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LIMITATION ON DIVERSION FROM THE WATERSHED: RIPARIAN ROADBLOCK TO BENEFICIAL USE

Back in the ages when man was first developing concepts of property rights, it no doubt occurred one day to an enterprising valley-dweller who had fashioned his hovel on the edge of a river that he had a valuable commodity which his upland neighbors lacked—a constant supply of life-giving water. Presumably, from such a revelation the doctrine of riparian rights developed, an antique system of water law which has survived unchecked into many present United States jurisdictions.

Basically, the riparian system bestows on the freeholder contiguous to a stream a batch of rights not enjoyed by landlocked titleholders. A riparian owner is entitled to the continuance of the flow of the stream by his property, undiminished in quantity or quality. The riparian does not own the water in the stream, but he is entitled to the beneficial use of such waters, as long as the use is reasonable and he returns the unused portion to the watercourse.¹

Part of the riparian doctrine is the concept that a riparian proprietor, though he can divert the water to his own purposes, cannot divert it beyond the watershed drained by the stream. Theoretically, this rule is based on the assumption that all the water diverted into the watershed will eventually return to the watercourse, thus fulfilling the right of the lower riparian to have the stream undiminished in quantity.² While the factual basis for this hypothesis may be doubtful, the theory is still strong enough to support this corollary.

Thus, it may be seen that the riparian doctrine eventually boils down to a battle between the "haves" and the "have nots"—the "haves" being the riparian owners who can use the water within the watershed, and the "have nots" being the landowners beyond the watershed with a need for water resources.

The watershed limitation doctrine has been frequently attacked as being impractical in an age when abundant, relatively pure water is already rare and becoming more so. Why should a riparian farmer be able to use river water almost to abandon to cool down his hogs, while the parched residents of the city

1. 93 C.J.S. *Waters* § 9 (1956).

2. *Id.* §§ 58-62.

over the hill thirst for an adequate water supply? This article will attempt to explore the legal foundation for such inequities and some of the approaches that have been taken within the law for dealing with the outdated restriction.

I. BASES FOR THE LIMITATION

The doctrine that water diverted from a watercourse must be retained within the watershed presents fundamental questions that go to the conceptual foundation of the riparian system. The first inquiry would seem to be, "How will 'watershed' be defined?" but a more basic question must first be considered—"Who are riparian owners?"

The general rules as to who are riparians have been expressed thus:

Riparian rights are appurtenant only to lands which actually touch on the watercourse or through which it flows, not to any lands physically separated from the stream, although belonging to the same owner; and one who owns land bordering on a stream may not enlarge the area of his "riparian" property by the acquisition of lands adjacent to those first owned, although not themselves contiguous to the stream, but separate tracts under separate patents based on separate entry, although contiguous to a tract bordering on a stream, do not give riparian rights to the simple owner, nor can the rights be made to extend beyond the natural watershed of the stream.³

There are various definitions of what is riparian land. One is called the "source of title" test, which is concerned with the devolution of riparian property from one owner to the next. Another is the "unity of title" rule, which defines riparian land as all that portion of a tract held in a single title contiguous to the watercourse. Neither of these two definitions is concerned with the watershed limitation. But the general definition of riparian land combines the "unity of title" test with the requirement that the land lie in the watershed of the watercourse.⁴

For those landowners who are found to meet such a definition, special rights attach:

3. *Id.* § 8.

4. Waite, *Beneficial Use of Water in a Riparian Jurisdiction*, 1969 Wisc. L. Rev. 864, 872-73, hereinafter cited as Waite.

Each riparian proprietor is entitled to have the water-course flow by or through his land in its natural course, quantity, and quality, subject only to reasonable use by other proprietors. He, in turn, is entitled to make use of the water in the stream while on his land in any way he sees fit, provided that he does not by such use unreasonably affect the right of an upper or lower riparian proprietor. The nine common law states in the Southeast seem to follow this general rule.⁵

Of course, the riparian proprietor can divert the flow of a stream while it is on his land, so long as he returns it to the lower riparian proprietors through the natural channel.⁶ But returning the surplus water to the natural channel is a most vital part of the rule—if the riparian cannot return it, then he must not divert it.⁷

South Carolina first set out its adherence to the riparian doctrine in the 1835 case of *Omelvany v. Jagers*.⁸ The court adopted the position that

the possessor of lands through which a natural stream runs, has a right to the advantage of the stream flowing in its natural course, and to use it as he pleases, and for any purposes of his own not inconsistent with a similar right of the proprietors of the land above and below; . . . and that whether loss by the diversion of the general benefit of such a stream, be or be not such an injury in point of law as to sustain an action without some special damage, yet as soon as the proprietor of the land has applied to it some purpose of utility, or is prevented from so doing by the diversion, he has a right of action against the person diverting.⁹

The court, adopting language from Kent's Commentaries, also laid down the general rule against diversion from the watershed:

Though [a proprietor] may use the water while it runs over his land, he cannot reasonably [sic] detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the

5. Agnor, *Riparian Rights in the Southeastern States*, 5 S.C.L.Q. 141, 143 (1952).

6. *Id.* at 144-45.

