Winter 1960

Riparian and Public Rights to Lakes and Streams

Ralph W. Johnson
University of Washington School of Law

Follow this and additional works at: https://digitalcommons.law.uw.edu/faculty-articles

Part of the Water Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Publications at UW Law Digital Commons. It has been accepted for inclusion in Articles by an authorized administrator of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.
RIPARIAN AND PUBLIC RIGHTS TO LAKES AND STREAMS
RALPH W. JOHNSON*

The competition for the available water supply in Washington,¹ as elsewhere,² has intensified in recent years. In the early history of the state, irrigation, particularly on the eastern side of the Cascade mountains, clearly dominated the water picture. Since then power, domestic consumption, industry, recreation and other uses have become increasingly important and have steadily encroached on the preferred status originally given irrigation.

In recent years this competition has resulted in the enactment of a number of important statutes, directed at protecting various water uses other than irrigation and making a reasonable apportionment of

* Associate Professor of Law, University of Washington.

1 See Report of State of Washington to United States Senate Select Committee on National Water Resources (1959). This report compiles and analyzes reports from the various state departments that control some aspect of water use, including: Department of Game, Fisheries, Health, Agriculture, Commerce and Economic Development, Pollution Control Commission and Weather Modification Board.

2 The President's Water Resources Policy Commission, in 1951 published: A Water Policy for the American People which said at page 2: "Now, midway in the twentieth century, two facts have become compellingly clear. The first is that water is limited in relation to the many and varied needs for its use. These needs will grow in size and complexity as the population grows and as industry develops. More water for domestic use is needed by our growing towns and cities. More water must be used to bring new lands into production in the West. New industrial techniques, such as those developed in the chemical industries, synthetic fuel production, and the harnessing of atomic power, bring with them increasing demands for water."

The prefatory note to the Model Water Use Act, adopted by the National Conference of Commissioners on Uniform State Laws in 1958 explains: "The demand for water is growing constantly throughout the United States. This seems to be brought about by an every increasing population and by expanding economic activities of many types. Consumption of water per capita appears to be increasing as our population grows.

"Industry is migrating into the countryside and requires large quantities of water for processing, for steam electric power, and for the making of the many modern devices and appliances required for our comforts. Agriculture is becoming more intensified through irrigation, drainage, flood protection, and other conservation practices. Water to provide critical seasonal needs for crops and livestock is a prime factor to be considered in modern, large scale farming in the so-called humid east, as well as in the west. Water seems to be a key factor now in all this burgeoning growth of our nation. ... In some areas and states supplies are currently inadequate to meet local demands, especially in the critical summer seasons. In other areas supplies for present and future uses require careful management if all needs are to served wisely."

In an article entitled The American West, Perpetual Mirage, Harper's Magazine, May, 1957, pp. 25, 26, the historian Walter Prescott Webb spoke of the water situation in the West in frightening terms: "The overriding influence that shapes the West is the desert... Within the desert states, the people have not overdrawn their water supply. They have struck a balance with their possibilities. This is not true in the rim states [of which Washington is one] where the great cities are. Today most of these cities have outgrown their water supply and are in crisis."

the benefits of the available water supply. Of particular significance was the establishment of the Pollution Control Commission in 1945\(^8\) which was directed to "maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wildlife, birds, games, fish and other aquatic life, and the industrial development of the state: . . ."\(^7\) In 1957 the Metropolitan Municipal Corporation Statute was enacted\(^5\) declaring among other things that it was the policy of the state to provide regional solutions to problems of "sewage and garbage disposal [and] water supply."\(^7\) Also in 1957 a statute was enacted establishing a Weather Modification board\(^7\) empowered to establish "standards and instructions to govern the carrying out of research or projects in weather modification and control."\(^7\)

On the federal level we have seen legislation authorizing the construction of numerous hydro-electric, and multiple purpose dams in and about the state; dams that supply us with huge amounts of power, flood control, and water for irrigation.\(^8\)

The above legislation has been enacted as a result of the increasing need for efficiency in utilizing the available waters of the state. It has not, however, been based on any comprehensive survey of those water resources and the demands on them. Such a survey is much needed. A possible step toward meeting this need was recently taken by the Legislative Council of the State of Washington in the appointment of a Water Resources Advisory Committee,\(^10\) composed of 15 persons representing different water uses, whose purpose is to study virtually every phase of water use.\(^11\) These studies will be made available to the legislature for possible legislative action.

\(^{8}\) RCW 43.54.
\(^{4}\) RCW 90.48.010.
\(^{5}\) RCW 35.58.
\(^{6}\) RCW 35.58.010.
\(^{7}\) RCW 43.37
\(^{8}\) RCW 43.37.030 (2).
\(^{9}\) The Columbia Basin Project alone will soon have almost one million acres under irrigation. A comprehensive study of the potential of the Columbia River Basin may be found in 2 TEN RIVERS IN AMERICA'S FUTURE 1 (1950). In addition see: Joint Hearings before the Committee on Interior and Insular Affairs and a Special Subcommittee of the Committee on Foreign Relations, U. S. Senate, 84th Cong., 2d Sess., 162 (1956).
\(^{10}\) This committee was established by Resolution of the House of Representatives of the State of Washington, adopted February 20, 1959. The chairman is Mr. Lawrence E. Hall, Bellevue, Washington.
\(^{11}\) The "Work Program" of the committee, dated December 16, 1959, states that it shall proceed as rapidly as possible to study: "Existing water resources of the State, means and methods of conserving and augmenting such water resources, existing and contemplated needs and uses of water for domestic, municipal, irrigation, power development, navigation, industrial, mining, recreation, livestock, wildlife, fishlife, waste dispersion and assimilation, and all other related subjects, including drainage, flood control."
Washington is not alone in its recognition of the need for a re-appraisal of its water controls. Similar action is being taken by many other states, and for much the same reasons as here. In the eastern part of the United States, where the riparian system prevails, there has been a rash of state study groups on water problems. One of the results of that activity has been the approval by the National Conference of Commissioners on Uniform State Laws of a Model Water Use Act,12 designed primarily for consideration by the eastern states, but of interest to legislators in all areas. It incorporates aspects of both the appropriation and riparian systems.

The purpose of this article is to assist in the re-examination of Washington water law by looking at the parts of that law encompassed within the labels "riparian" and "appropriation."13 The first few pages will sketch some of the current trends in water use, showing some of the remarkable differences in use between the first part of the century and today, and between the eastern and western parts of the state. The balance of the article will examine the two systems to see where they are meeting current needs of the state and where they are not. Several questions will be discussed; e.g., how do the riparian and appropriation systems combine in this state? In the area of conflict between these two systems, where does the riparian system enjoy a preferred status, and where the appropriation system? What trends are visible in each of these systems, and in the combination? Are these trends desirable? With a few obvious exceptions the material discussed will pertain only to the nonnavigable waters of the state, the smaller lakes and streams. The exceptions include (1) a discussion of...
what is meant by "navigable," and (2) whether riparian rights exist on navigable waters.

In Washington it is necessary when evaluating water controls to keep in mind not only the increasing number of uses for the available water, but also the vastly different climatological conditions prevailing on either side of the Cascade mountains. The eastern part of the state is made up of large, open plains and plateaus, well suited for farming and irrigation. But the rainfall throughout a large portion of this region runs as little as eight inches per annum. The need for water during the irrigation season is so great that frequently streams are completely used up for this purpose, so that no water can be found at the mouth. The state water code provides for a litigation process to determine in one hearing all the appropriative rights in a given river basin. Of the streams that have gone through that process fifty-seven of them have been east of the Cascades; only one has been on the western side. A sampling of supreme court cases involving appropriation problems reveals a similar ratio. As one might anticipate, the amount of irrigated land on the eastern side far exceeds that on the west.

On the eastern side the primary use of the

---

14 For a general statement of the climatological and hydrological problems occurring in Washington see Report of the State of Washington to United States Select Committee on National Water Resources (1959).

15 U.S. Department of Commerce, Weather Bureau, Climates of the States, Feb. 1960. The figures referred to were based on figures obtained over the period 1931-55. They show that the triangular area, Yakima, Pasco, Quincy receives about eight inches of rainfall per year. They also show that by far the bulk of the eastern part of the state receives less than 16 inches per annum.

16 RCW 90.12

17 The Yakima-Ellensburg area and the Walla Walla-Dayton area are the two most completely adjudicated areas in the state. According to the records of the Department of Water Resources there are only 58 adjudicated streams in the state.

18 Of 25 Washington cases involving appropriation issues which were checked at random, only three concerned rivers west of the Cascades.

19 In the publication by Washington Pollution Control Commission, Clean Water and You (1951), the breakdown of irrigated land in the state was as follows:

Yakima Valley ................................................................. 460,000 acres
North Central Wash. (Douglas, Chelan, and Okanogan) ............. 83,000 acres
Walla Walla River Basin (Columbia and Walla Walla Counties) .... 25,000 acres
Spokane Valley ............................................................. 22,000 acres
Other Eastern Washington localities .................................. 40,000 acres
West of Cascade Mts. (Supplemental Irrigation) ..................... 40,000 acres

Total 670,000 acres

These figures would appear to be too low when compared to the records of the Division of Water Resources. These records indicate that since 1917 permits have been granted for the irrigation by surface and ground water combined of 171,912 acres of land west of the Cascades, and 233,553 acres of land east of the mountains. These figures are not fully accurate, or complete, either. They do not show the number of acres that have been taken out of irrigation after the permits were issued. Furthermore they do not show the very substantial amounts of acreage, particularly in the eastern part of the
smaller rivers and streams is for irrigation—without which the economy would collapse. This is not true on the western side, as will be shown below.

The western part of the state is composed in large part of deep, heavily wooded canyons, quite unsuited for any agriculture except tree farming. It is true that near Puget Sound there are some areas which provide rich farmland, but on a much smaller scale than on the eastern side. The rainfall west of the mountains, except in one relatively small area, runs above thirty inches per annum, and gets above 120 inches in places on the western slopes of the Olympics and Cascades. During ten months of the year the problem frequently is how to get rid of the water, not how to get more of it, although somewhat strangely, during the crucial farming months of July and August the rainfall drops off severely, requiring farmers to resort to widespread supplemental irrigation.

