the public lands, prior to statehood, the federal government held title to the beds beneath the navigable waters.[15] As states were formed out of this land, they were admitted on an "equal footing" with the existing states.[16] This admission upon equal footing was held to be constitu-

10. Borax Consol., Ltd. v. City of Los Angeles, 296 U.S. 10 (1935); Knight v. United States Land Ass'n, 142 U.S. 161 (1891); Packer v. Bird, 137 U.S. 661 (1891); St Paul & Pac. R.R. v. Schurmeir, 74 U.S. (7 Wall.) 272 (1868).
11. Some jurisdictions determine ownership of land beneath their waters according to the English rule which grants ownership of land beneath all non-tidal waters to riparian owners. 1 R. CLARK, *supra* note 8, § 40.2. However, a majority of states use the American rule which provides that as an incident of sovereignty the state owns all land beneath the high water mark of its navigable waters. Weber v. Board of Harbor Comm'rs, 85 U.S. (18 Wall.) 57 (1873); Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); Goodtitle v. Kibbe, 50 U.S. (9 How.) 471 (1850); Pollard's Lessee v. Hagan, *supra* note 6; Martin v. Waddell, *supra* note 7.
12. As states were formed out of the public domain, they acquired title to the lands beneath their navigable waters upon their admission to statehood pursuant to the equal footing doctrine. Shively v. Bowlby, 152 U.S. 1, 26-40 (1894).
13. Ottawa Shores Home Owners Ass'n v. Lechlak, 344 Mich. 366, 73 N.W.2d 840 (1955); Munninghoff v. Wisconsin Conservation Comm'n, 255 Wis. 252, 38 N.W.2d 712 (1949); State v. Brace, 76 N.D. 314, 36 N.W.2d 330 (1949); Heimbecher v. City and County of Denver, 90 Colo. 346, 9 P.2d 280 (1932); Allott v. Wilmington Light & Power Co., 288 Ill. 541, 123 N.E. 731 (1919).
14. Shively v. Bowlby, *supra* note 12; Hardin v. Jordan, 140 U.S. 371, 381 (1891).
15. Shively v. Bowlby, *supra* note 12; Weber v. Board of Harbor Comm'rs, *supra* note 11; Pollard's Lessee v. Hagan, *supra* note 6; Martin v. Waddell, *supra* note 7.
16. Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 436 (1867); Smith v. Maryland, *supra* note 11; Goodtitle v. Kibbe, *supra* note 11; Pollard's Lessee v. Hagan, *supra* note 6. For a recent discussion of the equal footing doctrine, see North Dakota v. Andrus, 506 F. Supp. 619, 623-25 (D.N.D. 1981).

tionally required so that new states would be admitted with the same sovereign rights accorded to the original thirteen states.[17] Further, it was held that this doctrine required the federal government to relinquish its interest in title to the land beneath the navigable waters of the public lands to the new states upon their admission to the union.[18] Although this doctrine mandated a conveyance to the states of the beds beneath their navigable waters on the date when statehood was granted, it did not completely eradicate the federal interests present.[19] The determination of what waters were navigable at the time statehood was granted was held to be a federal question to be measured by the federal test of navigability.[20] Thus, federal courts decide what subaqueous lands were conveyed to the states upon their admission to the union pursuant to federal standards.

Federal title in non-navigable waters and the beds beneath them continued within the newly formed states.[21] This federal ownership complemented the large quantity of land owned by the federal government. The extent of the federal interests created a potential water use conflict between persons who were appropriating water pursuant to state appropriation systems and persons that would subsequently acquire title as federal patentees.[22] The appropriators feared that the federal courts might recognize riparian rights in patentees that would diminish their right to an established quantity of water. By adopting an appropriation

17. In *Pollard's Lessee*, the Court explained that pursuant to the equal footing doctrine, the new states upon admission to the union had acquired all the powers of sovereignty except those delegated to the United States by the Constitution. Pollard's Lessee v. Hagan, *supra* note 6, at 229.
18. Smith v. Maryland, *supra* note 11; Goodtitle v. Kibbe, *supra* note 11; Pollard's Lessee v. Hagan, *supra* note 6.
19. *See infra* note 31 and accompanying text on reserved water rights; *see also infra* note 82 and accompanying text.
20. The Court in *United States v. Oregon* held that the issue of what waters were navigable at the time of a state's admission to the union presented a federal question. 295 U.S. 1, 14 (1935).
21. Borax Consol., Ltd. v. City of Los Angeles, *supra* note 10; United States v. Mission Rock Co., 189 U.S. 391 (1903); Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892); Knight v. United Land Ass'n, *supra* note 10; McCready v. Virginia, 94 U.S. 391 (1876).
22. In the eastern states riparian owners are entitled to use a reasonable amount of the available water. Thus, as more persons acquire title to property on a water body, all must share the available supply equally. As the western states were formed, they adopted a system of prior appropriation to encourage development. This approach guaranteed prior appropriators continued use of an undiminished quantity of water.

system of water use, the western states acted to encourage development in an arid region where assurance of a constant water supply was essential to induce settlement.[23] To quell state concerns over federal interference with state systems of water allocation, Congress passed the Acts of 1866[24] and 1870[25] which gave vested state water use rights priority over the claims of federal patentees.[26] These Acts, however, left open the possibility that a federal patentee's riparian rights to the water might be accorded higher priority than the rights of a subsequent state appropriator. Congress acted to remedy this oversight by passing the Desert Land Act of 1877.[27] This Act has been held to have severed the unappropriated waters from the federal lands riparian to them.[28] This severance was based on the federal proprietary right to the water and allowed the states to establish their own independent systems of water use allocation.[29] However, the Act failed to specify what rights, if any, were retained by federal riparian land patentees. The states have contended that the Desert Land Act was nothing short of a complete surrender of federal power over water use rights to the states.[30] This assertion of absolute state power was rejected by the Court when it held the Act inapplicable to lands held in trust by the federal government for Indian tribes. This holding was based on the Court's finding that implied in reservation treaties were reserved rights to enough water to permit its use on all irrigable reservation lands.[31]

Congressional legislation concerning waterways and land riparian thereto has usually been based on the Commerce and/or Property clauses.[32] The navigational power,

23. 1 R. CLARK, *supra* note 8, §§ 18.1-.2.
24. 43 U.S.C. § 661 (1976).
25. *Id.*
26. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).
27. 43 U.S.C. § 321 (1976). Kansas, Nebraska and Oklahoma are not subject to the Desert Land Act.
28. California Oregon Power Co. v. Beaver Portland Cement Co., *supra* note 26.
29. *Id.*
30. Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258 (1900); Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).
31. Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908); *see also* Cappaert v. United States, 426 U.S. 128 (1976).
32. Arizona v. California, *supra* note 31, at 597; Winters v. United States, *supra* note 31.

which flows from the Commerce clause,[33] has been construed to give the federal government a navigational servitude that extends to the ordinary high-water mark.[34] This servitude has been held to be superior to private property interests found to interfere with the federal government's interest in navigation.[35] In contrast to the unquestioned superiority of the federal navigational power when exercised in conflict with a state or individual interest, it is unclear how the property clause applies to the resolution of federal-state disputes.[36] In decisions considering reserved water rights for Indian reservation land, the power of the federal government to grant implied reservations has been held to flow from the Property and Commerce clauses.[37] The Court in dicta in *Paul v. United States*[38] seemed to accept the view that federal property, acquired without state consent, would be held as if held by any other private owner subject to rights defined by state law.[39] This view of the Property clause's scope was repudiated by the Court in *Kleppe v. New Mexico*.[40] There, it was held that, regardless of state consent, the Property clause empowered Congress to exercise "the powers both of a proprietor and of a legislature over the public domain."[41] Hence, Congressional authority over the public lands is not controlled by state law.[42] However, state law can limit the use of federal property to the extent it

33. U.S. CONST. art. I, § 8.
34. United States v. Rands, 389 U.S. 121, 123 (1967); United States v. Chicago Mil., St. P. & Pac. R.R. Co., 312 U.S. 592, 597 (1941)
35. When the United States reserves the flow either of a navigable or non-navigable stream pursuant to its navigational power, it is exercising an established power derived from the Commerce clause that is superior to whatever state interests may exist. United States v. Grand River Dam Auth., 363 U.S. 229 (1960).
36. The Property clause states: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." U.S. CONST. art IV, § 3, cl. 2.
37. Winters v. United States, *supra* note 31; United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899).
38. 371 U.S. 245 (1963).
39. *Id.* at 264.
40. 426 U.S. 529 (1976).
41. *Id.* at 540.
42. *See* United States v. San Francisco, 310 U.S. 16 (1940). The Court, in *San Francisco*, stated that pursuant to the Property clause: "The power over the public land thus intrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine'." *Id.* at 29-30 (quoting Light v. United States, 220 U.S. 523, 537 (1911)).