7. 93 C.J.S. *Waters* § 62 (1956).

8. 2 Hill 634 (S.C. 1835).

9. *Id.* at 638-39.

consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw back upon the proprietors above, without a grant . . .¹⁰

Thus, according to traditional riparian doctrine, accepted in South Carolina and most of the eastern states, the stream water may be used only upon riparian land, and riparian land embraces only the land within the watershed. Such a limitation is consistent with the principle that a riparian owner's rights to use stream water are not limited to his existing uses, but include future uses as well. As one article has noted, "The watershed limitation is thus merely a means of protecting the riparian rights of others, by tending to make return flow available if needed in the future."¹¹

But how to define a watershed? The dictionary approach is "a whole region or area contributing to the supply of a river or lake," but this has been criticized as too simple. The practical difficulties involved in ascertaining the physical limits of a watershed include the problem of flat areas in the middle and upper reaches of rivers, where the flat areas can be included within a river basin by only faint topographic indication. Similar flat areas in coastal plains between rivers are also almost impossible to categorize in either one's basin.¹²

But such faint topographic dividers are vital to the issue at hand, for it is not hard to imagine that one large riparian tract may lie in more than one watershed:

Suppose that a large single tract of land touches a stream. This tract has riparian rights in the stream, but the question remains as to whether the entire tract is entitled to be benefitted thereby. There appears to be a distinction between land outside the watershed of the stream and land within the watershed. Land within the watershed of a stream is riparian land, while land outside the watershed of the stream is considered to be non-riparian land, even though it is contiguous to riparian land.¹³

10. *Id.* at 640. The later case of *White v. Whitney Mfg. Co.*, 60 S.C. 254, 38 S.E. 456 (1901), which relied on the *Omelwany* case, noted that the word "reasonably" in the above quotation was a misprint, and the word should have been "unreasonably."

11. Johnson and Knippa, *Transbasin Diversion of Water*, 43 TEXAS L. REV. 1035, 1036 (1965), hereinafter cited as Johnson and Knippa.

12. *Id.* at 1049.

13. Agnor, *Riparian Rights in the Southeastern States*, 5 S.C.L.Q. 141, 142 (1952).

Thus, the definition of a watershed is largely fulfilled by the geographical contour of the land involved. But another aspect of the watershed definition arises when there are several streams in one area, some of which may be tributaries of other streams. Then the question of where one watershed stops and another begins becomes more complex. The question is answered by considering where the man is who is doing the complaining.

The cases involving the riparian watershed limitation show that the meaning of the term for that purpose depends upon the nature of the controversy. A transfer of water from one tributary to another tributary of the same major stream is beyond the watershed if complained of by a riparian located on the originating tributary; but such a transfer is deemed to be within the watershed (of the main stream) and thus lawful if the only complaining riparians are located downstream from the point of confluence of the two tributaries.¹⁴

The same concept has been expressed in a 1969 *Wisconsin Law Review* article:

Under any definition of riparian land, the watershed is defined with reference to each riparian tract of land. The watershed definition has two elements. First, the land within the watershed must be drained by the watercourse. Second, once the water the land supplies is in the watercourse, it must flow by the particular tract of riparian land whose watershed is in question. Thus only the riparian tract at the mouth of the watercourse would have a watershed comprising all the land drained by a watercourse. And a riparian whose land is located below a stream junction has not experienced a transfer out of the watershed when water is transferred from one of the stream branches to land drained by the other.¹⁵

Though this concept of watersheds and tributary streams seems well accepted now, such was not always the case. The issue was best considered in a California case in 1938, *Rancho Santa Margarita v. Vail*.¹⁶ Because the case was so intimately

14. Johnson and Knippa, *supra* note 9, at 1049.

15. Waite, *supra* note 2, at 872 (fn).

16. 11 Cal. 2d 501, 81 P.2d 533 (1938). The action was brought in 1924, making 14 years until final decision was rendered. The record printed for review filled eleven printed volumes, supplemented with four volumes of

concerned with the issue of watersheds, it is worth close consideration in connection with this article.

