

**WATER RIGHTS LAWS
IN THE
NINETEEN WESTERN STATES**

Volume II

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A quarter-century before the *California Oregon Power Company* decision was rendered, the Oregon Supreme Court had taken its position in *Hough v. Porter*—practically contemporaneously with enactment of the liberal water code of 1909—that following adoption of the Desert Land Act, a settler on riparian public land became entitled to use the water only for domestic and associated stockwater purposes and had to acquire additional waters through prior appropriation.⁷⁴ The principle thus developed in *Hough v. Porter* as to the relation of the Desert Land Act to riparian lands has not been repudiated by the Oregon Supreme Court.⁷⁵

State land grants.—In several riparian doctrine States, questions arose concerning the passing of riparian rights to grantees of State lands. The consensus of decisions that have come to the author's attention is that in such jurisdictions the State holds title to riparian rights of lands which it possesses in a proprietary capacity; that by its appropriation legislation, the State offered such waters to the public for appropriation under the statutory procedure; and that purchasers of lands from the State thereby became vested with title to riparian rights which were inferior to appropriative rights previously vested but were superior to appropriations subsequently made. These principles are analogous to those that apply to riparian rights in lands acquired from the Federal Government. Details for several State situations follow.

(1) The first California statute authorizing appropriation of water, enacted in 1872 as part of the Civil Code, ended with section 1422 reading: "The rights of riparian proprietors are not affected by the provisions of this title."⁷⁶

According to the State supreme court, in *Lux v. Haggin*: (a) the water rights of the State, as owner of riparian lands, were not reserved to the State by section 1422, but instead were conferred on those who appropriated water in the manner prescribed in the act; (b) "section 1422 saves and protects the riparian rights of all those who, under the land laws of the state, shall have acquired from the state the right of possession to a tract of riparian land prior to the initiation of proceedings to appropriate water in accordance with the provisions of the Code;" and (c), section 1422 not only protected riparian rights already acquired when the appropriative provisions went into operation, but also saved riparian rights to those who should receive grants of State lands after such enactment.⁷⁷

According to Wiel, no more was said in section 1422 because the rights of private land had not been much involved in the litigation of which the code

⁷⁴ *Hough v. Porter*, 51 Oreg. 318, 383-407, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909). See *Hedges v. Riddle*, 63 Oreg. 257, 259-260, 127 Pac. 548 (1912).

⁷⁵ Hutchins, *supra* note 52, at 203. With respect to rights as between riparians not claiming under the 1909 water code, see *Fitzstephens v. Watson*, 218 Oreg. 185, 344 Pac. (2d) 221 (1959). For a dispute between riparians prior to the 1909 water code, see *Jones v. Conn*, 39 Oreg. 30, 64 Pac. 855, 65 Pac. 1068 (1901).

⁷⁶ Cal. Civ. Code § 1422 (1872).

⁷⁷ *Lux v. Haggin*, 69 Cal. 255, 368-370, 376, 439, 4 Pac. 919 (1884), 10 Pac. 674 (1886).

was merely declaratory. He says further that while *Lux v. Haggin* was pending, numerous unsuccessful attacks were made on this section in the legislature.⁷⁸ However, section 1422 was repealed in the year following the decision in *Lux v. Haggin*, with the proviso "that the repeal of this section shall not in any way interfere with any rights already vested."⁷⁹

(2) According to the Texas Supreme Court, riparian rights attached to lands granted by the Republic of Texas after 1840—the year in which the common law was adopted—and to lands granted by the State prior to the enactment of the first appropriation statute in 1889.⁸⁰ According to the Texas Legislature's own policy declaration in enacting the appropriation law of 1913—from which policy it has not receded—nothing contained in the act was to be construed as a recognition of any riparian right in the owner of any lands the title to which passed out of the State after July 1, 1895.⁸¹

(3) In 1903 the Washington Supreme Court held that certain lands reserved by the Act of Congress from the public domain for school lands were not segregated from the public domain until statehood was granted in 1889; that whatever rights the State had in the water annexed to the school land did not pass to any grantee until the school lands were sold by the State in 1909; and that riparian rights attached at the time of such sale.⁸² In a second decision in 1925, in which the court felt that it was faced by two apparently conflicting parts of the State constitution, the court held that the State's rights in the school lands for the purpose of irrigation had been granted to the public, so that its riparian rights in such lands were waived so long as title remained in the State, but that they attached to the lands by transfer from the State to private ownership.⁸³ However, in a recent case the court reevaluated its reasoning in the 1923 and 1925 opinions and held that "the state may establish riparian water rights in its trust lands, to the same extent that such rights could be established by a private owner. . . . To the extent that the *Doan Creek* and *Crab Creek* cases are inconsistent with this holding, they are overruled."⁸⁴

⁷⁸ Wiel, *supra* note 63, § 113.

⁷⁹ Cal. Stat. 1887, p. 114.

⁸⁰ *Mott v. Boyd*, 116 Tex. 82, 107-108, 286 S.W. 458 (1926).

⁸¹ Tex. Laws 1913, ch. 171, § 97, Rev. Civ. Stat. Ann. art. 7619 (1954). The Texas Supreme Court has said that grantees of public lands from 1840, when the common law was adopted in Texas, to the passage of the first water appropriation act in 1889, became vested with riparian rights in the waters of contiguous streams. *Mott v. Boyd*, 116 Tex. 82, 107-108, 286 S.W. 458 (1926).

⁸² *In re Doan Creek*, 125 Wash. 14, 23-24, 215 Pac. 343 (1923).

⁸³ *In re Crab Creek & Moses Lake*, 134 Wash. 7, 24-25, 235 Pac. 37 (1925).

⁸⁴ *In re Stranger Creek & Tributaries in Stevens County*, 77 Wash. (2d) 649, 466 Pac. (2d) 508, 513 (1970). The court said that while in the *Crab Creek* case it had been influenced by a desire to limit feared obstructive effects of the old riparian natural flow rule, "judicial and legislative developments have firmly established the preference for beneficial usage in concepts of both riparian and appropriative rights to water." The court stressed that by leasing its trust lands for grazing and forestry the State would