does not affect the government's title or interfere with its right of disposal.[43]

The problems considered by this article arise when the bounds of a water body change. Under both federal and state law, when such a change is deemed to be the result of accretion, riparian owners gain title to any resulting additions to their property.[44] Conversely, when erosion occurs the riparian owner loses title to the land that is consumed by the water.[45] The application of the accretion doctrine is premised on the rationale that an upland owner's access to the water should be maintained whenever possible without creating an undue hardship on abutting property owners. It has been stated that the effect of the accretion doctrine is to give riparian owners a fee that is determinable upon the occupancy of their land by the river.[46] Likewise, title to the riverbed is subject to defeasance upon a reliction by the river.[47] In comparison, the avulsion doctrine[48] is used to maintain title boundaries where they were prior to a sudden and drastic change in a watercourse even if this results in a loss of access to the water for some property owners.[49] This doctrine is employed when necessary to minimize the hardship that would result to abutting landowners if the accretion doctrine was followed.[50] The courts have thus

43. James v. Dravo Contracting Co., 302 U.S. 134, 142 (1937); Surplus Trading Co. v. Cook, 281 U.S. 647, 650 (1930).

44. Hughes v. Washington, 389 U.S. 290, 293 (1967); Arkansas v. Tennessee, 246 U.S. 158, 169-77 (1918); Jefferis v. East Omaha Land Co., 134 U.S. 178, 189 (1890); Smith v. Whitney, 105 Mont. 523, 74 P.2d 450 (1937). *See also* Comment, *Land Accretion and Avulsion: The Battle of Blackbird Bend*, 56 NEB. L. REV. 814 (1977).

45. *See* New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836). In *New Orleans*, the Court discussed the doctrine of accretion and stated that every riparian is "subject to loss by the same means which may add to his territory; and as he is without remedy for his loss in this way, he cannot be held accountable for his gain." *Id.* at 717. *See* Note, *Courts—Navigable Waters—State Law, Not Federal, Determines Riparian Rights to Accretions*, 54 N.D.L. REV. 505, 506-07 (1978).

46. Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 326 (1973), *rev'd*, Oregon *ex rel.* State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977).

47. Reliction is the term used to describe the process whereby water recedes from land that it formerly covered. Hammond v. Shepard, 186 Ill. 235, 57 N.E. 867 (1900).

48. *See supra* note 5.

49. Philadelphia Co. v. Stimson, 223 U.S. 605, 624 (1912); St. Louis v. Rutz, 138 U.S. 226, 245 (1891).

50. Nebraska v. Iowa, *supra* note 5. In this case the Court discussed the accretion and avulsion doctrines and stated with respect to the avulsion doctrine:

> But, on the other hand, if, deserting its original bed, the river forces for itself a new channel in another direction, then the nation,

recognized that if followed without exception, the accretion doctrine would on occasion result in an inequitable redistribution of property among property owners following a drastic change in the bounds of a waterway.

II. FACTORS AFFECTING THE USE AND CONTENT OF FEDERAL COMMON LAW

Under *Swift v. Tyson*,[51] the Rules of Decision Act was held to allow the federal courts to develop a general body of common law applicable to all disputes that were not strictly matters of "local law".[52] This remained the law of the land until 1938 when the Supreme Court, in *Erie Railroad Co. v. Tompkins*,[53] a suit based on diversity jurisdiction, overruled *Swift* by holding that state law applied, including state decisional law, unless supplanted by the Constitution or an act of Congress. Following *Erie*, the test of what law, federal or state, is used in diversity actions has evolved into a consideration of the policies that underlie *Erie*.[54] These policies were held to be "discouragement of forum-shopping and avoidance of inequitable administration of the laws."[55] Although at first glance *Erie* might appear to eliminate any use of federal common law, the Court, on the same day *Erie*

> through whose territory the river thus breaks its way, suffers injury by loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains in the middle of the deserted river bed. For, in truth, just as a stone pillar constitutes a boundary, not because it is stone, but because of the place in which it stands, so a river is made the limit of nations, not because it is running water bearing a certain geographical name, but because it is water flowing in a given channel, and within given banks. . . .

Id. at 362.

51. 41 U.S. (16 Pet.) 1 (1842).
52. The Rules of Decision Act stated that:
> [T]he laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92 (current version at 28 U.S.C. § 1652 (1976) and the term "civil actions" replaces "trials at common law").

In Swift v. Tyson, *supra* note 51, the Court interpreted the phrase "laws of the several states" as referring to only state statutes and "local" common law rules. The distinction that emerged under *Swift* between local and general law was not expressly articulated by the Court, but it was clear from the *Swift* decision that whether a state had an applicable law was of no relevance in determining what law applied.

53. 304 U.S. 64 (1938).
54. The *Erie* doctrine is not applicable to issues governed by federal law even when the suit is based on diversity. Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942). *See* Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013 (1953).
55. Hanna v. Plumer, 380 U.S. 460, 468 (1965).

was issued, held that federal common law governed resolution of a dispute between two states involving apportionment of waters in an interstate stream.[56] Thus, federal common law does exist.

Before a federal court can adjudicate a dispute, it must generally be demonstrated that either federal question or diversity jurisdiction exists.[57] Actions based on claims arising under federal law—Constitution, laws of the United States, or treaties—are within the federal question jurisdiction of the federal courts.[58] However, there are several situations where the Court has recognized the need for granting federal question jurisdiction despite the fact that the issue presented did not arise directly from the Constitution, laws, or treaties of the United States. The Court in *Clearfield Trust Co. v. United States*[59] held that when Congress has not addressed an issue which is "substantially related to an established program of governmental operation,"[60] federal courts must fill the existing gaps in federal law according to federal standards.[61] Also, in *United States v. Standard Oil Co.*,[62] the Court held that the federal nature of the relationship between a soldier and the government required federal common law to govern the legal consequences of that relationship.[63] In both of these situations the Court developed federal common law.[64] The Court has

56. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938). The use of federal law in interstate disputes reflects a recognition of the need for resolution of such disputes before a neutral third party, and the propriety of using federal decisional law in this type of situation has long been recognized. As stated in the Federalist papers, "[n]o man ought certainly to be a judge in his own cause. . . . This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different states. . . ." THE FEDERALIST No. 80, at 538 (A. Hamilton) (J. Cooke ed. 1961).
57. 28 U.S.C. §§ 1331(a), 1332 (1976).
58. Federal courts were provided jurisdiction over "[c]ases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority" by the Constitution. U.S. CONST. art. III, § 2, cl. 1.
59. 318 U.S. 363 (1943).
60. United States v. Little Lake Misere Land Co., Inc., 412 U.S. 580, 593 (1973) (quoting Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957)).
61. Clearfield Trust Co. v. United States, *supra* note 59, at 367.
62. 332 U.S. 301 (1947).
63. *Id.*
64. Recently the Court rejected the assertion that there was a federal common law right of contribution among antitrust conspirators. Texas Indus., Inc. v.

also held that federal common law can independently supply the necessary federal question jurisdiction since it is included within the constitutional meaning of "laws of the United States."[65]

Once the source of law is found to be federal, then the federal courts must apply a federal rule of decision. If the issue presented in a particular case is not resolved expressly by reference to the Constitution, laws, or treaties of the United States, then federal common law controls. In applying federal common law, a court must choose whether to adopt state law or develop a uniform federal rule as the rule of decision.[66] A test for determining what law to apply has not been consistently used by the Court. However, certain factors have reappeared in the cases. The Court has sometimes used a balancing test which weighs the federal and state interests.[67] On other occasions the Court has only focused on a more limited set of factors which it considers controlling while ignoring any comprehensive review of the factors it has previously deemed important.[68] This inconsistent approach makes it difficult to predict with any con-

Radcliff Materials, Inc., ... U.S. ....., 101 S. Ct. 2061 (1981). In *Texas Industries,* the Court stated that:

> [F]ederal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

Id. at 2067.