The plaintiff sued for an adjudication of water rights of the Temecula-Santa Margarita River and its tributaries, and to enjoin the defendants from interfering with its flow. The trial court found for the plaintiff, holding that it was entitled to 75% of the flow. On appeal, the issue was the definition of a watershed as to a riparian owner downstream from where two converging streams join. Stated differently, the question was, as to such a downstream owner, are lands located within the drainage area of a tributary within the watershed of the main stream?

The court reviewed three criteria for land having riparian status: (1) It must be contiguous to or abut on the stream. (2) The riparian right extends only to the smallest tract held under one title in the chain of title leading to the present owner. (3) The land, in order to be riparian, must be within the watershed of the stream.¹⁷

The defendant's upstream tract bordered both on the Temecula-Santa Margarita River and on Murrieta Creek, a tributary, although most of the tract in question was within the Murrieta watershed. The plaintiff's land surrounded the Temecula-Santa Margarita at the site of its mouth at the Pacific Ocean. The defendant contended that all of its land was riparian to the Temecula-Santa Margarita as against the plaintiff, a downstream riparian, regardless of the fact that the major portion of the area was within the creek's drainage area. The court agreed to the defendant's theory that "as to any owner below the confluence of two branches of a stream, the drainage areas of both branches must be deemed to constitute a single watershed, where riparian land . . . is owned by the upper owner on both branches."¹⁸

The factual issue was whether the defendant could divert water from the main stream into the watershed of the tributary. Quoting from an earlier California case, the court said:

exhibits. The cause was in the trial court for three years, consuming 444 actual court days. The appellate briefs of the parties totalled over 2,000 pages. The case fills 33 pages in the Pacific reporter, with 52 headnotes.

17. 81 P.2d at 547. There seems to be some doubt that South Carolina would follow the second part of the rule regarding necessity of continuance of title. Lecture of Prof. Charles Randall, Sept. 23, 1969, University of South Carolina School of Law.

18. *Id.*

Both watersheds are but parts of the watershed of the stream as it passes the plaintiffs' lands, and the rule that the owner of a tract of riparian land may not convey and use the water without the watershed of the stream has no application. The water is not conveyed and used without the watershed of the stream which passes the plaintiffs' lands, and that stream is the stream in which the plaintiffs have rights. They have no rights in the main stream and the branch above as separate streams.¹⁹

The court concluded, "This constitutes a direct and unequivocal holding that as to riparian lands downstream from the confluence the two branches constitute but one watershed."²⁰

The *Vail* case distinguished another earlier California case, *Anaheim Union Water Co. v. Fuller*.²¹ In that case the defendant owned two tracts of land, one on the main river and another on a tributary. Plaintiff's land was below defendant's on the main river, but above the point where the tributary joined. The plaintiff sued when defendant diverted water from the main stream for use on his tract within the watershed of the tributary. Obviously, the diverted water would thus by-pass the plaintiff's land. The court held that, where two streams unite, with regard to lands abutting thereon above the junction, the drainage area of each stream is a separate watershed. Quoting from *Fuller*, the *Vail* case explained the reasoning for the watershed limitation rule:

The principal reasons for the rule confining riparian rights to the part of lands bordering on the stream which are within the watershed are that, where the water is used on such land, it will, after such use, return to the stream, so far as it is not consumed, and that, as the rainfall on such lands feeds the stream, the land is in consequence entitled, so to speak, to the use of its waters. Where two streams unite, we think the correct rule to be applied, in regard to the riparian rights therein, is that each is to be considered a separate stream, *with regard to lands abutting thereon above the junction*, and the land lying within the watershed of one stream above that point is not to be

19. *Id.* at 548.

20. *Id.*

21. 150 Cal. 327, 88 P. 978 (1907).

considered as riparian to the other stream. The fact that the streams are of different size, or that both lie in one general watershed, or drainage basin, should not affect the rule²²

Thus, the *Vail*²³ case held that, as to the plaintiff, all of the defendant's riparian lands within the Murrieta drainage area are within the watershed of and are riparian to the Temecula-Santa Margarita, reversing the trial court on this point. The court succinctly summed up the entire controversy in one sentence: "It is the situation of land within the watershed that is material."²⁴

The riparian system, in the states where it is in force, thus serves as an effective means of protecting the interests of those fortunate enough to reside within a bountiful watershed. In many of the western states, where water is more scarce, the riparian system has been junked in favor of the more modern prior appropriation system. Though such jurisdictions may scoff at those clinging to the antique riparian rules, many appropriation states have not been hesitant to adopt watershed-protection legislation, thus guarding by statute that which is protected by the common law in riparian states. Such legislation is necessary to protect watershed landowners' interests, for the prior appropriation doctrine rejects the limitation of water use to the watershed.²⁵