On the western side of the mountains, irrigation has never enjoyed the preferred status that it has on the eastern side. Navigation, power generation, domestic supply, and industry have insisted upon equal, if not greater recognition. The requirements of industry in particular have been very substantial, and will likely double in the next ten years. In addition, two relatively new uses are demanding greater

---

20 The Pollution Control Commission reported that in 1950 the "average value of crop production per acre for crops produced in the U.S. Bureau of Reclamation Irrigation Projects in the Yakima Valley... was $134. Examples of typical per acre crop values are as follows: Hops, $1,300; Apples, $1,200; Potatoes, $340; Sugar Beets, $175; Alfalfa, $70; Pasture, $.10. These are per acre crop values on land worth possibly a dollar an acre without water.... It is believed that an average of $125 per acre can be applied as the value of crop production for all irrigated lands of the state. This gives an annual value of water for this purpose of $84,000,000.... Beyond any doubt, water for irrigation is the foundation of the economy of the whole [Yakima] valley." Washington Pollution Control Commission, Clean Water and You (1951).

21 The so called "Banana" belt of Washington, around Sequim on the northeast side of the Olympic peninsula records only 16.92 inches of rain per annum.


23 This is sometimes called supplemental irrigation because less water is needed to bring the soil to maximum productivity than is required for land on the east side of the state. The records of the Department of Water Resources indicate that the land on the east side usually requires about twice as much water per acre as that on the west.

24 The report of the Washington Pollution Control Commission contained in Addendum 7 of the Report of State of Washington to United States Senate Select Committee on National Water Resources (1959) reveals that the present industrial use in this state is approximately 1.2 billion gallons per day. The Commission then estimated that by 1980 this figure would increase to about 2.2 billion gallons per day. The largest users at present are the pulp and paper industry, 640 million gallons per day,
RIPARIAN RIGHTS

attention, i.e., recreation and homesite locations. The use of water for recreation has become increasingly important in this state, as well as in the nation.\(^{25}\) Giving legal protection to such use appears to be justified not only on the ephemeral, but real need to protect the health and welfare of the state's citizens, but also to protect the considerable economic activity created by that use. The available statistics\(^{25}\)

the Chemicals, Oil and Metal industries, 226 million gallons per day, and the Lumber industry, 201.5 million gallons per day. The bulk of the industrial uses are located on the west side of the mountains.


\(^{26}\) The 1951 report of the Pollution Control Commission commented on the intrinsic value of the waters of the state for recreational purposes, and then endeavored to relate this value to the tourist trade, saying: "the recreational facilities offered by the State do have certain economic values which cannot be overlooked and which can be estimated. One of these is the result of tourist travel within the State. Why is the tourist industry of Washington of such proportions as to rank among the top industries, and why is it increasing with such rapidity? The answer, of course, is that the State has such unlimited recreational resources. Mountains, timber and water, with all the charm and beauty which go with the combination of these natural facilities, is the attraction drawing tourists to this Pacific Northwest." Washington Pollution Control Commission, Clean Water and You (1951).

Precise figures establishing the recreational value of our rivers and lakes in dollars and cents are not available. There are, however, some figures which are relevant to this question. Of particular note is a book, Wallace, An Evaluation of Wildlife Resources in the State of Washington (1956). This study was based on a questionnaire mailed to 1,051 resident sportsmen in Washington in 1954. The figures collected showed the amount of money spent by these sportsmen in connection with their various sporting activities. The figures showed that resident, licenseholding fishermen spent $37,281,000 in 1954 in direct connection with the pursuit of their sport. This amounted to about $152 per individual, a surprisingly high figure. These figures do not include the expenditures by nonresidents, or nonlicense holders. The figure of $37,281,000 compares to $48,988,000 which was the amount of retail sales in the Dairy and Creamery business in Washington in the same year, and $65,015,000 for retail sales of packaged spirits, wine and beer.

Currently the state Department of Game plants over 40,000,000 trout each year in Washington's lakes and streams. The Department estimates that about 25,000,000 of these are caught annually.

Washington has 49 state parks, 34 of which boast swimming or fishing. The attractiveness of a number of others is considerable enhanced by the proximity of lakes or streams. Between October 1, 1958, and September 30, 1959, a total of 7,064,000 people visited these parks. The State Parks Commission estimates this figure will exceed 13,-

000,000 by 1967. (Letter, Sept. 2, 1960, from Ruth E. Pike, Supervisor of Public Information, State Parks and Recreation Commission). In 1956 about 39 per cent of those camping overnight in the state parks were from out of state (Washington State Parks and Recreation Commission, We Come to Camp in Washington State Parks, An overnight camping survey. (1956) Statistics published by the Washington State Department of Commerce and Economic Development reveal that from June 16 to September 15, 1959, 2,791,000 nonresidents visited Washington, and that these persons stayed an average of 4.9 days in the state. 1,900,000 of these persons travelled here for vacations and other pleasure. While in the state this latter group spent an estimated $45,000,000. (These figures were recently published in a brochure by the Business and Economic Research Division of the Department of Economic Development of Washington.)

None of the above statistics, or reports, directly tells us the monetary value of our lakes and streams for recreational purposes. However, they are sufficient to lead one to believe that this value is substantial, and worth preserving.
indicate that we could not well afford to allow water laws to exist which would impair the use of these waters for recreational purposes, whether by state residents or others.

The use of lakes and streams for homesite locations is another factor of growing importance in state water control. In the distant past this use was limited to those waters immediately adjacent to the cities and towns, and was thus not too significant. In recent years we have seen a tremendous increase in the efficiency of transportation. Permanent homes are being built much farther away from the cities than before, and summer homes can be found everywhere in the state. The enjoyment as well as the status value of living by a lake or stream is widely recognized and sought. Although no figures appear to be available on the value of riparian property devoted to homesite purposes, it would seem clear to one who has seen many of the state's lakes that this value must be enormous.

Another fact to be noted about water use in Washington concerns the different way in which natural lakes and streams are used. Irrigation continues to be an extremely important economic use of the streams, undoubtedly the most valuable use on many of them. On the other hand this use plays only a small, if not insignificant part, in the use of the vast majority of natural lakes, whether on the eastern or western side. The principal use of such lakes appears to be for recreation and homesite purposes.

We can summarize the above by saying that although irrigation still holds, and will continue to hold, an important position with regard to water use in Washington, particularly on the eastern side of the state, there are a number of other uses that now demand equal, if not greater protection. We have gone from a period in the early history of the state when irrigation was clearly the dominant economic use, to a period of multiple uses, each demanding more or less equal status. Let's see whether and how the law has conformed to these changes.

**The Riparian System**

A look at a weather map of the United States reveals that where there is an abundance of water the riparian system alone has been adopted—this system prevails in all of the states east of the North Dakota-Texas tier.\(^{27}\) Where there is somewhat less water the riparian

---

\(^{27}\) Some states that initially adopted the riparian system have since modified it by legislation to bring in aspects of the appropriation doctrine. See for example recent legislation in Minnesota and Mississippi.
and appropriation systems have been adopted in combination, as in Washington, Oregon, California, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas. These states form the borders of what was once designated the "Great American Desert." The states in this latter area, Montana, Idaho, Wyoming, Utah, Nevada, Colorado, Arizona, and New Mexico have adopted the appropriation system exclusively.

Among the states having only one of these systems exclusively, comparisons of the rules applicable in various situations is both possible and useful. This is seldom true of comparisons between those states having mixed systems, particularly when the investigation goes to the question of how the two systems integrate. California and Washington may be pointed to as examples. The California rule as to the status of riparian rights often depends upon the date of acquisition of title to the land, or to the appropriative right. No appropriative rights of any kind could be acquired prior to 1866. Even after that date, if a parcel of riparian land was patented from the United States prior to the making of a conflicting appropriation then the riparian rights were vested and could not be disturbed. Some of the harshness (to appropriators) of this rule was later modified by a 1928 constitutional amendment. But still in California one of the basic questions to be answered in a riparian-appropriator conflict is, when was title to the riparian land acquired from the United States? Washington, on the other hand, has seldom given much weight to the title question. Instead, in order to meet the great need for irrigation, the state supreme court simply modified the riparian doctrine, ruling by

---

28 Martz, Cases on Natural Resources 69 (1951).
30 Lux v. Haggin, 69 Cal. 255, 4 Pac. 919 (1884), 10 Pac. 674 (1886).
31 Cal. Const., art. XIV, § 3. The necessity for a constitutional amendment was indicated by the case of Herminghaus v. Southern Cal. Edison Co., 200 Cal. 81, 252 Pac. 607 (1926), which was the latest of a line of decisions upholding the riparian right as against that of an appropriator notwithstanding the unreasonableness or wastefulness of the riparian use. A section was added to the constitution prohibiting waste or unreasonable use by riparians, as well as others. It provided in part that the riparian right "to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water."

Cases commenting on the purpose of this amendment include: United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950); Gin S. Chow v. Santa Barbara, 217 Cal. 673, 22 P.2d 5 (1933); Meridian Ltd. v. City of San Francisco, 13 Cal. 2d 424, 90 P.2d 537 (1939).
case law\textsuperscript{32} that riparians did not have as extensive rights as they did under the common law,\textsuperscript{33} or in California.\textsuperscript{34} The Washington law has further split from that of California as a result of the particular form and timing of the 1917 water code and cases following it. This disparity, between the California and Washington water systems, is typical of the differences between states having combined systems.

In spite of the diversity of rules in the "combination" states, it is nevertheless true that they share a common source for their basic system of riparian rights. That source is the jurisprudence of the eastern states and of England.\textsuperscript{35} If one looks only at the riparian side of the laws in these states and not to the manner in which those rights combine with the appropriation systems, it is possible to elicit some useful general principles. Some of these are discussed below.

The riparian system originated and grew from natural causes, from the natural relationship that certain land occupies to water.\textsuperscript{36} It is distinctly of common law origin, and has insistently retained a characteristic flexibility that confounds the lawyer seeking certainty, as much as it pleases the economist seeking a system that can mould itself to the changing needs of our times. A wide variety of factors influence this flexibility, some of the more important of which are, the remarkable difference in geographical relationship of water to land from place to place, the amount of water available at a given place, and the principal economic uses for it.

It is widely recognized that each state has full power to declare and shape the riparian rights that will abide within its borders.\textsuperscript{37} Certainly the Washington courts have done just that. Riparian rights of some kind have always been recognized here.\textsuperscript{38} Yet the particular form and shape they have taken has frequently resulted more from the local geography and economic need than the calling up of rules from other jurisdictions.

\textsuperscript{32} Brown v. Chase, 125 Wash. 542, 217 Pac. 23 (1923) discussed at length later in this article, substantially limited the riparian right of irrigation, or diverting the water for any purpose.

\textsuperscript{33} WIEL, WATER RIGHTS IN THE WESTERN STATES § 742, 748 (3d ed. 1911).

\textsuperscript{34} Herminghaus v. Southern Cal. Edison Co., 200 Cal. 83, 252 Pac. 607 (1926).