65. *See* Illinois v. City of Milwaukee, 406 U.S. 91 (1972). The Court held that federal question jurisdiction existed because Milwaukee had violated the federal common law of nuisance and, further, it found that the federal common law had not been pre-empted by the Federal Water Pollution Control Act (FWPCA). *Id.* In a recent decision, the Court found that the 1972 amendments to the FWPCA had significantly altered the water pollution laws and that Congress, by those amendments, had thoroughly addressed water pollution concerns. Thus, the Court held that Congress, by its actions subsequent to its prior decision, had pre-empted the use of federal common law in this area of the law. City of Milwaukee v. Illinois, ... U.S. ....., 101 S. Ct. 1784 (1981).
66. United States v. Kimbell Foods, Inc., *supra* note 2; United States v. Standard Oil Co., *supra* note 62; D'Oench, Duhme & Co., Inc. v. Federal Deposit Ins. Corp., *supra* note 2; Board of County Comm'rs v. United States, 308 U.S. 343, 350 (1939).
67. *See* Mishkin, *supra* note 60, at 812; Comment, *Adopting State Laws as the Federal Rule of Decision: A Proposed Test,* 43 U. CHI. L. REV. 823 (1976).
68. *See* Wilson v. Omaha Indian Tribe, *supra* note 2.

fidence what the Court will find relevant in a particular situation.

In *Clearfield Trust*,[69] the Supreme Court opted for the use of a uniform federal rule by dismissing adoption because it would subject the rights and duties of the United States "to the vagaries of the laws of the several states."[70] The Court found the federal interest in having identical law apply to the numerous transactions in federal commercial paper to outweigh the state interest in having state law govern completely the commercial transaction at issue.[71] Despite *Clearfield Trust's* emphasis on uniformity for cases dealing with federal commercial paper, in *Bank of America v. Parnell*,[72] the Court held that issues regarding rights in federal commercial paper that do not touch on the rights and duties of the federal government were matters to be resolved by state law even though a companion issue was present that had to be governed by federal law.[73] Thus, *Parnell* stands for the proposition that even though the federal government may have an interest in particular property, unless its interests are affected by the decision, state law should apply.

Uniformity, as recognized by the Court in *Clearfield Trust*, is a major factor which supports the use of a uniform federal rule. In some cases the Court has weighed against the need for uniformity the state interest in having its own law apply because the issue presented was one of traditionally local concern.[74] Also, the Court has sometimes considered whether a conflict exists between the application of a particular state law and federal interests.[75] In *United States v. Little Lake Misere*, the Court did not adopt the

69. Clearfield Trust Co. v. United States, *supra* note 59. In this case, a check drawn by the United States was stolen and cashed on a forged endorsement. The United States sued the bank which had presented the check for a breach of its guaranty on the endorsement. If Pennsylvania law applied, the United States would have been estopped from asserting its claim as a consequence of its delay in notifying the bank of the forgery. However, the Court held that federal law controlled.
70. *Id.* at 367.
71. *See* 1A J. MOORE, MOORE'S FEDERAL PRACTICE pt. 2, ¶ 0.324 (2d ed. 1981).
72. 352 U.S. 29 (1956).
73. *Id.* at 33-34.
74. *See* United States v. Standard Oil Co., *supra* note 62; Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204 (1946).
75. *See* United States v. Little Lake Misere Land Co., *supra* note 60.

available state law because it was found to be hostile to the purposes of the federal program at issue.[76] However, the Court left open the possibility that a nonconflicting state statute dealing with the same issue might be adopted if a similar dispute arose in another state.[77] This approach suggests that the Court desires a case by case appraisal of the interests present. Contrary to the *Erie* diversity situation where there is a lack of court competence to decide substantive issues, in this situation a court remains free to control the extent and effect of adoption so that federal interests will be protected.[78]

It has been suggested that a federal court, in deciding whether to adopt state law, should additionally consider the effect of its decision on the distribution of power between the federal and state courts.[79] Also of importance is the ability of each court system to handle the issue presented. For example, the call for "uniformity" usually is the chief argument in support of establishing a uniform federal rule; yet, the only way a truly uniform rule can be promulgated is by Supreme Court action. This fact precludes the use of a uniform rule in many areas because the Court's workload is so heavy that it does not have the time to develop detailed substantive rules.[80] These factors should always be considered by the courts as part of a balancing approach to help determine, as a matter of judicial policy, what law is most appropriate for use in the case at bar.[81]

III. CURRENT USE OF FEDERAL COMMON LAW

A. *Scope of a Federal Grant*

The city of Los Angeles brought an action to quiet title in *Borax Consolidate, Ltd. v. Los Angeles.*[82] There, the Court

76. *Id.*
77. *Cf.* DeSylva v. Ballentine, 351 U.S. 570, 581 (1956); Reconstruction Fin. Corp. v. Beaver County, *supra* note 74, at 210.
78. United States v. Little Lake Misere Land Co., *supra* note 60; Wilson v. Omaha Indian Tribe, *supra* note 2.
79. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 507-08 (1954).
80. Mishkin, *supra* note 60, at 813.
81. *Id.* at 810-34; *see* United States v. Standard Oil Co., *supra* note 62, at 310.
82. *Supra* note 10. Los Angeles asserted that it held title pursuant to a grant by the California legislature. Borax, on the other hand, claimed superior title by virtue of a preemption patent issued by the federal government.

addressed a dispute involving the issue of whether land that had been conveyed under a federal patent was upland or tideland at the time of the federal grant. If tideland, it was erroneously included in the federal patent since upon California's admission to the union it acquired all right, title and interest in the tidelands. Conversely, if found to have been upland, it was properly included in the federal patent. The Court determined that the primary question posed by this case was the extent of the federal patent. Since the question presented involved "the validity and effect of an act done by the United States," it was held to implicate a federal interest.[83] Thus, the Court established where the boundary between the upland and tideland was according to federal principles.[84] Although the Court in *Borax* held that federal law governed the scope of title acquired by a federal patentee, in subsequent cases the Court has held that state law controls with respect to the property rights afforded to private owners.[85]

B. *Rights of a Federal Patentee Following an Accretive or Avulsive Change*

The *Borax* holding was expanded by the Court in *Hughes v. Washington*[86] to aid the Court in deciding whether federal or state law applied to determine the ownership of land gradually deposited by the ocean on upland property.

83. *Id.* at 22 (citing United States v. Utah, 283 U.S. 64, 75 (1931); United States v. Holt Bank, 270 U.S. 49, 55-56 (1926); Brewer-Elliot Oil Co. v. United States, 260 U.S. 77, 87 (1922); Packer v. Bird, 137 U.S. 661, 669-70 (1891)).
84. Borax Consol., Ltd. v. City of Los Angeles, *supra* note 10, at 22-27.
85. Wallis v. Pan American Petroleum Corp., *supra* note 3; United States v. Oklahoma Gas & Elec. Co., 318 U.S. 206 (1943). In *Wallis* the Court had to determine whether state or federal law controlled the validity of oil and gas leases which transferred the rights to exploit oil and gas deposits on the public domain. In its opinion, the Court stated that:
> In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. . . . Whether latent federal power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation in an area, as is true in this instance, it must be remembered that "Congress acts . . . against the background of the total *corpus juris* of the states. . . ."

384 U.S. at 68 (quoting H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953)). Thus, state law was held to control the issues in dispute since it was determined that there was no significant conflict between the state and federal interests present.
86. *Supra* note 44.