Nebraska, a state which combines both an appropriations and riparian rights system, is one state which has placed statutory restrictions on transbasin diversion. In *Osterman v. Central Nebraska Public Power and Irrigation District*,²⁶ the court construed the statute to bar transbasin diversions in all cases, "even where benefits to the receiving region would clearly outweigh the detriment suffered by the originating basin."²⁷ This decision was later essentially nullified by a 1960 case, *Ainsworth Irrigation District v. Bejot*,²⁸ which seemed to say a diversion was not a transbasin one since the diversion was from one river which was tributary to another, to which the water would be diverted. Nevertheless, it may be seen that such statutes may be

22. 81 P.2d 549; emphasis by the court.

23. *Rancho Santa Margarita v. Vail*, 11 Cal. 2d 501, 81 P.2d 533 (1938).

24. *Id.* at 81 P.2d 550.

25. *Johnson and Knippa*, *supra* note 9, at 1037.

26. 131 Neb. 356, 268 N.W. 334 (1936).

27. *Johnson and Knippa*, *supra* note 9, at 1039.

28. 170 Neb. 257, 102 N.W.2d 416 (1960).

even more stringent in keeping the water in the watershed than the common law riparian doctrine. Such a result has been soundly criticized: "The Nebraska experience demonstrates, if demonstration be needed, the lack of wisdom, and indeed the futility, of attempting to deal with the problem of transbasin diversion by a blanket statutory prohibition."²⁹

Colorado is an appropriation state which straddles the Continental Divide. There a statute effected the policy that a transbasin diversion should be allowed only as to the excess water above the present and future needs of the originating basins for consumptive uses. This so-called watershed-of-origin statute applied only to water-conservation districts, so it would not affect transbasin diversions that did not rely on such districts. Such an act, in an appropriation state, may be vulnerable to constitutional attack. There is some indication that the policy may be the result of the political power of United States congressmen representing the comparatively water-rich districts on the western slope of the Continental Divide.³⁰

In populous California, the problem is one of water maldistribution. There the threat to originating basins has been manifested in both county-of-origin and watershed-protection statutes. The state attorney general construed the latter act to entitle the residents of the protected areas to future appropriations of water, even if it would be necessary to recapture water already appropriated for use outside the watershed. This statute, and the general problem of reconciling the interests of originating and receiving regions, became the subject of an intense controversy when the Feather River project, which would move vast quantities of water from northern California to the southern part of the state, was proposed. Such legislation has also been questioned in light of the California constitutional mandate that water be put to the fullest extent of beneficial use. The Feather River project was given final approval only after the inclusion of a provision for the construction of local projects in originating areas.³¹

Texas has enacted a so-called watershed-prejudice statute, which makes it illegal to divert water from one watershed to another "to the prejudice of any person or property situated within the watershed from which such water is proposed to be

29. Johnson and Knippa, *supra* note 9, at 1039.

30. *Id.* at 1040-42.

31. *Id.* at 1042-44.

taken or diverted.”³² The legislative purpose here may have been not only to protect the holders of water rights, but also others located in the originating basin who benefit from the flow of the stream, such as businessmen serving farmers engaged in irrigation. The term “prejudice” in the statute probably implies a balancing situation, where benefits and detriments expected to result from the proposed transbasin diversion would be compared, and prejudice found only if the detriments outweigh the benefits. The Texas statute differs from the California legislation in that it does not imply that the future needs of the originating basin can be met by recapturing water diverted elsewhere.³³

A 1965 Texas statute put a fifty-year limitation on planning for transbasin diversion. Called the “fifty-year lockup” by critics, the limitation was the result of apprehension by the inhabitants of eastern Texas, and was intended to assure originating areas of sufficient water for their anticipated needs. The provision thus creates a preference for intrabasin needs. Such a policy may clash with the Texas priority-of-use statute—a municipality, which is given the first priority, may be shut out from getting water from an adjacent watershed.³⁴

II. DEALING WITH THE LIMITATION

With the deck stacked against widespread use of water resources by the riparian doctrine in some states and watershed-protection statutes in others, how can the water be legally transferred from the watershed “haves” to the dryland “have-nots”? Solutions have been attempted, both by the federal government at the planning level, and by state governments with specific legislation.

It first may be noted that there is apparently no clear federal policy on the protection of watersheds-of-origin. True, restrictive provisions have been incorporated into particular federal projects in some instances, but this may be due to the political power of the affected areas. Federal agencies generally seem to give deference to state policy on the protection of the water supply. The recent Water Resources Planning Act of 1965³⁵ contained a disclaimer that the legislation gave any authority for recommending transfer of waters between river basins.³⁶

32. TEX. PENAL CODE art. 842 (1961).

33. Johnson and Knippa, *supra* note 9, at 1044-48.

34. *Id.* at 1052.