\textsuperscript{35} HUTCHINS, LAW OF WATER RIGHTS IN THE WEST 38-9 (1942).

\textsuperscript{36} WIEL, WATER RIGHTS IN THE WESTERN STATES § 709 (3d ed. 1911). In the case of Turner v. James Canal Co., 155 Cal. 82, 99 Pac. 520 (1909), at 522, the court said of the riparian system: "It comes from the situation of the land with respect to the water, the opportunity afforded thereby to divert and use the water upon the land, the natural advantages and benefits resulting from the relative positions, and the presumption that the owner of the land acquired it with a view to the use and enjoyment of these opportunities, advantages and benefits."


\textsuperscript{38} Benton v. Johncox, 17 Wash. 277, 39 Pac. 485 (1897).
RIPARIAN RIGHTS

Virtually all states having the riparian system agree on the principle that there is no riparian right to have the water of a river flow past one's property in its natural state. Instead one must allow reasonable uses by other riparians, both above and below, and can make only reasonable uses of the water on one's own land. Beyond this generalization we are faced with a myriad of individual "rights" that have been recognized from time to time in various places. Often there is an inconsistency in these rights from state to state and from one time to another. In Washington some of the riparian rights that have been recognized are: the right to access, to swim, bathe, fish, boat, to allow livestock to occupy riparian land and thus permit drainage from their pasture to flow into the water, to irrigate riparian land, to prevent a nonriparian from making any "customary" appropriation on private land whether or not one's own use is affected, to prevent a nonriparian from floating across or fishing in the waters of a stream where the riparian owns the bed, to enjoin uses of the water for boating or swimming by other riparians or their licensees to the extent that such uses constitute a nuisance, to have the water of a lake lap one's shores "as they were wont to do," to hold title to the bed if the water is nonnavigable, and to eject a trespasser from tideland under navigable waters in front of riparian land if the trespasser is not acting under authority of the state.

Many other individual rights could be set out, but the above are sufficient to demonstrate the diverse nature of such rights. The discussion that follows will consider many of these rights in detail, and will show how they are sometimes recognized and protected in one state while ignored in another, and at times given only sporadic protection in a single state.

30 Martz, Cases on Natural Resources 719 (1951); Wiel, Water Rights in the Western States § 739 (3d ed. 1911); Restatement, Torts §§ 850-57 (1939).
31 In re Clinton Water Dist., 36 Wn.2d. 284, 218 P.2d 309 (1950).
32 Brown v. Chase, 125 Wash. 542, 217 Pac. 217 Pac. 23 (1923).
33 Wallace v. Weitman, 52 Wn.2d 585, 328 P.2d 157 (1958). Prior to the 1917 water code there were two ways to obtain an appropriative right: (1) The "customary" method of merely appropriating the water on the public domain and putting it to beneficial use, Thorpe v. Tenem Ditch Co., 1 Wash. 566, 20 Pac. 588 (1889). No valid "customary" appropriation could be made by a diversion on private land. (2) Between 1891 and 1917 one could also obtain an appropriative right by a statutory "notice" system which required the posting of a notice at the point of diversion. Wash. Sess. Laws 1891, c. 142. See In re Icicle Creek, 159 Wash. 524, 294 Pac. 245 (1930). Under the rule of the Weitman case, and Mally v. Weidensteiner, 88 Wash. 398, 153 Pac. 342 (1915), a riparian could enjoin any "customary" diversion by a nonriparian on private land, whether or not the riparian was actually injured.
34 Griffith v. Holman, 23 Wash. 347, 63 Pac. 239 (1900).
35 Snively v. Jaber, 48 Wn.2d 815, 296 Pac. 2d 1015 (1955).
36 Litka v. Anacortes, 167 Wash. 259, 9 P.2d 88 (1932); In re Martha Lake Water Co., 152 Wash. 53, 277 Pac. 382 (1929).
37 Litka v. Holman, 23 Wash. 347, 63 Pac. 239 (1900).
38 West Coast Improvement Co. v. Winsor, 8 Wash. 490, 36 Pac. 441 (1894).
The variability and uncertainty in the riparian system presents particular problems in a "combination" state such as Washington. The rights of appropriators, present and future, are fairly easily determined under the 1917 water code. Although the code is not perfect, it does give a considerable degree of certainty where it is deemed to apply. The difficulty is that there are many areas where one can not be completely certain that the code will apply, because opposing it and reaching into many of the same spheres of economic activity, is the riparian system. The case law announced immediately after the enactment of the 1917 code indicated that the appropriation system was gaining ground in these areas of conflict. Cases of more recent vintage seem to indicate that the pendulum has edged back in some areas toward riparianism.

One of the first questions to be answered in analyzing the current status of Washington water law is, what did the appropriation code and subsequent cases do to the riparian system? What riparian rights have survived that code? Which of these exist today?

**How Do the Appropriation and Riparian Systems Combine in Washington?**

The most serious conflict between the riparian and appropriation systems began with the enactment of the appropriation code of 1917 which provides\(^48\) as follows:

The power of the state to regulate and control the waters within the state shall be exercised hereinafter in this title provided. *Subject to existing rights*, all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be acquired only by appropriation for a beneficial use and as provided in this title. As between appropriations, the first in time shall be the first in right. *Nothing in this title shall lessen, enlarge, or modify the rights of a riparian owner existing as of June 6, 1917*, or any right however acquired existing as of that date, except that they shall be subject to condemnation for public use, and the amount and priority thereof may be determined as hereinafter provided. [Emphasis added.]

The italicized portions of the above statute raise but do not answer an important question, *i.e.*, what were the "existing" riparian rights as of June 6, 1917? It has often been said that riparian rights are not gained by use, nor lost by disuse and that they are not merely appurtenances but are part and parcel of the land.\(^49\) Thus it could be

\(^{48}\) RCW 90.04.020.
\(^{49}\) Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147 (1894). Wiel,
urged that the 1917 code had no effect upon any of those rights, including the right to irrigate, because they all “existed” prior to the code and were preserved by its saving clause even though they had not yet been exercised. Strangely, the cases in this state have not yet clearly answered this question, although the executive branch has taken a definite stand on it. The supreme court opinion that sheds the most light here is Brown v. Chase. Certain riparians on the Wenatchee River sought to block the issuance of an appropriation permit to nonriparian defendants. The permit would have allowed temporary storage of the water each year in Lake Wenatchee for release during the irrigation season. Although the riparians could show no harm to their lands either presently or prospectively they nevertheless contended they had a legal right to bar the appropriation. The court declined to agree, stating “Waters of nonnavigable streams in excess of the amount which can be beneficially used, either directly or prospectively, within a reasonable time, on, or in connection with riparian lands, are subject to appropriation for use on nonriparian lands.”

Thus it would seem that in Washington the riparian right to appropriate water for use on riparian land is not always an “existing” right. If it were “existing” the court would have to hold that any appropriation that deprived one of this right could be made only upon the payment of “just compensation” to the riparian. It did not do so. Instead, it held that as against a conflicting prior appropriation under the code such a riparian right does not exist. Does the Brown case also mean that if the riparian had not made his appropriation prior to June 6, 1917, and did not intend to do so within a reasonable time thereafter he is forever barred from taking such action? It would seem so, although the opinion does not directly answer the question. Under Brown v. Chase, a riparian who on June 6, 1917, had not actually appropriated water for use on his land and did not intend to do so within a reasonable time thereafter could not be said to have an “existing” right as of the date of the code. His right to appropriate is actually “gained” by present or prospective use. Not having been
in existence at the time of the code it could not have been saved by
the savings clause.

There is another reason why such a riparian right should not exist
in this state. One of the basic purposes of the water code is to bring
as much certainty as practicable to the ownership and control of water
rights. If a riparian today could appropriate without proceeding
through the code there would be no record of his appropriation in the
state files, and the uncertainty already existing in this state by reason
of pre-1917 riparian diversions would increase.

The above discussion concerns only those riparian rights which are
also subject to acquisition as appropriative rights. These are the ones
most likely to have been eliminated by the code, although in one case
a dissenting judge suggested that possibly a number of others (swim-
ming, boating, and fishing) were relegated to an inferior status by
the code.

Let's examine some of these other riparian rights to see how they
have withstood the attempts at erosion by the appropriation system.
One such right is sometimes referred to as the right to have the water
"lap [one's] shores as they were by nature wont to do." This par-
ticular right is vital to the continued value of the thousands of sum-
mer homes built on the lakes of the state. If appropriators could
reduce the water level of these lakes without payment of compensa-

---

53 Most of the better farm land on the eastern side of the Cascade mountains was
put under irrigation prior to 1917. A substantial share of that irrigation was done
under rights claimed by farmers as riparians—rights which are still valid. No record
of these rights was required to be filed in any public office; accurate records were
seldom kept by the individuals themselves. Many additional pre 1917 diversions for
irrigation were made under the "customary" or "notice" theories of appropriation which
again required no adequate public record to be made. The result is that the present
records of the Division of Water Resources cover only a relatively small portion of
the appropriations actually being made in the state today. It is true that 51 streams
of the state have gone through the water code's litigation process, and thus the rights
on them are fully determined and recorded. However, this is only a small portion of
the streams that ought to have such action. At the present time the Division of Water
Resources lacks both money and personnel to guide other basins through this exacting
process.

54 Hill, J., in the dissent in In re Clinton Water Dist., 36 Wn.2d 284, 218 P.2d 309
(1950) suggested that under the exercise of the state's police power through the 1917
code even the riparian rights of swimming, fishing, and boating were secondary to
the rights of appropriators. It was not contended that riparians, or others, had to apply
(or could apply) under the code for the acquisition of such rights, but rather that
(1) the state became the owner of the water by that act, (2) appropriation was given
a status of priority under that act, (3) swimming, fishing, and other uses made of the
water itself, not under a code permit, are privileges engaged in only by consent of the
state and are by the same token subject to loss where they come into conflict with
appropriative rights.

55 This quote is from the dissent in In re Clinton Water Dist. 36 Wn.2d 284, 295,
218 P.2d 309, 316 (1950). Cases protecting this right are: Litka v. Anacortes, 167
Wash. 259, 9 P.2d 88 (1932); In re Martha Lake Water Co., 152 Wash. 53, 277 Pac.
382 (1929).
tion to riparian for resulting damage, many riparian lands would suffer a substantial diminution in value.