In *Hughes*, the upland property had been conveyed by the federal government to the petitioner's predecessor in title prior to Washington's grant of statehood.[87] If the land in question had been accreted prior to statehood, under a uniform federal rule the riparian owner would have been entitled to it.[88] Washington claimed that Article 17, § 1 of its Constitution provided that it would gain title to any coastal accretions occurring after 1889.[89] This was the State's position despite the fact that the Washington Supreme Court had previously rejected that interpretation in *Ghione v. State*.[90]

In *Hughes*, the Supreme Court of Washington reversed its prior holding and found that the State's Constitution of 1889 had eliminated the application of the riparian doctrine of accretion to property riparian to the Pacific Ocean. Thus, the court held that the State held title to all land formed by coastal accretions.[91] The case then went to the United States Supreme Court where the applicability of federal law was at issue. The state argued there was no federal interest present and that *Borax* was inapplicable because it did not deal with riparian rights. Notwithstanding this argument, the Court found that there was no "significant difference" between this case and *Borax*. Consequently, it held that the question of what rights were included in the initial federal grant was sufficient to justify the exercise of federal question jurisdiction. Moreover, the use of a uniform rule was found to be necessary to protect the scope of the federal patentee's title.[92] It was noted that to hold otherwise would leave riparian owners in danger of losing the most valuable feature of their land—access to the water.[93]

87. *Id.*
88. County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46 (1874); Jones v. Johnston, 59 U.S. (18 How.) 150 (1855).
89. WASH. CONST. art. XVII, § 1 provides:
> The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes.
90. 26 Wash. 2d 635, 175 P.2d 955 (1946).
91. Hughes v. State, 67 Wash. 2d 799, 816, 410 P.2d 20, 29 (1966).
92. Hughes v. Washington, *supra* note 44, at 292.
93. *Id.*

The Court's majority opinion in *Hughes* relied on *Borax* in holding that the issue presented required in effect a determination of a federal patent's original scope. In reaching its decision the Court did not discuss or attempt to distinguish *Borax* and *Hughes* from its earlier decision in *Joy v. City of St. Louis.*[94] In *Joy,* a riparian owner, whose title descended from a prestatehood federal grant, claimed that the federal origin of his title implicated a sufficient federal interest to support federal question jurisdiction in a dispute involving ownership of accretions deposited adjacent to his land.[95] The Court, however, held that the federal origin of the grant did not by itself present a federal question.[96] The Court went on to note that the dispute did not involve the land actually conveyed or an act of Congress. Consequently, the lower court's dismissal for lack of jurisdiction was affirmed. *Joy,* thus, stands for the well settled rule that federal law should not be applied merely because the United States happens to be a party in the chain of title.[97]

C. *The Type and Scope of Title Acquired by the Public Land States Upon Their Admission to the Union Under the Equal Footing Doctrine*

The Court extended the use of federal common law in *Bonelli Cattle Co. v. Arizona.*[98] This case involved a dispute over land that was included in a prestatehood federal patent to a railroad company. The land was riparian to the Colorado River and upon admission to the union, Arizona succeeded to the federal government's title in the bed of the river.[99] Over the years, the river gradually moved eastward engulfing the subject land. As this process occurred the State mechanically acquired title to the land as part of the

94. 201 U.S. 332 (1906).
95. *Id. See also* Note, *Riparian Rights: The Law Returns to its Former Course,* 23 LOY. L. REV. 563, 568-69 (1977).
96. Joy v. City of St. Louis, *supra* note 94.
97. *See* Oregon *ex rel.* State Land Board v. Corvallis Sand & Gravel Co., *supra* note 46 and *infra* notes 110-17 and accompanying text; Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507 (1900); United States v. Denby, 522 F.2d 1358 (5th Cir. 1975); United States v. Schwarz, 460 F.2d 1365 (7th Cir. 1972); United States v. 1,078.27 Acres of Land, 446 F.2d 1030 (5th Cir. 1971).
98. *Supra* note 46.
99. Shively v. Bowlby, *supra* note 12; Pollard's Lessee v. Hagan, *supra* note 6.

riverbed.[100] When the cattle company acquired its title in 1955, most of the property conveyed by the original grant was under water and, therefore, held by the State. In 1959, a project by the Federal Bureau of Reclamation deepened and rechanneled the river, thereby resulting in the re-emergence of a substantial portion of the original parcel.[101] The State claimed this change was avulsive, and argued that title to the land which formed the bed of the river prior to reclamation remained in the state by virtue of the equal footing doctrine and the Submerged Lands Act.[102] The cattle company alleged the change to be accretive. Alternatively, the company asserted that even if the change was deemed avulsive, it had reacquired title under the doctrine of re-emergence.[103] The Arizona Supreme Court, however, rejected the company's position and held the change to be avulsive with title vested in the State.[104]

In *Bonelli*, the United States Supreme Court first had to decide whether ownership of the subject land was to be governed by state or federal law. The Court stated its continued adherence to the principle that state law should determine rights in the beds of navigable waters whose title was indefeasibly vested by federal law in the states. It was noted by the Court, however, that the issue was not what rights the state had accorded to private owners, but what type of title the state had acquired under the equal footing doctrine and Submerged Lands Act.[105] The Court found that construction of this doctrine and the Act involved a "right asserted under federal law"; therefore, it presented a federal question.[106] After an examination of

100. Bonelli Cattle Co. v. Arizona, *supra* note 46, at 318; *see* Oklahoma v. Texas, 268 U.S. 252 (1925).
101. When the Bonelli Cattle Co. acquired the land in 1955, 530 of the original 590 acres were submerged beneath the river. Bonelli Cattle Co. v. Arizona, *supra* note 46, at 316.
102. The State claimed to own all property up to the pre-Hoover dam ordinary high-water mark. After the dam began to operate, less of the subject land was covered by the river's high water mark. *Id.* at 317.
103. *Id.* at 316. In Arkansas v. Tennessee, *supra* note 5, at 175, the Court stated that the doctrine of reemergence "amounts to no more than saying that where the reliction did but restore that which before had been private property and had been lost through the violence of the sea, the private right should be restored if the land is capable of identification."
104. State v. Bonelli Cattle Co., 107 Ariz. 465, 489 P.2d 699 (1971).
105. Bonelli Cattle Co. v. Arizona, *supra* note 46, at 319-20.
106. *Id.* at 321.

the policies behind the avulsion and accretion doctrines, the Court held that the state had acquired a fee determinable to the land that had gradually eroded into the river.[107] When this land re-emerged, the state's interest in the former riverbed was held to be defeased and title reverted to the riparian owner. The Court reasoned that when the water receded from the subject property there was no longer a public purpose being served by state retention of title to the re-emerged tract.[108] Further, it was stated that, if allowed, continued state ownership of this property would have allowed the deprived private owner to possibly raise a constitutional objection that the state's assertion of title had resulted in a taking without just compensation.[109] This issue was not addressed by the Court because, after balancing the federal and state interests, it held that title to the re-emerged land should be governed by the federal principle of accretion to protect the riparian owner's right of access to the water and to prevent the state's receipt of a land windfall.[110]

Growth of the federal common law of riparian rights was curtailed and severely restricted when the Court overruled *Bonelli* in *Oregon v. Corvallis Sand & Gravel Co.*[111] The dispute in *Corvallis* centered on the issue of whether the State or the Corvallis Sand and Gravel Company owned land which formed a peninsula known as the Fischer Cut.[112] The Willamette River flowed around this peninsula, but by 1890 a channel had formed across its neck. During periods when the river's flow was intermediate to high, the new channel would carry part of the resulting flow. In 1909, a major flood occurred which resulted in the entire Fischer Cut being submerged. Subsequent to this change the company used the area in its digging operations for 40-50 years. Oregon brought suit to eject Corvallis Sand from the property claiming that it was owner in fee simple of the disputed

107. *Id.* at 326.
108. *Id.* at 328.
109. *Id.* at 331 (citing Hughes v. Washington, *supra* note 44, at 298) (Stewart, J., concurring).
110. *Id.* at 325-30; Note, *supra* note 45, at 509-10.
111. *Supra* note 46.
112. *Id.* The property in dispute had been included in a pre-statehood federal grant.

land. This claim was based on the assertion that as new beds were formed under navigable waters, fee simple title to them automatically vested in the state as an incident of sovereignty under the equal footing doctrine.[113] The Oregon courts used federal common law as set forth in *Bonelli* to award the disputed land to Corvallis Sand under either the avulsion theory or pursuant to an exception to the accretion rule.[114]

The Supreme Court in *Corvallis* held that the state court had erred in treating the equal footing doctrine as the source of a federal interest which required application of a uniform federal rule to questions concerning title acquired by the states from the federal government to the riverbeds beneath navigable waters.[115] Not only was this basis for federal question jurisdiction rejected, but the Court also stated that the mere fact a parcel of land had originally been conveyed by a federal grant does not give rise to a controversy arising under the laws of the United States.[116] *Borax* was explained by the Court as only being applicable to disputes involving the location of an original boundary.[117] *Hughes* was not considered since it was not cited below by the Oregon courts. This abrupt change in the Court's analysis resulted in the quick burial of *Bonelli* as the basis for applying federal common law. Consequently, it appears that disputes concerning land ownership will now be resolved solely as a matter of state law unless a federal interest other than federal origin of title or conveyance under the equal footing doctrine can be established.[118]

D. *Disputes Over Interstate Boundaries*

Disputes involving the location of interstate boundaries affected by accretive or avulsive changes have consistently