35. Pub. L. No. 80, 89th Cong., 1st Sess., July 22, 1965.

36. Johnson and Knippa, *supra* note 9, at 1054-55.

But federal involvement in water matters begins at a level even more basic than the watershed. The broadly-construed federal navigation power includes rivers navigable in fact, those navigable with reasonable improvements, non-navigable portions of a navigable waterway, and non-navigable tributaries. Thus, as a corollary to the navigation power, the government claims a dominant servitude over the land on which such waterways flow. Under this theory, there can be no compensation for water rights lost as the result of federal diversion, because no property has been taken to which the federal government did not already have a right.³⁷

Federal primacy in stream waters is further supported by the rule that there is no such thing as "ownership" of the water in a navigable stream.³⁸ Thus the federal government owes no compensation for taking the running water in a navigable stream, since it is owned by no one. Compensation is given, if at all, only for physical damage to the lands contiguous to the stream.³⁹ But it is unlikely that the federal government would have to compensate for even such damage to adjacent lands:

[T]he extent and nature of rights to water based on the ownership of riparian lands is governed exclusively by the law of the state in which the riparian land lies. The federal government, however, under the commerce clause, has the power to utilize the water without paying compensation for the impairment of water rights recognized by the state law, including the impairment of the strictly riparian value of the adjoining lands (the value solely due to the existence of the government owned running water) It is only when the United States alters some water right on the navigable mainstream of a river that it is immune from such payment.⁴⁰

Thus, although a state can prevent waters from a wholly intrastate stream from being exported to another state,⁴¹ the

37. Comment, *Problems in Interbasin Water Transfer*, 1 CALIF. W. L. Rev. 136, 140 (1965), hereinafter cited as Comment.

38. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913), held that ownership of water flowing in a navigable stream is "inconceivable."

39. Comment, *supra* note 33, at 141.

40. *Id.*, citing *United States v. Twin City Power Co.*, 350 U.S. 222 (1956).

41. *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908). This would appear to be in accord with the traditional claim of state governments to the right to retain natural resources within their boundaries. Johnson and Knippa, *supra* note 9, at 1056.

federal government still retains the right to transport the water of interstate streams, or of navigable streams lying wholly within a state, under the general power to regulate commerce.⁴²

Although the federal government could conceptually siphon water from any sizable watershed in the nation and transfer it to another, without fear of compensating injured riparians or prior appropriators, such an approach would probably be too grandiose for even the most power-conscious administration to take. More practically, federal involvement is more likely to attach at the planning level. Such regional planning would effect the transportation of water from areas of abundance to areas of need. Naturally, areas with plentiful water supplies would view such a scheme with alarm, but proponents of federal planning contend that recognition of the prior rights of the area of origin can be made in the form of benefits, such as power and flood control projects or aid to intrastate water programs.⁴³

The very scale of the problem of interbasin transfer would seem to suggest the desirability of federal regional planning, for the federal government is not limited by jurisdictional boundaries or geographical areas. But still the conflict devolves into one between the "haves" and the "have-nots," and one writer has pragmatically predicted that the outcome will be the result of that ultimate settler of accounts, political power:

The feasibility of regional planning depends upon the willingness of the individual states to accept future benefits for present detriments. Political power, therefore, will be a determining factor in making a particular regional plan desirable from the standpoint of the states involved and may even equalize the time factor by forcing the giving of a greater future benefit in exchange for a lesser present detriment. In any event, each state can seek any type of benefit it could conceivably desire as consideration for its participation. The quantity and quality of the consideration is limited only by the extent of the political power of the state.⁴⁴

42. Comment, *supra* note 33, at 142. As to the allocation of water rights in interstate streams, this is usually accomplished by (1) a suit between two states under article III of the Constitution, (2) a compact between the states under article 1, section 10, or (3) judicial interpretation of a federal act, as was done in *Arizona v. California*, 373 U.S. 546 (1963). *Id.* at 137.

43. *Id.* at 148.

44. *Id.* at 149.