The supreme court held early, in *In re Martha Lake Water Co.*,\(^{56}\) that an appropriator, even acting under the code, had no right to lower the level of a nonnavigable natural lake, so as to expose the lake bottom, to the damage of riparians. This case did not affect the rule of the earlier decision in *Proctor v. Sim*\(^{57}\) that a riparian who owned all the land around and under a natural lake in the eastern part of the state could not stop an appropriator from taking some of the water where no harm resulted to the riparian land. In the *Martha Lake* case the state had granted a permit for the appropriation of water from a lake which would have lowered the water level about twelve inches and bared from eight to fifty feet of muddy lake bottom. The riparian owners had purchased their land for homesites, and for ready access to fishing, swimming, and boating. The court rejected the argument that the *Brown* case gave paramount status to appropriators in this situation and held that the water could not be appropriated unless the riparians were first compensated for the damage that would be caused their lands. A similar result was reached a short time later in the case of *Litka v. Anacortes*\(^{58}\).

In 1950 another case was decided that drew the outer limits of the appropriation system in still another area of conflict with riparianism. This case, *In re Clinton Water District*,\(^{59}\) involved a conflict between riparians and appropriators on Deer Lake, a natural lake on Whidbey Island in the western part of the state. The riparians used their land for homesites and for pasturing livestock, and used the water for swimming, boating and fishing. The Water District sought a permit to appropriate water for domestic use. Upon denial of the application this action was brought to require its issuance. The Water District contended that the appropriation of the water would not, in itself, affect any riparian uses or values. However, state health statutes forbade the deposit of any polluting substance in a lake used for drinking purposes. Regulations of the State Board of Health forbade fishing, boating, bathing or wading in such waters. The majority of the court assumed that if the appropriation were authorized the health authorities would enforce the regulations and thus the riparians would be

---

\(^{56}\) 152 Wash. 53, 277 Pac. 382 (1929).

\(^{57}\) 134 Wash. 606, 236 Pac. 114 (1925).

\(^{58}\) 167 Wash. 239, 9 P.2d 88 (1932).

\(^{59}\) 36 Wn.2d 284, 218 P.2d 309 (1950).
effectively deprived of their use of the lake. The court therefore affirmed the refusal to issue an appropriation permit.

It will be observed that the above cases all involved lakes, as distinguished from rivers and streams. It would, in fact, be surprising to find such a rule applied to rivers and streams. In the first place the physical situation on a stream is usually quite different. The water level on virtually all streams fluctuates substantially with the seasons. Riparian proprietors seldom build houses or plan their recreation with a specific water level in mind. Dams in existence, and now being built, will undoubtedly tend to stabilize some stream levels, however, there will still be much more fluctuation than is usual on a lake. In addition the prevailing custom and belief in this state is that the first duty of stream water is to irrigate farmland, and that riparian uses come second. Certainly it is true that the streams of the state, particularly on the eastern side of the mountains, are substantially reduced in volume each year, and are at times dried up entirely, without significant complaint from riparians.

On the other hand the rule of the Clinton Water District case would seem to apply all the more cogently to the rivers and streams of the state. It would seem most unlikely that a court would hold that an appropriation for domestic (municipal) use on the lower reaches of a Washington river could require riparians, and for that matter the public, to cease using the water for fishing, swimming, boating, and pasture drainage, from that point up.

The Martha Lake, Litka, and Clinton Water District cases all arose on the western side of the state. Would the same rule apply on the eastern side? Probably so. To date the court has not been inclined to make geographical distinctions in the application of water laws. Furthermore there would not seem to be any strong reason to do so. The records of the Division of Water Resources indicate that only a few appropriations are being made from natural lakes on the eastern side of the state, and even these are not usually sufficient to alter appreciably the water level, or require quality control. Homes and recreational activities on the eastern side of the state are being centered around lakes in much the same way that they are on the west. It seems likely that the value of these activities is too great to permit

60 See for example the discussion of this matter in Benton v. Johncox, 17 Wash. 277, 49 Pac. 495 (1897).
the announcement of a rule that would cause their serious damage or destruction.

**RIPARIAN RIGHTS—WHERE THERE IS NO CONFLICT WITH APPROPRIATIVE RIGHTS**

The Distinction Between Navigable and Nonnavigable Waters. In Washington there are many differences between the riparian rights that apply to property adjacent to navigable waters, and those that apply to property lying on nonnavigable waters. It has frequently been said that in Washington there are no riparian rights to navigable waters. The cases collected in the following pages will debunk this notion. However, it is true that riparian rights on navigable waters are substantially less than the ones accruing to landowners on nonnavigable waters. For example, only landowners on nonnavigable waters have a right to access to the water, even against the state. They also have more extensive rights of fishing, swimming, and boating on the adjacent water; they own the bed; and they have more extensive powers to limit the use of the adjacent waters by other persons. Because of the differences in these rights, it becomes important to determine what waters are navigable.

**When Are Waters “Navigable”?** Navigability is defined in different ways for different purposes, as, for example, for: (1) title to the bed, (2) right of public use, (3) extent of federal power under the commerce clause, and (4) extent of federal power under the admiralty clause. Numbers (1) and (2) will be discussed in more detail below. As for number (3) we may observe that the test for determining the extent of federal control was originally the same as that for determining the title to beds, although in recent years it may have been somewhat expanded. One aspect of the commerce clause

---

61 See Port of Seattle v. Oregon & W. R. R., 255 U.S. 56 (1921); Hill v. Newell, 86 Wash. 227, 149 Pac. 951 (1915); State ex rel Ham, Yearsley & Ryrie v. Superior Court, 70 Wash. 442, 126 Pac. 945 (1912); Lownsdale v. Grays Harbor Boom Co., 54 Wash. 542, 103 Pac. 833 (1909); Grays Harbor Boom Co. v. Lownsdale, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267 (1909); Brace & Hergert Mill Co. v. State, 49 Wash. 326, 95 Pac. 278 (1908).

62 For a collection and appraisal of many of the Washington cases on this subject see Roe, “Navigability in Washington” (1960), an unpublished research paper in the University of Washington Law School Library.

63 In United States v. Utah, 283 U.S. 64 (1931) the court said: “The rule of navigability for rivers is the same whether the question is one of navigability of rivers of the United States or one of title.”

64 In United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940), the court said that waters were navigable under the commerce clause of the federal constitution if they could be made so with reasonable improvements: “Although navigability to
cases does deserve special comment. In United States v. Rio Grande Dam & Irr. Co., decided in 1898, the United States Supreme Court held that the federal power under the commerce clause permitted congressional control over nonnavigable tributaries of navigable waters, on the theory that such control was necessary to preserve federal power over navigable waters. This is not to say, however, that these waters have now been held navigable.

The federal power under the admiralty clause also extends over navigable waters. Once again, this test is for a different purpose and care must be used in comparing these and the title cases.

**Title to Beds: The Federal Test Controls.** Title to beds of fresh water navigable rivers and lakes vests in each state as it is admitted to the union. This results from the doctrine of equality of states. Since the original thirteen states exercised ownership of and control over the beds of their navigable waters, ownership and control of such waters also vests in the new states as they are formed.

It is usually said that the federal test controls the determination of navigability for title purposes. Although there may have been some doubt about this at one time, that doubt seems to have been resolved by the United States Supreme Court. The reason for the rule would appear to be that the disposal of federal domain is involved, and under article IV, sec. 3(2) of the federal constitution the power to dispose of such land belongs exclusively to the federal government.
RIPARIAN RIGHTS

The federal test was laid down in *Daniel Ball v. United States*:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continuous highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

In *United States v. Rio Grande Dam & Irr. Co.* the test was amplified as follows:

The mere fact that logs, poles and rafts are floated down a stream occasionally and in times of high water, does not make it a navigable river... It is not... every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable, but in order... to give it the character of a navigable stream... it must be generally and commonly useful to some purpose of trade or agriculture.

Lakes: Navigability for Title. Has the Washington court adhered to the federal test in determining the navigability of its lakes? It would seem so from an examination of the cases, although at no place has this writer discovered any admission by our court that it deemed itself bound by that test. The fact is that the federal test is broad enough to allow considerable latitude by the state courts, and that latitude has in fact been taken in this state. The early state cases applied a test that went far toward declaring navigable the vast majority of lakes. The extreme case of this group was *Ortel v. Stone,* decided in 1922, which held navigable Davis Lake, in Okanogan county, a lake measuring about 3/4 of a mile by 3/8 of a mile, containing about forty acres, with a depth ranging from ten to fifty feet. The lake did not connect with other waters, and did not serve any commercial purpose. (The Washington court does not consider boat rentals and resort operation as a commercial purpose.) The court announced the test that a lake was navigable if it was large enough to

---

70 77 U.S. (10 Wall.) 557, 563 (1870).
71 174 U.S. 690, 698-99 (1899).
72 119 Wash. 500, 205 Pac. 1055 (1922).
be susceptible of use for commercial purposes—if it was large enough to float commercial vessels and products—and it made no difference that no such use had ever been made of it or was likely to be made of it in the future. The rule of Ortel v. Stone was rejected in Procter v. Sim,74 decided in 1925. There the court held a twenty-five acre lake nonnavigable and announced the rule which still prevails to the effect that a lake used principally as a pleasure resort for boating, fishing, swimming and skating, is not navigable where it is not situated so that it can or is likely to be used as a highway for trade or travel or as a means of commercial transportation. Thus it is not enough that the lake is physically large enough to float commercial vessels or products. It must be located so that it has been used, or will likely be used for that purpose.75 Since the Ortel case, several lakes similarly situated but larger in size, have been held nonnavigable.76

Lakes: Navigability for Public Use. Even though the bed of a lake is privately owned the riparians and their licensees may have a common right to use the whole surface. This is true in Washington,77 as well as a number of other states, as will be indicated in the following pages. In Washington, however, there are no cases indicating the test for determining when a body of water is too small to give the riparians such a right. The single case announcing the common use rule on a privately owned lake is Snively v. Jaber78 where the court assumed without discussion that Angle Lake was navigable for this purpose. This lake was described in an earlier case79 as being approximately one mile long, ¼ mile wide, containing about 119 acres, and varying in depth from ten to forty-five feet. There were about 200 summer homes on the lake. It would further appear that there are few cases in other jurisdictions raising this question. It was, however, discussed

74 134 Wash. 606, 236 Pac. 114 (1925).
75 The same rule prevails in Minnesota. State v. Adams, 251 Minn. 521, 89 N.W.2d 661 (1957). The court in that case examined a number of cases on the issue of navigability and determined that, under the federal test, for a lake to be navigable it had to be large enough to float not only commercial vessels, but also had to be so located as to make such commerce practicable.
76 In Snively v. State, 167 Wash. 385, 9 P.2d 773 (1932), the court held Angle Lake nonnavigable. It measured one mile by ¼ mile and was from ten to forty feet deep. In Best v. State of Washington, 153 Wash. 168, 279 Pac. 388 (1929), the court held nonnavigable a lake measuring ¾ of a mile by ¼ mile. In Smith v. State, 184 Wash. 58, 50 P.2d 32 (1935), the court held Cow Lake nonnavigable. It measured one mile by 1/3 mile, covering about eighty acres, and was eighty feet deep in places. In Lefevre v. State, 195 Wash. 537, 81 P.2d 819 (1938) the court held the 700 acre Silver Lake nonnavigable.
78 Ibid.
Recently in a Minnesota decision, where the court held a private lake navigable for common riparian use and then said:80

It does not follow that the foregoing riparian rights rule applies to every pothole or swamp frequented by wild fowl and over which a small boat might be poled to retrieve game, but which as a practical matter does not lend itself in any substantial degree to the customary propulsion of boats by outboard motors or oars. A minor body of water which by its nature and character reasonably has no overall utility common to two or more abutting owners would fall outside the rule. No hard and fast line can be drawn and each case must be determined according to its own peculiar facts.