113. *Id.* at 372-73.
114. State *ex rel.* State Land Board v. Corvallis Sand & Gravel Co., 272 Or. 545, 536 P.2d 517, *reh'g denied*, 272 Or. 545, 538 P.2d 70 (1975); *see* Commissioners v. United States, 270 F. 110 (8th Cir. 1920).
115. Oregon *ex rel.* State Land Board v. Corvallis Sand & Gravel Co., *supra* note 46, at 370-71.
116. *Id.* at 372. The Court stated that, "*Pollard's Lessee* . . . holds that the State receives absolute title to the beds of navigable waterways within its boundaries upon admission to the Union, and contains not the slightest suggestion that such title is 'defeasible' in the technical sense of that term." *Id.*
117. *Id.* at 376.
118. *Id.* at 381-82.

been recognized by the courts and commentators as requiring the use of a uniform federal rule.[119] The Supreme Court has held that even though the issue is not governed explicitly by the Constitution or federal statute, federal common law principles of accretion and avulsion must necessarily be developed and used to avoid the problems inherent in adopting state law to resolve interstate conflicts.[120] This approach was used in *Arkansas v. Tennessee*,[121] where a river, which indicated the interstate boundary, suddenly changed course. The Court declared that state law would determine the rights of riparian owners within their own state, but that a state could not render a decision that might affect an interstate boundary.[122] Since classification of a change as accretive or avulsive can determine whether a state gains or loses property along an interstate boundary, the Court used a uniform federal rule to resolve the issue of what type of change occurred.[123]

E. *Disputes Over Land Held in Trust by the Federal Government*

The Courts have recognized a federal interest in protecting lands held in trust by the United States for American Indian tribes. Most of the Indian tribes occupy reservations that were set aside for them by federal treaty or executive order.[124] Within reservation boundaries, property and sovereign rights exist that cannot be derogated by state or federal law.[125] Furthermore, the existence of reservations and commerce with them is controlled by the federal government.[126] In *Oneida Indian Nation v. County of Oneida*,[127] the Court held that the issue of whether the Oneidas had a

119. Arkansas v. Tennessee, *supra* note 5; Nebraska v. Iowa, *supra* note 5.
120. Illinois v. City of Milwaukee, *supra* note 65; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Hinderlider v. La Plata River & Cherry Creek Ditch Co., *supra* note 56.
121. *Supra* note 5.
122. *Id.*
123. *See supra* notes 119-20.
124. United States v. Forty-three Gallons of Whiskey, 93 U.S. 188 (1876).
125. The courts have held that vested treaty rights cannot be impaired by legislation or state court decisions. United States v. First Nat'l Bank, 56 F.2d 634 (D. Neb. 1931), *aff'd*, 59 F.2d 367 (8th Cir. 1932).
126. The federal government has the power to manage and control tribal affairs on reservations but must do so within Constitutional bounds. United States v. Klamath and Moadoc Tribes, 304 U.S. 119, 123 (1938).
127. 414 U.S. 661 (1973).

valid claim to possession of disputed property pursuant to a treaty with the federal government was a matter governed by federal law.

The Oneida holding was recently reaffirmed by the Court in *Wilson v. Omaha Indian Tribe.*[128] In *Wilson* a dispute arose over ownership of land that originally was included in the Omaha Indian tribe's reservation which was located in 1867 on the west bank of the Missouri River in Nebraska. Following the establishment of the reservation, the river changed course several times with the result that a portion of the original reservation ended up on the east side of the river in Iowa. This land was subsequently settled by non-Indians. The federal government and the Omahas brought suit to quiet title in the disputed lands claiming that the changes in the Missouri river's course had been avulsive and, therefore, the boundaries of the reservation should remain unaffected. The non-Indian residents argued that the changes in the river's course resulted from a gradual process of erosion and accretion, thereby passing title to the east bank riparian owners.[129] The Court held that the Indians' claim to the property was to be resolved by federal law citing *Oneida* to support its holding that questions regarding Indian occupancy of reservations are "exclusively [within] the province of federal law."[130] While adopting the *Oneida* holding that the adjudication of rights involving reservation lands implicates a federal interest requiring use of a federal common law, the *Wilson* Court held that state law should be adopted as the federal rule of decision.[131]

The Court reached its decision after considering the factors it set forth in *United States v. Kimbell Foods, Inc.*[132]

128. *Supra* note 2.
129. *Id.* at 660.
130. *Id.* at 670-71 (citing Oneida Indian Nation v. County of Oneida, *supra* note 127).
131. An interstate compact was entered into by Nebraska and Iowa in 1943. *Id.* at 672. It was held that the compact governed what law would control the resolution of interstate boundary disputes. Nebraska v. Iowa, *supra* note 5. Consequently, the Court could not use a uniform federal rule in *Wilson* based upon the fact that the dispute at issue involved an interstate boundary.
132. In *Kimbell* the Court had to decide what law governed the relative priority between liens arising under a federal loan program and private liens. After deciding that federal law governed resolution of the dispute the Court

There it had grappled with a choice between adopting state law or applying a uniform federal rule to govern the relative priority between a private lien and a federally created lien. In *Wilson* the Court concluded that there was no need to develop a uniform federal rule since an interstate boundary was not in dispute. Further, the Court expressed concern that a uniform federal rule would result in disparaging treatment of the private property owners located next to the Indian reservation. The fear was that they might have their boundary disputes resolved differently than persons who were not similarly located adjacent to an Indian reservation.[133] The Court also asserted that state law would be applied in an equitable fashion and that a tribe might gain as well as lose land. Finally, the Court stated that it would not accept "generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect [federal interests]."[134]

IV. ANALYSIS

A. *Extent of a Federal Grant*

In *Borax* the Court held that the initial boundaries of federal grants are to be determined according to federal rules of construction. This approach was chosen as necessary to protect private interests acquired pursuant to federal dispositions of property. If state law were allowed to deter-

questioned whether it should adopt state law as the federal rule of decision. In analyzing this issue the Court stated that:

> Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial ploicy "dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law."
>
> [W]hen there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision. Apart from considerations of uniformity, we must also determine whether application of state law would frustrate specific objectives of the federal programs. If so, we must fashion special rules solicitous of those federal interests. Finally, our choice of law inquiry must consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.

United States v. Kimbell Foods, Inc., *supra* note 2, at 728-29. The Court in *Kimbell* found no need for a uniform rule, and it further determined that adopting state law would not adversely affect federal interests. Therefore, state law was adopted.

133. Wilson v. Omaha Indian Tribe, *supra* note 2, at 674.

134. *Id.* at 673 (quoting United States v. Kimbell Foods, Inc., *supra* note 2, at 730).

mine the scope of federal grants, it could operate to impair the validity of the congressional act which authorized the conveyance. This would run afoul of the supremacy clause[135] and Congress' power to dispose of federal property pursuant to the property clause.[136] Since disputes involving the extent of a federal grant present questions regarding rights accorded by federal law, federal question jurisdiction is present to govern such disputes.[137] It should be noted that *Borax* was decided prior to *Erie* and it, therefore, contained no discussion of adopting state law as the federal rule of decision.

B. *Rights of a Federal Patentee After an Accretive or Avulsive Change*

The Court has left unresolved the direct conflict between *Hughes* and the *Corvallis* and *Joy* line of cases. *Corvallis* and *Joy* considered the issue of whether a federal patent provided a basis for federal question jurisdiction, thereby enabling the courts to use federal common law to determine whether a poststatehood change was accretive or avulsive.[138] In *Corvallis*, the Court refused to reconsider *Hughes* since it was not relied on below. The Court did hint in a footnote that the fact *Hughes* involved a parcel of land on the boundary of an international sea might have been sufficient to justify the use of federal common law.[139] If the federal courts do indeed have the power to determine the future right to accretions on such oceanfront property based upon the federal interests involved in the location of an international boundary, then the equal footing doctrine would be as offended as it is in similar non-oceanfront disputes since federal law has not been applied to govern a change that affected oceanfront property in one of the original 13

135. U.S. CONST. art. VI, § 2, which states as follows:
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

136. *See supra* note 36 and accompanying text.
137. Borax Consol., Ltd. v. City of Los Angeles, *supra* note 10.
138. Oregon *ex rel.* State Land Board v. Corvallis Sand & Gravel Co., *supra* note 46, at 377 n.6.
139. *Id.*

states.[140] Thus, this distinction lacks merit. Either the prestatehood federal grant is a basis for federal question jurisdiction or it is not, and the weight of authority is that it is not. Therefore, the continued validity of the majority opinion in *Hughes* on this point is doubtful and it appears to be an isolated decision with little validity after *Corvallis.*