State governments, however, have no such constitutional blessing as the navigation clause to exert power over their waters, and thus the states must search for other means for providing for a beneficial distribution of water without subjecting themselves or their subdivisions to liability to riparians or prior appropriators. Of course, such objections could be silenced by the purchase or condemnation of such rights,⁴⁵ but few state governments could afford to pay the price for such action. Therefore, the states have sought other ploys for eluding the restriction. The usual approach is through legislation, but such a solution is not without its pitfalls:

State legislatures might alter the common law and allow [transbasin] diversions for consumptive beneficial uses, but legislative solutions may be delayed or prevented by groups preferring that water remain in watercourses. New statutes also invite litigation of their constitutionality.⁴⁶

One approach is to distinguish regular stream flow from flood waters. Some riparian states permit public impounding of water "in excess of existing reasonable uses."⁴⁷ Under this theory, riparians have no rights to such increased flowage, and such water is thus freed from the riparian doctrine. The riparian roadblock swept away by the flood, the water may be then used at any place and for any purpose contemplated by the statute.⁴⁸

Texas, a state which employs a combined riparian-prior appropriation system, is one jurisdiction which has tried the flood water approach. There the riparian rights are limited to "normal flow" and do not attach to "storm and flood waters." Thus reservoirs, which provide the source of water for inter-basin transfer, can be conceptually fitted into the "storm and flood water" category.⁴⁹ The state supreme court seemed to affirm the distinction in a 1927 decision, *Texas Co. v. Burkett*.⁵⁰ That case held that, while, as a general rule, a riparian owner had no right to divert riparian water to non-riparian land, he might do so when water is abundant and no possible injury could result to lower riparian owners. The court concluded that

45. Johnson and Knippa, *supra* note 9, at 1038.

46. Waite, *supra* note 2, at 864.

47. IND. ANN. STAT. § 27-1403 (2) (1960).

48. Waite, *supra* note 2, at 869.

49. Johnson and Knippa, *supra* note 9, at 1037.

50. 117 Tex. 16, 296 S.W. 273 (1927). An annotation on this point may be found at 54 A.L.R. 1411 (1928).

only a prejudicial diversion of water was prohibited by the state statutes.

But the flood-water approach still seems to go against the grain of the riparian doctrine, which is not only concerned with the present right to the stream's flow, but also unimpaired future rights:

Traditional doctrine entitles the riparian to commence making actual reasonable use of the water anytime in the future. Possibly permitting water to be diverted from a stream, thereby reducing the flow of water passing riparian land downstream from the point of diversion is such a reduction of riparian rights as to be a taking of property, even though, at the time the diversion permit is issued, the downstream riparian is not actually using the stream. The same possibility is present in situations where the downstream riparian is actually using the stream, but the use is not affected by the diversion.⁵¹

Indiana, a riparian state, has tried a contract approach. A statute authorizes the use of contractual arrangements to provide minimum quantities of stream flow or to provide water to purchasers. The contracts have a fifty-year limitation and are loosely restricted to "uses and needs in a manner consistent with the public interest."⁵² The water used to fulfil such contracts is taken from state-financed reservoirs,⁵³ which are probably supplied by the excess-water doctrine.

Another method of combating the watershed limitation doctrine is the permit approach. In Wisconsin, a riparian state, there has been no move to adopt a state-administered water use permit system. But the state Public Service Commission was given power to permit water diversion for the purpose of restoring normal lake and stream levels when lowered by drought and for purposes of agriculture or irrigation. The commission construed the granting legislation to mean that it had the power to determine whether a proposed diversion would injure riparians already making a beneficial use of the water, and thus require their consent before diversion might be permitted. The Wisconsin supreme court did not see it that way. In a 1959

51. Waite, *supra* note 2, at 870.

52. IND. ANN. STAT. § 27-1407 (10) (Supp. 1968).

53. Waite, *supra* note 2, at 867-68.

case,⁵⁴ the court held that if water is being used beneficially, its diversion is per se harmful to a riparian, and under the statute his consent is required. In other words, the commission could not arbitrarily determine whether or not a diversion would be harmful to a riparian making use of the flow. The decision may have been prompted by a feeling that the commission was indeed acting arbitrarily in its program of water use control.⁵⁵

But a water use permit system in a riparian jurisdiction raises the question as to whether riparians along the affected watercourse must be compensated for not receiving the water delivered to the state-authorized user. Constitutionally, the question must be answered by determining whether the particular deprivation is a "taking" by the government of riparian property rights. If so, compensation must be paid.⁵⁶

Bino v. City of Hurley,⁵⁷ a Wisconsin decision, suggests that the crucial question for compensation purposes is whether a particular riparian right has been eliminated. In that case, the city tried to protect the purity of its water by prohibiting bathing, boating, and swimming in the lake which was the city's water supply. A riparian owner successfully challenged the prohibition as a taking of his property without compensation. The court described the riparian right as "a substantial and valuable one for which compensation must be given if the owner is to be deprived of it." Though this case does not involve the question of a permit, it demonstrates the high regard riparian state courts afford to riparian rights. Devising a permit system which would not bankrupt the state by indemnifying injured riparians will be a most difficult problem.