Streams: Navigability for Title. In Washington, as in various other states,81 the two intrastate purposes for testing the navigability of rivers and streams are to determine title, and the right of public use. A stream may be nonnavigable for title purposes (title is then in the riparians), but navigable for public use.82 As might be expected where two tests are very similar, there is occasionally some confusion about their use.83

The cases on title generally state a test that would terminate navigability at a lower point on a given river than those deciding the right of public use. The title test was discussed at length in the early case of Griffith v. Holman,84 where the court quoted with approval from a number of authorities as follows:

A stream is a public highway wherever it is suitable in its natural condition for general use in travel or in the transportation of property. Gould, Waters, § 107.

The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river,

80 Johnson v. Seifert, 100 N.W.2d 689, 697 (Minn. 1960).
81 See for example: Elder v. Delcourd, 364 Mo. 835, 269 S.W.2d 17 (1954); Williams v. Beaver Lake Club, 90 Ore. 13, 175 Pac. 437 (1918); Micelli v. Andrus, 61 Ore. 78, 120 Pac. 737 (1912).
82 Strand v. State, 16 Wn.2d. 107, 132 P.2d 1011 (1943); Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 Pac. 813 (1904); Watkins v. Dorris, 24 Wash. 636, 64 Pac. 840 (1901).
83 In Kemp v. Putnam, 47 Wn.2d 530, 288 P.2d 837 (1955), the court held the Boga- chiel and Quillayute rivers navigable for title. Two of the three Washington cases relied on in this decision were cases on the right of public use.
84 23 Wash. 347, 63 Pac. 239 (1900). In this case the court held the Little Spokane River nonnavigable. Thus a riparian who owned the bed was allowed to recover damages against a fisherman who damaged the riparian's fence across the stream and caught fish over his land. The river was described as forty feet wide, having an average depth of four feet during three months of the year, and two feet during the other nine months. During the low water period the water was found to be as shallow as six inches over certain riffles, however, at all times and places it was large enough to carry ordinary rowboats. It had never been used for the floating of logs, or any other commercial purpose.
rather than the extent and manner of that use. *The Montello*, 20 Wall. 430.

Nor is it every small creek, in which a fishing skiff or gunning canoe can be made to float, at high water, which is deemed navigable. But in order to have this character, it must be navigable for some purpose, useful to trade or agriculture. *Rowe v. Granite Bridge Corp.*, 21 Pick 344.

To go beyond this and declare a stream navigable which can float a log, would be to turn a rule intended for the benefit of the public, into an instrument of serious detriment to individuals, if not of actual private oppression. *America River Water Co. v. Amsden*, 6 Cal. 443.85

Later cases have made it clear that a river need not be navigable at all times of the year in order to meet the test of navigability for title. In *Kemp v. Putnam*86 the court quoted with approval the following: "The navigability quality of a watercourse need not be continuous, but the seasons of navigability must occur regularly, and be of sufficient duration to subserve a useful public purpose for commercial intercourse."

It is probably not enough that the river have merely sufficient size to float commercial products. To be navigable it must have been actually used for such purposes, or be located in such a manner that commercial use is more than a mere possibility.87

A river is not navigable for title purposes where the only commercial use that can be made of it is for floating logs.88 Thus in *Diking Dist. No. 2 v. Calispel Duck Club* the court said: "A stream which is navigable only for the purpose of floating logs is not a navigable stream, within the meaning of our constitutional provisions, art. 17, 85 Id. at 351-54; 63 Pac. at 241-42.

86 47 Wn.2d 530, 534, 288 P.2d 837, 840 (1955). In this case the court held the Quillayute and Bogachiel Rivers navigable, describing them as follows: "In the early days, these two rivers were the only means of access to the area in which they are located; lumber, produce, and supplies for the early settlers were transported up and down these rivers, and for a period of time both rivers were used for the rafting and transporting of pulpwood; the use of the rivers declined, but in 1921, following a severe wind storm, as a result of which all roads were blocked, they were again used as the only highway. The Indians formed the Bogachiel Transportation Company to freight supplies and to transport men up the river. The testimony further shows that the rivers are in the same condition today as they were in the early days...."

87 All of the witnesses testified that during the freighting season, from October until May, the entire channel of the Quillayute and the channel of the Bogachiel, for a distance extending far beyond the appellants' property, are deep, clear, and navigable." 47 Wn.2d at 533, 288 P.2d at 839.


sec. 1, declaring the ownership of the beds of navigable waters to be in the state.\textsuperscript{86} It would probably follow from this language that a stream is not navigable for title merely because it is large enough to be used, and has been used, for floating pleasure craft such as rowboats and canoes.

To summarize: The test for determining title requires that a river must have, during fairly regular periods each year, both the capacity and location for reasonable use as a carrier of commercial products other than merely logs.

*Streams: Navigability for Public Use.* The test for determining the right of public use on streams is more liberal, i.e., it covers more water. A stream is navigable if it is capable, by reason of location and size, of being commercially useful for the carrying of logs.\textsuperscript{90} Under the present state of the law, capacity for carrying pleasure craft, such as rowboats and canoes, is not enough to make a river navigable for public use. This subject will be discussed infra.

**Riparian Rights in Navigable (For Title) Waters of Washington**

Starting with *Eisenbach v. Hatfield*,\textsuperscript{91} decided in 1891, there are many Washington cases that say there are no riparian rights to navigable (for title) waters in this state.\textsuperscript{92} However, a close examination of these and other cases indicates that this statement, standing alone, is much too broad. What is really meant is that there are no riparian rights as against the state or persons claiming under it.

\textsuperscript{86} 11 Wn.2d at 137, 118 P.2d at 782.

\textsuperscript{90} Strand v. State, 16 Wn.2d 107, 132 P.2d 1011 (1943); Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 Pac. 813 (1904); Watkins v. Dorris, 24 Wash. 636, 64 Pac. 840 (1901). In the Watkins case the court said: "If the stream is not meandered, it must then be determined whether it is or is not navigable in fact for floating logs or timber. If navigable for such purpose, it is a public highway for this purpose." 24 Wash. at 644, 64 Pac. at 843.

\textsuperscript{91} 2 Wash. 236, 26 Pac. 539 (1891).

\textsuperscript{92} See for example: Port of Seattle v. Oregon & W.R.R., 255 U.S. 56 (1921); Hill v. Newell, 86 Wash. 227, 149 Pac. 951 (1915); State ex rel. Ham, Yearsley & Ryrie v. Superior Court, 70 Wash. 442, 126 Pac. 945 (1912); Lownsdale v. Grays Harbor Boom Co., 54 Wash. 542, 103 Pac. 833 (1909); Grays Harbor Boom Co. v. Lownsdale, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267 (1909); Brace & Hergert Mill Co. v. State, 49 Wash. 326, 95 Pac. 278 (1908). Additional cases in this state on the question of riparian rights in navigable waters are: Newell v. Loeb, 77 Wash. 182, 137 Pac. 811 (1913); State v. Sturtevant, 76 Wash. 158, 135 Pac. 1035 (1913); Bilger v. State, 63 Wash. 457, 116 Pac. 19 (1911); Northern Pac. Ry. v. Slade Lumber Co., 61 Wash. 195, 112 Pac. 240 (1910); Hulet v. Wishkah Boom Co., 54 Wash. 510, 103 Pac. 814 (1909); Van Siclen v. Muir, 46 Wash. 38, 89 Pac. 188 (1907); Madison v. Spokane Valley Land & Water Co., 40 Wash. 414, 82 Pac. 718 (1905); New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735 (1901); West Coast Improvement Co. v. Winsor, 8 Wash. 490, 36 Pac. 441 (1894).
The majority of jurisdictions, including a majority of those in the western part of the United States, recognize some riparian rights in navigable waters. The California and Texas courts recognize such rights as long as they are not inconsistent with the public easement. Each state may, of course, adopt whatever rule it deems appropriate.

In Washington the holding of the Hatfield case was based primarily upon a provision in the Washington constitution which states: "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 the 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." The plaintiff riparian sought by injunction to require defendant to remove certain wharves from the state tideland (on navigable waters) in front of plaintiff's property. The location of the wharves had been approved by state legislation. The court refused to order their removal, saying: "[R]iparian proprietors on the shore of the navigable waters of the state have no special or peculiar rights therein as an incident to their estate. To hold otherwise would be to deny the power of the state to deal with its own property as it may deem best for the public good." The holding is founded upon the idea that the state owns the navigable waters within its borders, and the lands underlying them, and thus has full right to control these areas. Riparians have no right to build wharves or other structures on the surface or bed of navigable waters without the consent of the state. They have no vested right to future accretions. They have no common law right to appropriate water superior to the appropriative rights of nonriparians whose rights were acquired under the state water code. This is true even though the riparian land in

---

93 Port of Seattle v. Oregon & W.R.R., 255 U.S. 56 (1921); WIEL, WATER RIGHTS IN THE WESTERN STATES §§ 904-06 (3d ed. 1911).
94 HUTCHINS, LAW OF WATER RIGHTS IN THE WEST, 37 (1942). "The states which recognize the riparian doctrine so far as nonnavigable waters are concerned are not uniform in extending that doctrine to the use of the waters of navigable streams for irrigation purposes, but the weight of authority in such western jurisdictions seems to be in favor of applying the rule to navigable water."
98 WASH. CONST. art. 17, § 1 (1889).
99 Eisenbach v. Hatfield, 2 Wash. 236, 253, 26 Pac. 539, 543 (1891).
100 Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539 (1891).
101 State ex rel. Ham, Yearsley & Ryrie v. Superior Court, 70 Wash. 442, 126 Pac. 945 (1912).
question was acquired by patent from the United States prior to the adoption of the constitution. They cannot even complain if the state, or someone acting by its authority, totally deprives them of access to navigable waters, e.g., by diverting the water away from the riparian land. And they have no right to interfere with fishing by a member of the public in the water opposite their shores.