Joy held that state law should control to determine whether an accretive or avulsive change had occurred when such a change affected land that had been the subject of a prestatehood federal grant.[141] In its holding the Court noted that state law could impair the federal patentee's use and enjoyment of his property, but the Court failed to adequately explore the effect of this limitation on state court authority to deny a riparian owner water access. Thus, the Court ignored the possibility that a right granted by federal law could be eroded by state law. This result was supported by the assertion that the Constitution requires, via the equal footing doctrine, that the states established subsequent to our nation's founding acquire the same sovereign rights as the original 13 states. Although the equal footing doctrine does require equality of sovereign rights, it is inevitable, as a consequence of the federal government's initial ownership of large quantities of western land, that the federal impact there will be greater than in the east. The federal government conveyed property by grants prior to statehood in the territories. By virtue of this federal origin of title, the application of federal law is required to determine the extent of these original conveyances.[142] The result is a displacement of state rules of construction. In the founding 13 states, this application of federal principles is not required. However, it is not asserted that this federal involvement infringes on state sovereignty, rather, it is perceived as a reflection of the need to protect the scope of the federal title conveyed.

140. In a post-*Hughes* decision, the New Jersey Supreme Court held that its state law of accretions determined whether lands formed on upland adjacent to the Atlantic Ocean were owned by the State or the upland owner. Borough of Wildwood Crest v. Masciarella, 51 N.J. 352, 240 A.2d 665 (1968).

141. Unlike the situation in *Hughes*, in *Joy* the state court's decree did not operate retroactively to radically change prior law.

142. *See supra* notes 82-84.

Although at first glance the foregoing analysis may seem to be inapposite to the equal footing doctrine, it might only be the result of the varied histories and not an interference with state sovereignty. The Court has noted that the equal footing doctrine was not intended to destroy all differences but was only intended to insure parity with regard to political standing and sovereignty.[143] The state's sovereign rights were not deemed to have been undermined by granting the riparian owner the right to accretions under federal law by the *Hughes* Court, but *Hughes* now appears to be little more than an aberration.

The federal jurisdiction in *Hughes* rested solely on the fact that the petitioner could trace her title to a prestatehood federal grant. This is precisely the type of case where as a general rule state law has governed.[144] The *Hughes* decision was reached as a result of a misplaced expansion of *Borax*. The Court in *Borax* explicitly stated that the only issue present was whether the land in controversy was upland or tideland when California was admitted to the union.[145] If found to be tideland then the Court recognized that the State's title would be *complete* and, therefore, nondefeasable.[146] Consequently, where *Borax* dealt exclusively with the scope of title initially conveyed by federal grant, the *Hughes* Court attempted to use it to justify a continuing federal interpretation of poststatehood property changes. This approach ignored and placed little weight on the history of state control over real property issues which had long been recognized and protected by application of the equal footing doctrine. Further, as an indication of the Court's brief and faulty analysis in *Hughes*, the Court there stated that it could choose to select state law as the federal rule but declined to do so by asserting that *Borax* had held that no such choice should be made in this area of the law.[147] What the Court failed to recognize was that *Borax* was decided

143. Bonelli Cattle Co. v. Arizona, *supra* note 46, at 320; Shively v. Bowlby, *supra* note 12, at 43; Barney v. Keokuk, 94 U.S. 324, 333 (1876).
144. Joy v. City of St. Louis, *supra* note 94; Wilcox v. Jackson, 38 U.S. (13 Pet.) 498 (1839).
145. Borax Consol., Ltd. v. City of Los Angeles, *supra* note 10, at 16.
146. *Id.* at 19.
147. Hughes v. Washington, *supra* note 44, at 293.

prior to *Erie* when there was no adoption of state law, and, thus, that possibility had not been considered as an option. Consequently, *Borax* should not have been cited as controlling on that issue.

The Court's real concern in *Hughes* might have been that addressed by Justice Stewart in his concurring opinion. In it, he accepted the state's power to change and fully determine the laws governing riparian rights. He saw this power as an incident of the state's constitutionally delegated control over real property matters. Justice Stewart did not think this delegation of authority to the states should be manipulated to prevent state abuses. Instead, he found that the needed protection for individual property owners was provided by the fifth and fourteenth amendments' proscription against state confiscation of property rights without just compensation.[148] This proposed use of constitutional safeguards to protect valuable riparian rights would have allowed the Court to accord proper deference to state real property law while preventing the type of state abuse which prompted the Court to manipulate the equal footing doctrine. So far the Court has not acted to so extend fifth and fourteenth amendment protections.

A Hawaii federal district court in *Robinson v. Ariyoshi*[149] held that a radical departure by the Supreme Court of Hawaii in its interpretation of well established water law resulted in the taking of private property without just

148. Justice Stewart stated that:

> Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer. And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners. Nor are riparian owners who derive their title from the United States somehow immune from the changing impact of these general state rules. . . . For if they were, then the property law of a State like Washington, carved entirely out of federal territory, would be forever frozen into the mold it occupied on the date of the State's admission to the Union. It follows that Mrs. Hughes cannot claim immunity from changes in the property law of Washington simply because her title derives from a federal grant. Like any other property owner, however, Mrs. Hughes may insist, quite apart from the federal origin of her title, that the State not take her land without just compensation.

Id. at 295.

149. 441 F. Supp. 559 (D. Hawaii 1977).

compensation.[150] This constitutional violation was found to support the court's exercise of federal question jurisdiction. In reaching this conclusion, the court relied heavily on Justice Stewart's concurrence in *Hughes*. Also, its finding was based by implication on the assumption that since the fourteenth amendment applied to courts in other areas, that the fifth amendment's proscription against taking without just compensation as applied to the states by incorporation through the fourteenth amendment also applied and limited the state judiciary.[151] The taking analysis employed in *Robinson* by the court has been termed by a commentator as the laymen's view.[152] Using this approach, the court quantitatively compared the private property rights possessed before and after the state court's decision. Since the private property rights had diminished, the court held that the state court decision had resulted in an unconstitutional taking of property rights without just compensation.[153]

The Hawaii federal court's finding that it possessed original jurisdiction to determine whether the state court's action in this matter was constitutional was rejected by the fifth circuit in *Reynolds v. Georgia*.[154] The plaintiff in *Reynolds* claimed that an unpredictable decision by a state court had deprived her of fifth amendment rights. Although the fifth circuit accepted the proposition that a state court decision could operate unconstitutionally to deprive a person of their property, it held that this determination was for an appellate court to make. Consequently, the court in *Reynolds*

150. The radical change by the Hawaii Supreme Court was effected in McBryde Sugar Co. v. Robinson, 55 Hawaii 260, 517 P.2d 26 (1973), *cert. denied*, McBryde Sugar Co. v. Hawaii, 417 U.S. 976 (1974), where it determined what water rights were possessed by landowners located adjacent to the Hanapepe River. The court in its decision rendered two holdings that varied radically from its prior decisions in that area of the law. First, it asserted that the State owned all surplus water in the river and, second, it held that acquired water rights could not be transferred.

151. Shelley v. Kraemer, 334 U.S. 1 (1948). In *Shelley* the equal protection clause of the fourteenth amendment was found to proscribe court enforcement of a racially restrictive covenant. *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (due process clause).

152. Chang, *Unraveling Robinson v. Ariyoshi: Can Courts "Take" Property?* 2 U. HAWAII L. REV. 57, 63-67 (1979).

153. The Hawaii federal district court in a subsequent decision also found that the Hawaii Supreme Court's radical departure from prior law constituted a taking without just compensation. Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Hawaii 1978).

154. 640 F.2d 702 (5th Cir. 1981).

held that federal district courts are not empowered to hear appellate issues since they only possess original jurisdiction. In support of its decision, the *Reynolds* court cited *Rooker v. Fidelity Trust Co.*[155] There, the Supreme Court held that a federal district court lacked jurisdiction to hear a claim that a state's highest court had acted unconstitutionally. Thus, although the *Robinson* decision has not been overturned, it stands alone for the proposition it sets forth.