Any state system employing the excess water, contract, or permit approach for spiriting water away from the strong riparian grasp contemplates that the water so salvaged will be put to public use. This use in itself meets a separate riparian hurdle. For the ultimate question under the riparian system is whether the use of the flow is reasonable, and not whether it is in the public interest. As one writer has noted, "The sense of public use associated with exercise of public rights in watercourses seems alien to riparianism"⁵⁸ Further, it has spe-

54. *Nekoosa-Edwards Paper Co. v. Public Service Comm'n*, 8 Wisc. 2d 582, 99 N.W.2d 821 (1959).

55. Waite, *supra* note 2, at 865-66.

56. *Id.* at 868.

57. 273 Wisc. 10, 76 N.W.2d 571 (1956).

58. Waite, *supra* note 2, at 878.

cifically been held that to take the flow of a stream to supply water for the inhabitants of a town was a violation of the rights of the lower riparians, especially where the water was being used on non-riparian land.⁵⁹

A 1951 Maine case, *Kennebunk, Kennebunkport and Wells Water District v. Maine Turnpike Authority*,⁶⁰ indicates that riparian courts look with disfavor on public use as against riparian rights. There the turnpike authority bought a right-of-way and constructed a roadway across a brook. The water district brought suit to recover damages for injury to its water supply, because the construction had created a turbid condition of the water. The court held that, where the water district did not buy by purchase, prescription, grant or eminent domain acquire—as against the turnpike authority, which was an upper riparian proprietor—the right to use waters as a source of supply for public distribution, the turnpike authority could proceed with construction even though it created the turbid condition in the brook. The court did not mince words:

If control of the watershed of a stream for the purpose of protecting its water supply be desired by a water company or water district, it should be acquired by purchase, or . . . by the exercise of eminent domain. It cannot, as against upper proprietors, be acquired by a prescriptive use of the water for such purpose.⁶¹

The court's further language seemed to condemn any type of public use which could injure riparian rights:

The use of water for public distribution in this State is a non-riparian use, and a use of the water by the plaintiff which cannot be a factor in determining as between the plaintiff and the defendant whether or not the use by the defendant of its upper riparian land is a reasonable use.⁶²

Thus, the court indicated that since the water district was not making a riparian use of the water, it lacked standing to challenge the turnpike authority's use as being unreasonable. Seemingly, the turnpike authority could muddy the water supply with impunity as long as it wished. Such holdings indicate the

59. Agnor, *Riparian Rights in the Southeastern States*, 5 S.C.L.Q. 141, 145 (1952).

60. 147 Me. 149, 84 A.2d 433 (1951).

61. *Id.* at 154, 84 A.2d at 438.

62. *Id.* at 155, 84 A.2d at 439.

practical impossibility of planning for large scale public water use in any riparian jurisdiction.

South Carolina, a riparian state, has been blessed with an abundant water supply, so the problems of water supply which have plagued some of the drier states have not arisen in this state. But with increased population and industrialization, it is doubtful that South Carolina's carefree cavorting with its plentiful water can survive far into the future.

The only statutory enactments in this area have been local legislation dealing with particularized situations. The acts, concerned mostly with municipal water supply, seem unconcerned that public use is not a proper riparian use. Some of the acts specifically recognize the right of riparians to the water being diverted, and inferentially allow suit to be brought against the diverting municipality. But because the state's water supply is so abundant, the issue apparently has not been raised.

One such South Carolina act authorizes the city of Walterboro to divert eight per cent of the flow of the Edisto River from a point near the river's junction with U.S. Highway 15, almost due north of Walterboro. The statute enables the city to impound the water and distribute it through the municipal water system.⁶³ Provision is made for the use of the power of eminent domain to procure rights of way for transporting the water,⁶⁴ but apparently not for condemning lower riparian rights. Indeed, one section of the act provides, "This article shall not affect the right of any person to recover . . . damages sustained as a result of the diversion of the waters permitted by this article,"⁶⁵ and another part recognizes, "Nothing contained in this article shall prevent any riparian owner of lands, either above or below the point of diversion, to use the waters of the Edisto River for irrigation and for other agriculture purposes."⁶⁶ Apparently water is so plentiful in the low country that Walterboro can siphon away eight per cent of the Edisto without fear of suit from injured riparians.