Care should be taken to note that most of the limitations on riparian rights in navigable waters extend only in favor of the state, or someone acting under its authority. In *Eisenbach v. Hatfield* the court said that the plaintiff riparian could not object to defendant’s use of the tidelands in front of plaintiff’s land where that use was pursuant to statutory authority. The court then added that the defendant could not enlarge upon his use of the land unless he acquired additional authority and title from the state. In *West Coast Improvement Co. v. Winsor* the court held that a riparian could enjoin as a trespass the driving of piling on the tideland in front of his land where the “trespasser” was not acting under any authority from the state. The court said that the *Eisenbach* rule did not decide the question of loss of riparian rights as to anyone except the state or someone claiming through it. The holding of the *Winsor* case was affirmed in *Van Siclen v. Muir* where the court said that the riparian right in question was the result of the preference right in the riparian to purchase the shoreland in front of his land when it was placed up for sale.

There are some cases that seem to go even a step further in protecting riparian rights to navigable waters—even as against someone acting under state authority. In *Northern Pac. Ry. v. Slade Lumber Co.* the court said that a riparian who had purchased the tidelands

---

101 Id.
103 Id.; 9 Wash. 490, 36 Pac. 441 (1891).
104 Id. at 493, 36 Pac. at 442. In speaking of the *Eisenbach* case the court said: “That case, however, did not go to the extent of holding that an upland proprietor had no interest in the tide land in front of him, except as against the state, and the question as to what would be his rights as against one not claiming under the state has not been passed upon, so far as we are advised, by this court.” The court went on to say that it was not necessary to pass directly on that issue in this case because the preference right which the legislature had enacted into law implicitly gave the riparian on navigable waters a right to exclude trespassers from the area that he might later purchase.
105 46 Wash. 38, 89 Pac. 188 (1907).
106 61 Wash. 195, 112 Pac. 240 (1910). This rule was also stated in *State v. Sturtevant*, 76 Wash. 158, 135 Pac. 1035 (1913).
in front of his property, and had constructed a wharf abutting on the navigable portion of the river, had a right of access to that water as against the owner of a drawbridge operating under both state and federal authority who claimed that the ships tied to defendant's docks impaired the operation of the bridge. The court said that if plaintiff drawbridge owner had a right to require removal of ships from defendant's wharf in order for the drawbridge to operate there was no reason why someone in another situation might not totally destroy a riparian's access to navigable waters. The court refused to accept such a rule. In *Hulet v. Wishkah Boom Co.*\(^{108}\) the plaintiff established that the defendant's log floating operation occasionally caused the river in front of plaintiff's land to be completely blocked by log jams. In addition, the artificial freshets released by defendant from his splash dams to better float the logs caused the deposit on plaintiff's riparian land of numbers of logs, and caused the washing away of about an acre of plaintiff's farm. The supreme court affirmed a trial court injunction requiring that defendant refrain from so operating its splash dams and boom as to obstruct navigation and injure plaintiff's lands. The theory of the decision was that defendant's conduct constituted a public nuisance, and that plaintiff was a person specially injured by this nuisance. It is true that the defendant did not own the tidelands under the navigable waters in question (he did have federal authority to use the river) nevertheless the court took pains to point out that the result would not be changed if the defendant were to acquire title to these lands from the state. The case would appear to raise navigable-water-riparians to a position considerably above the "no right" status.

Lastly, there is the case of *New Whatcom v. Fairhaven Land Co.*\(^{109}\) where the court held that a riparian on a nonnavigable outlet of a navigable lake did have riparian rights, and could enjoin the taking of water from the lake where such taking deprived him of water for the operation of his sawmill. Similarly, in *Madson v. Spokane Valley Land & Water Co.*\(^{110}\) the court held that a riparian who owned the land under a nonnavigable arm of a navigable lake had a riparian right of access to that arm which justified an injunction against another who put up a dam that dried it up.

By way of summary it may be said that the court has effectively restricted private riparian rights on navigable waters where those

---

\(^{108}\) 54 Wash. 510, 103 Pac. 814 (1909).

\(^{109}\) 24 Wash. 493, 64 Pac. 735 (1909).

\(^{110}\) 40 Wash. 414, 82 Pac. 718 (1905).
RIPARIAN RIGHTS

rights are in conflict with the constitutional power of the state to control such waters. The constitution does not purport to eliminate riparian rights as between individuals, and the court has not so construed it.

RIPARIAN RIGHTS ON NONNAVIGABLE (FOR TITLE) WATERS
(Not in Conflict with Appropriate Rights)

Riparian Rights on Nonnavigable Lakes. Five cases decided in the past five years, in Florida,111 Minnesota,112 Arkansas,113 Michigan,114 and Washington,115 reflect a distinct trend116 in the direction of wider public use of the nonnavigable lakes in the United States. The beds of all of these lakes were privately owned by riparians. However in each case the court held that all of the riparians had a common right to the use of the whole surface, and not merely the portion over his own land. The Washington case that falls within this group is Snively v. Jaber.117 It is one of the few cases in this state dealing with riparian rights to a nonnavigable lake118 where there was no conflict with appropriators. It arose out of a long standing dispute about the use of Angle Lake, which is located just south of Seattle. The plaintiffs were owners of riparian land, part of which was being used for a homesite and part of which was being subdivided into residential lots for sale. Defendant operated a summer resort with a dance hall, picnic grounds, swimming area, and rental boats. The resort operation began in 1919; plaintiffs acquired their land in 1926. Plaintiffs sought a permanent injunction against the use by defendant's patrons of that part of the lake overlying plaintiffs' land. Plaintiffs complained that the patrons (1) operated boats on the water over his portion of the lake, and (2) used defendant's boats to land on and litter plaintiffs' shores. Plaintiffs also claimed that defendant's rafts were anchored to plaintiffs' portion of the bottom of the lake. The trial court enjoined as a nuisance the renting of boats by

---

111 Duval v. Thomas, 114 So. 2d 791 (Fla. 1959).
112 Johnson v. Seifert, 100 N.W.2d 689 (Minn. 1960).
116 In 1952 a tabulation of states that had decided one way or another on the question of whether a riparian on a lake has an exclusive right to the water over his land showed that ten states held for the exclusive right, and only three held for the right of common usage by all riparians. See 5 Fla. L. Rev. 166 (1952). Washington, Arkansas, and Florida had not decided the question in 1952. Minnesota had decided it in favor of the exclusive right position, and then, in the case cited above, reversed that position. Michigan, in the above case, reaffirmed and clarified its prior holding in favor of common use by all riparians.
117 48 Wn.2d 815, 296 P.2d 1015 (1956).
118 Angle Lake had previously been held nonnavigable in Snively v. State, 167 Wash. 385, 9 P.2d 773 (1932).
defendant for a period of two years, on the showing that by then probably all of plaintiffs' subdivided land would be sold and improved, and that defendant's patrons did not seem to land on, or litter, the occupied property on the lake. The court refused to issue a permanent injunction against the use of plaintiffs' portion of either the surface or bed of the lake by other riparians or their licensees (defendant's patrons). The supreme court affirmed. Other than a general reference to the limitations placed on riparian rights by the 1917 water code, the opinion appears to be based on the ground of economic and social necessity. In answering the plaintiffs' contention that they should have the right of exclusive possession of the water over their portion of the lake bottom the court aptly pointed out:

The adoption of the rule urged by the plaintiffs would in effect destroy all of the rights of riparian owners in nonnavigable lakes except the right of appropriation. What practical value would the vested rights to boat, swim, fish, and bathe, have to any riparian owner if such rights were restricted to his fenced-in pie-shaped portion of the lake?

The court then held:

[With respect to the boating, swimming, fishing, and other similar rights of riparian proprietors upon a nonnavigable lake, these rights or privileges are owned in common, and that any proprietor or his licensee may use the entire surface of a lake so long as he does not unreasonably interfere with the exercise of similar rights by the other owners. This rule does not have the effect of making the nonnavigable lake public, since the stranger has no right to enter upon the lake without the permission of an abutting owner. The rule we have announced affords equal protection to the interest of all riparian owners in the use of the water and seeks to promote the greatest beneficial use by each with a minimum of harm to other owners.]

The Minnesota Supreme Court reached a similar conclusion in *Johnson v. Seifert*, holding that a riparian on a nonnavigable lake was entitled to an injunction against another riparian to require the removal of a fence the other had constructed on his property line through the lake. In so holding the court expressly overruled a prior

119 The court cited RCW 90.04.020 of the appropriation code as "a recognition by the legislature of the limitation upon the common-law right of riparian owners." One may question the relevance of this argument in a case involving only riparians against each other, and not raising any question of riparian vs. appropriator.

120 48 Wn.2d at 821, 296 P.2d at 1019 (1956).

121 Id. at 821-22, 296 P.2d at 1019 (1956).

122 100 N.W.2d 689 (Minn. 1960).
contrary decision. As in Washington the ruling appeared to be based on the ground of economic necessity.

In the Florida case of Duval v. Thomas, the plaintiff riparian sought an injunction to require two other riparians to remove dikes they had placed along their boundary lines in a nonnavigable lake. The dikes restricted plaintiff to a small portion of the surface. The court granted the injunction, again relying largely on economic, rather than "property right" grounds. Special recognition was given the value of tourism in Florida, the court saying:

We take judicial knowledge of the importance of "tourism" to our state. Florida is advertised as a playground, a retreat from the hurry-scurry of the modern world and from the rigors of northern climes. Fishing and swimming are prominent if not principal items of the entertainment the stranger expects to find here. If the enjoyment of non-navigable lakes were to be curtailed or restricted by a holding that the owner of a portion of one of them, and his guests, should enjoy the waters only within the property lines the damage would be immeasurable.

In the Michigan case of Kerley v. Wolfe, the court decided that a riparian could not fence along his property line where such a fence would stop boat traffic from going through a narrow neck of a non-navigable lake. And in the Arkansas case of Harris v. Brooks the court said that a riparian was making an "unreasonable" use of the waters of a nonnavigable lake and could be enjoined by other riparians when he pumped water out in sufficient quantities to make the lake unsuitable for fishing, recreation, and other lawful purposes.

In the Washington case the underwater boundary lines had not been surveyed and were not known at the time of the decision. Because of this it was urged in a subsequent case that the rule of common use applied only where the boundaries were not known. However the court said this was not the basis of the Snively case and that the common right of use exists whether or not the boundaries are fully known.