Without using constitutional safeguards, the Court has attempted on occasion to broaden the scope of federal interests to impose some federal protection for riparian rights.[156] In *Hughes,* the Court implicitly recognized that without federal protection the state judiciary would be able to deprive the riparian federal patentee of the most valuable attribute of her land—her right of access to the water. The Court there relied on *Borax* in finding that deprivation of this riparian right was not distinguishable from allowing state law to interpret the original extent of federal grants.[157] In both instances, if state law were controlling, it would have enabled the state to diminish the value of a grant that was created by federal law pursuant to constitutionally delegated powers.

In conclusion, although absolute equality of treatment for the states is impossible, the Court should require an overwhelming justification for imposing federal common law on the states in an area of predominantly state concern. In *Hughes* there was some justification as described above for finding federal question jurisdiction but, if allowed on the basis of a federal patent alone, it would be such a broad expansion of jurisdiction that federal regard for the states' right to control real property would be significantly diminished. Therefore, the needed protection might be better provided by the fifth and fourteenth amendment to the Constitution.

155. *Id.* at 706-07 (citing Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923)).

156. See discussions of *Hughes supra* in text accompanying notes 86-97 and *Bonelli supra* in text accompanying notes 98-110.

157. Hughes v. Washington, *supra* note 44, at 292.

C. *The Type and Scope of Title Conveyed to the Public Land States Under the Equal Footing Doctrine*

Bonelli, like *Hughes*, was an expansion by the Court of *Borax*. In *Bonelli*, the Court held that federal law applied because the issue involved the extent of title acquired by Arizona under the equal footing doctrine and Submerged Lands Act. The Court acknowledged that if the land in question had vested in the state there would be no federal question jurisdiction present.[158] However, the Court held that Arizona had not acquired a fee simple to the bed of the river upon its admission to statehood. Instead, it found that the State had a fee determinable upon the reliction of the water. Thus, when the land in dispute re-emerged, the state no longer had an interest in the property, and it reverted to the riparian owner. This novel approach allowed the Court to sidestep consideration of the assertion that retention by the state of title would amount to a taking without just compensation.[159] Additionally, the Court failed to adequately explain why the equal footing doctrine would not preclude this approach. Jurisdiction on these facts boiled down to the fact that the federal government as sovereign had owned the riverbed prior to Arizona's statehood and, therefore, it could determine the type of title conveyed to the state. However, no such federal interest is present in the original thirteen states which lack a history of federal ownership. This is precisely the type of disparity the equal footing doctrine was intended to prevent, and several Supreme Court decisions have held that the new states have the same rights to the soil beneath their waters as do the original states.[160]

158. Bonelli Cattle Co. v. Arizona, *supra* note 46, at 320. The Court stated that "[t]he present case, however, does not involve a question of the disposition of lands, the title to which is vested in the State as a matter of settled federal law." *Id.*

159. *Id.* at 331-32.

160. As the Court stated in Shively v. Bowlby, *supra* note 12, at 58:

> Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future State when created; but leave the question of the use of the shores by the owners of the uplands to the sovereign control of each State, subject only to the rights vested by the Constitution in the United States.

See Hardin v. Jordan, *supra* note 14; Barney v. Keokuk, *supra* note 143; Mumford v. Wardwell, *supra* note 16; Pollard's Lessee v. Hagan, *supra* note 6.

In *Weber v. Harbor Commissioners*, the Court stated that California upon admission to the union had acquired "absolute property in, and dominion and sovereignty over, all soils under the [waters]" and consequently the state could dispose of title to the beds in any manner it might deem proper.[161] The only mentioned limitation on this absolute right was the federal navigational servitude which was not at issue in *Bonelli*.[162] Surely, if Arizona had exercised its right to convey the submerged property to a private owner prior to its re-emergence, the Court would not have found the owner's fee determinable upon the water's reliction. Furthermore, as in *Hughes*, the *Bonelli* Court failed to recognize that *Borax* only applies to questions regarding the extent of title conveyed at the time statehood was granted.

The parties in *Corvallis* did not request that the Court reexamine *Bonelli*, but several states in amicus briefs did urge that *Bonelli* be reviewed and overturned. The Court reviewed *Bonelli* and found that in *Bonelli* it had erred in holding that federal common law governed resolution of the dispute there. Accordingly, the Court held that property once subject to state law was not subject to defeasance by operation of federal common law. After *Corvallis*, it appears that federal law will only be applied to determine the original boundary of property conveyed by the federal government.

D. *Adoption of State Law When a Dispute Involves Land Held In Trust by the Federal Government*

The *Wilson* holding reaffirms an Indian tribe's right to an adjudication before a federal forum whenever reservation land is involved in a title dispute. Despite this recognition of the need for federal protection of tribal land rights, the Court did not find it necessary to use a uniform federal

161. Weber v. Board of Harbor Comm'rs, *supra* note 11, at 65-67.

162. For a recent Court opinion discussing the navigational servitude, see Kaiser Aetna v. United States, 444 U.S. 164 (1979), where the Court found that the federal government could take action that would diminish or impair a riparian owner's access rights to water without being required by the Constitution to compensate the owner for his loss. *See also* United States v. Rands, 389 U.S. 121 (1967). *See* Note, *The Navigational Servitude and the Fifth Amendment*, 26 WAYNE L. REV. 1505 (1980), for a discussion of the history of the navigational servitude and the gradual expansion of its scope.

rule of decision.[163] Instead, the Court found that the Indians' interest in having a uniform federal rule apply was outweighed by a substantial state interest in having its own law apply. One factor that appeared to be important to the Court in making this determination was what it perceived would be the inequity, if it used a uniform federal rule, of having disputes involving private owners resolved in one manner under state law while disputes between private owners and an Indian tribe would be resolved in a different manner with a uniform federal rule.[164] In contrast, the Court has not found a similarly substantial state interest in having state law govern disputes between private riparian owners that are situated on interstate boundaries, even though such owners have their disputes which involve the interstate boundary resolved by a uniform federal rule, while neighbors not on the boundary have similar disputes decided under state law.[165]

The *Wilson* Court recognized in deciding whether to adopt state law as the federal rule of decision that it should consider a variety of factors that were relevant to the governmental interests involved.[166] However, the Court's subsequent analysis was insufficient in that it relied exclusively upon the factors set forth in *United States v. Kimbell Foods, Inc.*[167] The factors set forth in *Kimbell* were used to determine whether state law should be adopted in a controversy involving a nationwide federal commercial program. Accordingly, the Court in *Kimbell* did not set forth an exclusive list of factors to be used under all circumstances to determine whether state law should be adopted. The *Wilson* Court, however, failed to consider factors other than those set forth in the commercial law context of *Kimbell.* Specifically, it did not take notice of the fact that Indian reservations have a special, federally-created sovereign status that should have been considered in determining whether to use a uniform federal rule.[168]

163. Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979).
164. *Id.* at 674.
165. *See supra* text accompanying notes 117-21.
166. *See supra* notes 77-78 and accompanying text.
167. *Supra* note 2.
168. *See supra* note 124.

In *Wilson*, the Court also failed to properly apply the uniformity factor used in *Kimbell*.[169] In addition to the misplaced emphasis on intrastate uniformity as indicated above, uniformity was also used in a manner that failed to give appropriate weight to the fact that when the various American Indian tribes, including the Omahas, negotiated separately with the United States government for a resolution of the conflicts between them, they acted in a sovereign capacity and relied upon the authority of the federal government to conclude a treaty that would serve as a satisfactory indication of the rights each would possess in an ongoing relationship.[170] By treaty the Omahas relinquished far-reaching territorial claims of sovereignty in exchange for a promise by the federal government that it would hold an established area of land in trust for the tribe to use and occupy.[171] By failing to use the available federal principles of accretion and avulsion for disputes involving Indian land, the Court ignored the tribe's expectations of having complete federal protection for its interests. These expectations were created by the government's recognition of the tribe's status as a foreign nation during the treatying process as well as the need to protect tribal land and affairs from state governmental interference. Thus, it was reasonable that the tribe would assume that this type of dispute would be resolved by applying the well developed uniform federal principles of accretion and avulsion.[172] However, the Omahas' expectation interests were ignored by the Court.

The Court also stated that federal jurisdiction alone would be sufficient to insure that federal interests were not

169. *See supra* text accompanying note 164.