A 1963 amendment to the Walterboro legislation gave all of that city's rights of diversion to Colleton County as well.⁶⁷ That amendment contained a proviso that the Colleton-Walter-

63. S.C. CODE ANN. § 70-471 (1962).

64. S.C. CODE ANN. § 70-473 (1962).

65. S.C. CODE ANN. § 70-477 (1962).

66. S.C. CODE ANN. § 70-478 (1962).

67. S.C. CODE ANN. § 70-475.1 (Supp. 1969).

boro diversion "shall not interfere with the commissioners of public works of the city of Charleston obtaining eighty million gallons per day through the two existing intakes at Givhans."⁶⁸ Charleston, of course, is either in the watershed of the Ashley or Cooper rivers; yet this amendment takes notice of the fact that Charleston draws eighty million gallons of water a day from a point at least thirty miles from the city and entirely within a separate watershed.

Another group of local statutes⁶⁹ deals with the Bushy Park Authority in Berkeley and Charleston counties. The function of the authority is to impound fresh water flowing down the Cooper River for distribution to industrial and domestic uses within its service area, though it is not to compete with the city of Charleston's public works commission. The authority is specifically authorized to divert water from the Cooper River to the Back River, and to construct dams on the Back River to impound the water.⁷⁰ Presumably such a diversion is still within the Cooper watershed, but while the watershed objection is not raised, the question of using riparian water for public use is still presented.

Various other South Carolina acts empower scattered municipalities with questionable rights of diversion. Newberry is authorized to divert water from the Saluda River for municipal purposes.⁷¹ In Florence County, the Ebenezer Community Watershed Conservation District is authorized to divert water from Middle Swamp,⁷² and the Polk Swamp Watershed Conservation District is empowered to divert water from Black Creek for use within the district.⁷³ One article permits the International Paper Company at Georgetown to divert one hundred cubic feet of water per second per day from the Great Pee Dee River. The authorized point of diversion is above the point where the Great Pee Dee and the Little Pee Dee unite to form the Pee Dee, which has its mouth in Georgetown's Winyah Bay. The act provides that the company "shall obtain all necessary rights of way from the landowners concerned, from and including the point of diversion to the point of use at the plant in Georgetown," but again this provision is apparently con-

68. *Id.*

69. S.C. CODE ANN. §§ 70-391 *et. seq.* (1962).

70. S.C. CODE ANN. § 70-397 (8) (1962).

71. S.C. CODE ANN. §§ 70-491 (1962).

72. S.C. CODE ANN. § 70-411 (1962).

73. S.C. CODE ANN. § 70-412 (1962).

cerned with the rights of way for canals, pipelines, and ditches to transport the water, and not with riparian rights. Other provisos in the act provide that any person may recover damages sustained as a result of the diversion, and that riparian owners shall not be prevented from using the Pee Dee waters for irrigation and agricultural purposes.⁷⁴ Apparently, the company is willing to take that risk.

III. CONCLUSION

Putting aside the riparian and statutory limitations placed on transfer of water out of the watershed, what preference should rationally be given to originating basins? First to be determined is whether the physical characteristics of the watershed justify the retention of stream flow within the watershed. Many writers question the appropriateness of the watershed as a proper unit for usage planning. Since there is a natural equilibrium between surface and ground waters caused by the charging of ground water into streams in time of surface slack, a watershed is not necessarily isolated from the adjacent watershed. Ground water aquifers cause natural interbasin transfer.⁷⁵

The nature of intrabasin interests which are protected are not only the legally-guarded water rights, but other benefits economically related. Thus, there should be a comparison of intrabasin benefits with the benefits to be derived from diversion. As one authority has noted, "It would be folly for a state to jettison a transbasin project of vast importance to the economy of the state in order to assure the continued solvency of a handful of intrabasin businessmen."⁷⁶ Further, "When a water project is involved, there is the added risk that projection of future needs of the originating basin will cause waste of water until such time as those needs develop."⁷⁷

So a balancing of interests doctrine would seem to answer all interests best. Then, a proposed transbasin diversion would be rejected for the sake of intrabasin interests only if the benefits from protecting such interests are more important to the state than the benefits to be derived from the project. For transbasin diversion in itself is neither good nor bad, and the merits of each case should be determined on a project-to-project basis.

74. S.C. CODE ANN. § 70-481 (1962).

75. Johnson and Knippa, *supra* note 9, at 1058.

76. *Id.* at 1059.

77. *Id.* at 1060.

"What is needed is machinery which will provide for thorough consideration of interests both inside and outside the basin of origin and set up as a standard for decision the welfare of the entire state."⁷⁸ In a state with a comprehensive water plan and a competent water administrative agency, there is no need for any restrictions—common law or statutory—on transbasin transfers.

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78. *Id.*