123 Lamprey v. Danz, 86 Minn. 317, 90 N.W. 578 (1902).
124 Johnson v. Seifert, 100 N.W.2d 689, 695 (Minn. 1960).
125 114 So. 2d 791 (Fla. 1959).
126 Id. at 795.
128 225 Ark. 436, 283 S.W.2d 129 (1955).
129 See also Johnson v. Seifert, 100 N.W.2d 689 (Minn. 1960).
130 Judd v. Bernard, 49 Wn.2d 619, 304 P.2d 1046 (1955). The question involved was whether the representatives of the State Game Department could go upon a non-navigable lake and poison the fish, as a part of its game management program. The court said yes. "The appellants further contend that the representatives of the game commission have no right to go on those portions of the lake under which they own title
Although this issue is not expressly raised in the cases from the other states it seems clear from their facts that the same rule applies there.

The Washington case—recognizing a common right of use of the surface—is one of the few such cases which also goes on to find, and enjoin, an abuse of that right. The *Snively* case held that the public’s use of defendant’s boats to litter the shores of other riparians was a “nuisance” and thus enjoinable. The nuisance theory as expressed here would seem to be closely analogous, if not identical, to the “reasonable use” theory which has historically controlled riparian uses in the face of conflicting rights. Under that theory a riparian can make any use of the water that is not unreasonable as to other riparians. Thus in the Arkansas case noted above the court held that a riparian had a right to pump water from a lake, but not to the extent that it substantially impaired other riparian uses of the surface for fishing and boating. To do so was “unreasonable” and enjoinable. Presumably in Washington the “nuisance” idea will be used wherever appropriate to control the common right of use of such lakes. One problem in this area—raised but not decided in the *Snively* case—was whether one riparian can permanently anchor a dock or other object in the water over another’s land. In that case the plaintiff argued that defendant’s dock was anchored over plaintiff’s portion of the lake bed, and should be ordered removed. The court declined to so order because the boundary lines were not known and it could not be sure on whose land the dock was anchored. If the boundaries had been known it would seem that the court might properly have ordered removal on the ground that the maintenance at that location was a “nuisance,” or an “unreasonable” use. Such conduct would not seem to be a trespass; if it were, then even the anchoring of a fishing skiff for a few moments would also seem to be one. Such a result would be antithetical to the purpose of the common use rule.

In four of the five jurisdictions named above the ruling in favor of common riparian use was new. (The case from Michigan was a clarification of an earlier rule.) In Minnesota the court had to overrule expressly a previous decision to apply this rule. In Florida the court

to the bed. They attempt to distinguish *Snively v. Jaber*...holding that riparian owners enjoy such rights as boating, fishing, and swimming in common, on the ground that the boundaries of their portions of the lake bed have been determined; whereas, no such determination had been made in that case. The holding in that case regarding the right to use the surface of the lake was not based upon the fact that the lake bed boundaries had not been determined, but on the reasoning that these riparian rights, if not enjoyed and exercised in common, cannot be enjoyed or exercised at all.” 49 Wn.2d 619, 621, 340 P.2d 1046, 1049 (1956).

131 4 Restatement, Torts, Ch. 41, Topic 3, Scope Note (1939).
said that the common law rule was "ambiguous" and thus it could, and would exercise its discretion and adopt the rule of common sense. In the Arkansas case the principal issue was whether the pumping of water from the lake was a "reasonable" use. The court more or less assumed that each riparian had a common right to the use of the surface of the lake with others. In Washington the court had to overcome the logic of an early case, *Griffith v. Holman,*232 defining riparian rights on nonnavigable streams, where it was said that riparians had an exclusive right of fishery in the stream flowing across their land. In distinguishing the *Griffith* case the court used two arguments, saying (1) "the holding has no application in a case involving a large lake surrounded by many riparian owners,"233 and (2) the *Griffith* case was "justified" by a "fencing" statute234 that applied only to nonnavigable, nonmeandered streams. By distinguishing the *Griffith* case the court has suggested that there are two sets of rules concerning riparian rights, one for nonnavigable lakes, and another for nonnavigable streams. The *Snively* case purports to define those rights only for lakes. So far as the language of *Snively* is concerned we are pushed back to *Griffith v. Holman* for our most direct statement of riparian rights to nonnavigable streams. This subject will be discussed infra.

One of the most significant portions of the *Snively* opinion is that which says that the "licensees" of riparians can use the surface of the lake in common with other riparians. None of the other cases noted above directly raised this issue, although certainly the implication is abundantly clear in the Florida case that patrons of a resort can use the lake in common with others.235 In the Washington case the term "licensee" was used to include (1) friends and acquaintances of riparians using the lake with the permission of the property owner, and (2) patrons of a summer resort.236 Who else might be licensees? What about the public where a state road touches a lake? In the past few years the Washington State Department of Game has instituted a campaign to acquire many public access roads to nonnavigable lakes of

---

232 23 Wash. 347, 63 Pac. 239 (1900).
234 RCW 90.28.160. "The owner or occupant of land may fence across an unmeandered stream which is not used as a public highway, if the fence does not obstruct the flow of the stream." Wash. Sess. Laws 1891 c. 120 § 3. This statute, and the *Griffith* case, will be discussed later in this article.
235 The court said that "If the enjoyment of nonnavigable lakes were to be curtailed or restricted by a holding that the owner of a portion of one of them, and his guests, should enjoy the waters only within the property lines the damage would be immeasurable." 114 So. 2d at 795.
Anyone, whether or not a citizen of the state, is invited to use these roads. Sometimes the state acquires title to the road area, and sometimes merely an easement. If it has title then under the reasoning of the *Snively* case the members of the public would seem clearly to be "licensees." If it has merely an easement then they would probably still be licensees, although there would seem to be some question whether the state in such a case is a riparian. Still another question is presented in the case of a regular state highway that happens to touch on a lake. To be a licensee presumably the access area must be used with the consent of the riparian owner. Whether the state has consented to the use of a particular highway as an access road would seem to depend on the circumstances of each case. Certainly the state would have the right to either give, or deny, its consent to the use of its roads for this purpose.

It might be suggested that when the state acquires a riparian road all the citizens of the state thereby become riparians and have a right to use the waters of the lake in common with others. For a number of reasons it seems unlikely that a court would stretch the term "riparian" that far.

**Riparian Rights on Nonnavigable Streams.** There have not been as many cases in recent years on the public right to use "nonnavigable" (for title) streams in the United States as there have been on the right to use nonnavigable lakes. Two such cases, however, deserve

---

137 The records of the State of Washington Department of Game show that the state has acquired 229 areas on 221 lakes for purposes of public access. 169 of these areas are presently developed. The total amount of land under state control for access purposes is 5,804.42 acres.

138 It has been said that "generally the person entitled to the exclusive right to possess and use riparian land, although he does not own the fee, is entitled to enjoy the riparian rights incident to the land." 56 Am. Jur., Waters, § 283 (1947). See also 93 C.J.S. Waters § 8 (1956). If this rule were to apply in Washington then the state would appear to be a riparian where it has an easement for highway purposes. Such easements give the state an exclusive right of possession. They are distinguished from the easement a person might acquire across another's land to be used in common with the landowner. For an additional case on this question see: Village of Pewaukee v. Savoy, 103 Wis. 271, 79 N.W. 436 (1899). In Washington it has been held that a settler on the federal domain has riparian rights from the date of his settlement (taking possession with intent to homestead) and not merely from the date of issuance of his patent. Sander v. Bull, 76 Wash. 1, 135 Pac. 489 (1913). See also Benton v. Johncox, 17 Wash. 277, 49 Pac. 495 (1897).

139 Unless a statute is enacted defining the manner in which the state can designate which roads are to be used by the public for access and which are not, then it would seem that the state's intentions could be gleaned from any one of a number of sources. Probably in most cases that intention would be known through rulings or statements of the State Department of Game, or through state acquiescence.

140 This theory was recently suggested as the basis for the public right to use state lakes by the Director of the Washington State Department of Game in a letter to the author. See 56 Am. Jur., Waters, § 280 (1947).

141 Some of the reasons why such a holding seems unlikely are: (1) the few authorities on the related question of whether the citizens of a city all become riparians when
special note, Elder v. Delcour,\textsuperscript{142} and State v. Red River Valley Co.\textsuperscript{143} These cases indicate a slight, but visible trend toward recognition of greater public use in such waters. The Elder case has probably gone as far as any other in the direction of recognizing and protecting the public right of use. There the Missouri Supreme Court held that a member of the public was not a trespasser where he (1) pressed down the riparian’s fence across a nonnavigable stream, (2) took his canoe across the fence, (3) floated in the canoe across the riparian’s land, (4) carried the canoe on the bank around a log jam, (5) then waded down the bed of the stream to fish before re-embarking in the canoe and leaving the land of the riparian. One of the primary bases of the opinion was a series of declarations contained in federal legislation,\textsuperscript{144} and the Missouri constitution,\textsuperscript{145} to the effect that “the Mississippi and Missouri Rivers, and the navigable waters flowing into them, and the carrying places between the same, shall be common highways and forever free to the people of the said territory and to the citizens of the United States without any tax, duty or impost therefor.”\textsuperscript{146} The court said that the title to the bed of the stream in question was acquired subject to these pronouncements, and thus the public had an easement over it.

The New Mexico case\textsuperscript{147} took a different approach in arriving at about the same point, \textit{i.e.}, that the public have a right to fish in a pri-

\textsuperscript{142}364 Mo. 835, 269 S.W.2d 17 (1954).
\textsuperscript{143}51 N.M. 207, 182 P.2d 421 (1945).
\textsuperscript{144}2 STAT. 743, 747 (15) (1812).
\textsuperscript{145}Mo. Const. art. I (1875).
\textsuperscript{146}2 STAT. 743, 747 (15) (1812).
\textsuperscript{147}State v. Red River Valley Co., \textit{supra} note 143. The statement on riparian and public rights to nonnavigable streams of the state was dicta: The issue in the case was whether the public had a right to fish in a portion of a reservoir where the bed was privately owned.
vately owned stream. The basis for this case was said to be a constitutional provision that "the unappropriated water of every natural stream... within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use." Inasmuch as the water belonged to the public, the court said the public had a right to fish in it, in spite of the fact that the bed was privately owned.

A recent case holding contrary to the above is Boerner v. McCallister, where the Virginia Supreme Court held that a riparian who owned the bed of a nonnavigable stream also had the exclusive right to fish in it. This decision, however, is based essentially upon the terms of an early grant, by which the riparian's predecessors took from King George II certain lands and "the rivers, waters and water courses therein contained, together with the privilege of hunting...fishing... ."