170. A treaty entered into with an Indian tribe prior to 1871 must be accorded the same dignity and protection that would be given to a treaty with a foreign nation. Turner v. American Baptist Missionary Union, 24 F. Cas. 344 (C.C.D. Mich. 1852) (No. 14,251); Anthony v. Veatch, 189 Or. 462, 220 P.2d 493, *reh'g denied*, 189 Or. 462, 221 P.2d 575 (1950), *appeal dismissed*, 340 U.S. 923 (1951); Matter of Adoption of Buehl, 83 Wash. 2d 649, 555 P.2d 1334 (1976). The status of Indian tribes as sovereign nations for treaty negotiations was prospectively abrogated by Congress on March 3, 1871. 25 U.S.C. § 71 (1976).

171. A treaty was entered between the United States and the Omaha Indians on March 16, 1854. 10 Stat. 1043. *See* United States v. Omaha Indians, 253 U.S. 275, 277-78 (1920).

172. Treaty rights cannot be diminished by the admission of a state into the union. Holcomb v. Confederated Tribes of Umatilla, 382 F.2d 1013 (9th Cir. 1967); State v. Gurnoe, 53 Wis. 2d 390, 192 N.W.2d 892 (1972).

impaired.[173] This assertion, however, ignored the fact that reservation land and water rights were granted to the tribe in its sovereign capacity with the expectation that federal law and principles would govern all aspects of the tribe's relationship with the federal government. Although federal courts can control when state law is adopted, this decision makes it possible that state law will be applied in certain cases to deprive an Indian tribe of riparian rights where federally developed principles would have protected such rights.[174] The Court acknowledged this when it stated that although the application of state law could on occasion result in a tribe losing land, on other occasions the tribe would be as likely to gain property by virtue of the application of state law. Thus, in *Wilson* the Court found that the state interests in having state law apply outweighed the federal interest in treating similarly situated Indian tribes uniformly. The Court did not find state interests to so outweigh federal interests in *Hughes* where the federal interests present were not as substantial as they were in *Wilson.*

The federal courts, in developing a uniform federal rule of accretion and avulsion, have been sensitive to the underlying rationale of the doctrines whereas some state courts have stuck rigidly to the mechanical distinction between the definitions of accretion and avulsion in developing the law in this area with little regard for the underlying purposes of the doctrines.[175] This difference should at least have been considered by the Court in evaluating the factors to be used in deciding whether to use a uniform federal rule. Additionally, the Court should have considered as relevant the fact that the use of a uniform federal rule to determine whether the change was accretive or avulsive would not have resulted in an undue burden on the judicial system since a federal body of law to govern such disputes has already been developed.[176] This law could easily have been applied, and it would not have required any significant Supreme Court in-

173. Wilson v. Omaha Indian Tribe, *supra* note 2.
174. If the Supreme Court intended state law to be adopted only when it accurately reflected federal principles, it was not explicitly set forth in *Wilson.*
175. *See* Bonelli Cattle Co. v. Arizona, 108 Ariz. 258, 495 P.2d 1312 (1972).
176. *See supra* text accompanying notes 118-22.

volvement. Also, the use of a uniform federal rule would assure that such disputes were resolved by the application of the principles underlying the accretion and avulsion doctrines and not by a state's reliance on a mechanical distinction based solely on the rate of change of a waterbody's bounds regardless of the equities involved.

Since the federal government holds title to reservation lands, state law should govern only to the extent that it does not interfere with federal title.[177] By adopting state law to govern when uniform federal rules have already been developed for similar disputes involving interstate boundaries, the Court has allowed state law to determine the extent of federally created property rights. This is inapposite to the Court's *Borax* holding.[178] It also conflicts with the property clause which has been held to require that when state law is exercised to control rights affecting federal property, it must not interfere with the federal government's right of disposal.[179] Here, as a result of adopting state principles of accretion and avulsion, the land has been held not to be part of the reservation. Therefore, the federal government has been deprived of any possible future right of disposal by the adoption of state law as the federal rule of decision.

It has been held that although the federal government did not expressly reserve water use rights for the Indian tribes in treaties with them, there are implied reservation rights which appropriate sufficient quantities of water for the irrigable land within the reservations.[180] In developing this reserved water rights doctrine, the Court recognized the unique nature of society's obligation to the American Indians and its federal origin.[181] The Court has applied this doctrine to permit withdrawal of water from state systems of appropriation. This infringement upon the state's sovereign power over water was deemed necessary to insure

177. Borax Consol., Ltd. v. City of Los Angeles, *supra* note 10, at 22.
178. *Id.* at 27.
179. James v. Dravo Contracting Co., *supra* note 43, at 142; Surplus Trading Co. v. Cook, *supra* note 43, at 650.
180. Arizona v. California, *supra* note 31; Winters v. United States, *supra* note 31.
181. Arizona v. California, *supra* note 31; Winters v. United States, *supra* note 31.

an adequate supply of water for the Indians in an arid region and it protected their expectation of a continued water supply. Just as reserved rights are of prime importance to the Indians, the right of access to water is equally important. After *Wilson*, if an accretive or avulsive change occurs in a waterbody bounding a reservation, state law will likely determine the nature of such a change. Thus, an Indian tribe could end up losing its right of access to water based upon the application of a state law that embodies a mechanical distinction between the accretion and avulsion doctrines. In *Hughes*, the Court recognized that the potential loss of access to the ocean by a federal patentee was not a loss that should be accepted; therefore, it required the use of a uniform federal rule to protect federal interests.[182] Although *Hughes* is no longer "alive," the Court's recognition there of the importance of the need to protect access rights where there is a federal interest present by using a uniform federal rule should have been considered by the Court in *Wilson*. However, this factor was ignored and the Court failed to explain why the tribe's interests in having a uniform federal rule apply were not given appropriate consideration.

V. CONCLUSION

In *Bonelli* and *Hughes*, the Court's application of federal common law enabled the riparian owners to maintain the riparian character of their property. However, if state law had been applied, it would have resulted in a loss of access rights for the upland private property owners involved. Since the Supreme Court has repeatedly refused to apply fifth and fourteenth amendment protections to prevent state confiscation of riparian rights without just compensation, the Court in *Bonelli* and *Hughes* sought to provide the needed protection by applying federal common law. As the Court indicated in *Corvallis*, federal common law was improperly used in *Bonelli*, and the *Bonelli* majority's reasoning was flawed in that it did not adequately explain how title to property once passed from federal to state ownership could be subject to later defeasance. The *Bonelli* Court also failed

182. Hughes v. Washington, *supra* note 44.

to properly analyze the requirements of the equal footing doctrine. Although the *Bonelli* Court's legal analysis and reasoning was faulty, the Court correctly recognized that there were valuable private property rights—riparian rights, e.g., access rights—subject to being taken by the state without adequate protection being afforded by the law. Since in *Corvallis* the Court determined that federal common law could not be used to protect the riparian rights of private owners, other methods of protection should be considered to determine whether they might be applicable in a given situation to protect a private owner's riparian rights from confiscation by a state without just compensation.

Logically, the protection of private property rights would seem to be provided by the fifth and fourteenth amendments' prohibition against taking without just compensation. However, as indicated above, the Court has held that the taking of riparian rights does not require compensation under the fifth and fourteenth amendments. The case history that supports this position should be reexamined to determine whether it in fact justifies the Court's continuing exemption of riparian rights from the list of property rights that cannot be taken without just compensation by a state.

Some protection against an arbitrary taking of riparian rights b ya state court can be provided by reliance on the cases that hold a state court cannot radically change the application of its law if such a change will diminish the rights of a private property owner. This approach could be used by federal courts to prevent state courts from altering the tests used to determine whether an accretive or avulsive change has occurred. Consequently, state courts would not be able to arbitrarily change the criteria used for deciding whether a change in a waterbody's bounds was avulsive or accretive. Absent the application of constitutional safeguards, state courts are completely free to apply the accretion and avulsion doctrines in whatever manner they desire, regardless of past practice and precedence. This could result in the acquisition of large tracts of land by a state without it having to tender just compensation.

The Court in *Wilson* properly resolved the property issue before it as a matter of federal law, but it failed to recognize a federal need for applying a uniform federal rule. In *Wilson*, the Court failed to go beyond the factors set forth in *Kimbell* to discuss the unique status, expectation and treaty rights of the Omaha Indian tribe. Additionally, the Court placed an undue amount of weight on the asserted need for intrastate uniformity when the Court should have looked at the need for uniform treatment of all tribal lands similarly situated. Thus, this holding was based upon an unnecessarily limited analysis of the factors that should have been considered by the Court and a faulty analysis of some of the factors it did consider.