Other jurisdictions are split on the question of the public right to use nonnavigable, privately owned streams.

In Washington the case of Griffith v. Holman, decided in 1900, is one of the few cases dealing directly with this question. There the plaintiff riparian sued in trespass alleging that defendant, a fisherman, (1) cut the wire fence that plaintiff had placed across the Little Spokane River at the border to his property, and (2) caught plaintiff's fish while floating across the property in a boat. The trial court awarded plaintiff $250 damages on each of these charges and the supreme court affirmed. Among other things the supreme court held that the plaintiff had a right to fence the stream. The decision was apparently based on a "fencing" statute, still in existence, which provides: "Fencing across streams. The owner or occupant of land may fence across an unmeandered stream which is not used as a pub-

\[^{148}\text{N.M. Const. art. XVI § 2.}\]
\[^{149}\text{197 Va. 169, 89 S.E. 2d 23 (1955).}\]
\[^{150}\text{Cases holding for a right of public use are: Attorney General v. Woods, 108 Mass. 436 (1871); Collins v. Gerhardt, 237 Mich. 38, 211 N.W. 115 (1926); State v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945); People v. Kraemer, 7 Misc. 2d 363, 164 N.Y.S.2d 423 (1957); Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914); Willow River Club v. Wade, 100 Wis. 86, 76 N.W. 273 (1898). Contra: Hood v. Murphy, 231 Ala. 408, 165 So. 219 (1936); Hartman v. Tresise, 36 Colo. 146, 84 Pac. 685 (1905). Analysis of the various cases on this subject may be found in 12 Wyo. L. J. 167 (1958); 33 N.Y.U. L. Rev. 229 (1958); 42 Va. L. Rev. 121 (1956); 35 Ore. L. Rev. 237 (1956); and Note, 47 A.L.R. 2d 381 (1956).}\]
\[^{151}\text{23 Wash. 347, 63 Pac. 239 (1900).}\]
\[^{152}\text{The fencing statute does not appear in the Griffith opinion. However, in the recent case of Snively v. Jaber, 48 Wn.2d 815, 296 P.2d 1015 (1956), the court said this statute was the justification of the Griffith case.}\]
\[^{153}\text{RCW 90.28.160. "Fencing across streams. The owner or occupant of land may fence across an unmeandered stream which is not used as a public highway, if the fence does not obstruct the flow of the street." Wash. Sess. Laws 1891 c. 120, § 3.}\]
lic highway, if the fence does not obstruct the flow of the stream.” It would seem, however, that this statute is at best only permissive, and that it would not give to riparians any greater rights against third parties than they had before its enactment.

Other aspects of the *Griffith* decision tend to make it suspect. A substantial portion of the opinion was taken up with a discussion of the ownership of fish. The court said they belonged exclusively to plaintiff, and that plaintiff had an exclusive right of fishery in such waters. The court further said that this is true even on navigable waters—a proposition patently incorrect, and completely rejected since then. It is also clear in this state, as in others, that fish found in nonnavigable as well as navigable waters are not only subject to state control, but belong to the state. The only part of the *Griffith* rule that has not been changed in subsequent opinions—probably because it has not come up for decision—is the holding that a riparian has an exclusive right of fishery over his land.

The *Griffith* case appears to be the only one in the state dealing directly with the matter of riparian rights to nonnavigable streams as against the boating public. There is, however, a group of cases on a closely related subject which shed some light on this question. Typical of these cases is *Watkins v. Dorris*. There the court was concerned with the right of a logger to float his logs down a nonnavigable stream over plaintiff’s riparian land. An 1890 statute provided:

> “All meandered rivers, meandered sloughs and navigable waters in this state shall be deemed as public highways... for the purpose of this act.”

The court said this statute meant that one could float logs down a “navigable stream” even though it was not meandered. The court also said that a stream is navigable for log floating if it is commercially usable for that purpose. This is not to say, however, that navigability for this purpose also makes it navigable for title determination. In fact in the *Watkins* case the court held that the creek in

---

155 3 C.J.S. *Animals* § 5 (1936).
157 Peterson v. Arland, 79 Wash. 679, 141 Pac. 63 (1914); Wilson v. Prickett, 79 Wash. 89, 139 Pac. 754 (1914); Fortson Shingle Co. v. Skagland, 77 Wash. 8, 137 Pac. 304 (1913); Summer Lumber and Shingle Co. v. Pacific Coast Power Co., 72 Wash. 631, 131 Pac. 220 (1913); Kuhns v. Lewis River Boom and Logging Co., 51 Wash. 196, 98 Pac. 655 (1908); White v. Codd, 39 Wash. 14, 80 Pac. 836 (1905); Matthews v. Belfast Manufacturing Co., 35 Wash. 662, 77 Pac. 1046 (1904); Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 Pac. 813 (1904); Ingram v. Wishkah Boom Co., 35 Wash. 191, 77 Pac. 34 (1904); Watkins v. Dorris, 24 Wash. 636, 64 Pac. 840 (1901); East Hoquiam Boom & Logging Co. v. Neeson, 20 Wash. 142, 54 Pac. 1001 (1898).
159 24 Wash. 636, 64 Pac. 840 (1901).
160 RCW 76.28.090.
question was nonnavigable for title, but navigable for log floating.

In a subsequent case\textsuperscript{160} the court explained some of the limitations on the right of one floating logs across another's land, holding that the log driver must confine his operations to the bed of the stream, and has no right to use the banks.

How does the \textit{Watkins v. Dorris} line of cases mesh with the ruling in \textit{Griffith v. Holman}? The \textit{Griffith} case appears to have been laid under the theory of trespass to real property. The court said that the "right of fishery" in the riparian owner "is absolute." In \textit{Watkins v. Dorris} the court held that a member of the public had a right to float logs across another's land, pursuant to an 1890 statute. The statute in this case, however, would seem to make no difference to the really important question, \textit{i.e.}, was the log floating a trespass, or a taking of private property for which compensation must be paid? It would seem clearly not. There are few absolute rules in the riparian system. It certainly cannot be said that there is a universally recognized exclusive right to the use and possession of water flowing across one's land. Whether such a right, or any particular riparian right, exists in a given case depends upon the social and economic needs involved.\textsuperscript{161} The need to support logging operations in this state is great, and so we find the result in the \textit{Watkins} line of cases. We saw a similar approach on the matter of riparian rights to nonnavigable lakes in \textit{Snively v. Jaber}.

What would be the rule today with regard to the public right of boating and fishing on the nonnavigable rivers and streams of the

\textsuperscript{160} Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 Pac. 813 (1904). See also: Summer Lumber & Shingle Co. v. Pacific Coast Power Co., 72 Wash. 631, 131 Pac. 220 (1913).

\textsuperscript{161} This principle has been recognized in Washington in a number of cases, typical of which is \textit{Snively v. Jaber}, 48 Wn.2d 815, 296 P.2d 1015 (1956), and Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 Pac. 813 (1904). In the \textit{Monroe} case the court said: "The reasons leading to the holding in this state and others, where the timber industry is important, that streams which are navigable in fact for the floatage of timber to market shall be public highways for that purpose, are founded upon commercial convenience and necessity, because of the environment of the industry. Much of the timber grows in the mountains, also upon the foothills, and in other localities which are inaccessible by means of transportation facilities, without great expense. Nature has, however, provided numerous streams which flow out of these timber centers, and which are available highways for the carriage of the timber to market. In a locality so situated, it seems reasonable that these highways should be used for such purposes. It is true, the majority of these streams, being unmeandered, pass over private property, and their beds are owned by the adjacent land owner. But the lands are naturally burdened, if it be a burden, by the streams themselves, with their defined banks and flowing water, and it is not an additional burden to the land owner for the timber product to float along with the already running water, provided it is so done as not to damage his land." 35 Wash. 487, 495, 77 Pac. 813, 815 (1909).

\textsuperscript{162} According to the records of the State of Washington Department of Game the state now owns or controls 189.9 miles of streambank on 41 different streams for the use of fishermen. It also controls an additional 867.06 acres of land for the purpose of boat launching sites, parking, etc.
state? Would the court adhere to the ill-formed rule of *Griffith v. Holman*, or would it recognize the increasing social and economic need that these waters be held for wide public recreational purposes and apply a rule such as that of *Snively v. Jaber*? The latter rule would seem to be in conformity not only with the state's needs, but also with the long standing custom and practice with regard to the use of our rivers and streams.

**CONCLUSION**

New demands on our available water resources are being made at a very fast pace. We are now in a time when the "multiple use" concept, which is being applied widely to the control of our timber lands, will have to be applied extensively to the control of our water resources. In the early history of the state the principal economic use of the lakes and streams was for irrigation. That use is still dominant in some locales, however, in many areas other uses, such as for recreation and homesites, have crowded into the foreground, and are insisting upon greater legal recognition. In some ways the law has reflected this changing picture. Following the adoption of the water code in 1917, and the decision in *Brown v. Chase* in 1923, it appeared that the appropriation system was gaining clear superiority in those areas where it conflicted with riparianism. It now appears that the *Brown* case was probably the high-water mark of the appropriation system. In 1929 the supreme court decided *In re Martha Lake Water Co.* and in 1950 *In re Clinton Water District*, two cases limiting appropriations that would have encroached upon recreational and homesite uses of nonnavigable lakes. We do not yet know what the court might do under similar circumstances with regard to the non-navigable streams of the state, although it would seem unlikely that appropriative rights would be as strictly limited there in view of the much greater dependence of irrigation on stream waters. In any event it may be observed that the constantly changing nature of water uses seems to be encouraging our court in (1) holding the line on further expansion of the appropriation system, and (2) applying wherever appropriate the more viable principles of riparianism.

The trend in the direction of greater protection for recreational uses

---

162 RCW 90.
164 125 Wash. 542, 217 Pac. 23 (1923).
165 152 Wash. 53, 277 Pac. 382 (1929).
166 36 Wn.2d 284, 218 P.2d 309 (1950).
167 48 Wn.2d 815, 296 P.2d 1015 (1956).
is also discernible in the cases dealing with riparian rights in which no appropriations were involved. The 1955 case of Snively v. Jaber held that all riparians and their licensees on a given lake have a right in common to the use of the lake, thus giving substantial protection to riparian, and apparently public, rights of recreation on nonnavigable lakes. We do not have any such recent cases on the extent of riparian and public recreational rights on nonnavigable streams, although the early case of Griffith v. Holman strictly limited those rights. If the court continues to follow the trend toward protection of recreational uses indicated by the lake cases it would seem unlikely that it would—or should—today adhere to the rule of the Griffith case.