ARTICLES

THE LEGACY OF *SCHODDE V. TWIN FALLS LAND AND WATER COMPANY*: THE EVOLVING REASONABLE APPROPRIATION PRINCIPLE

BY

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This Article examines an underappreciated 1912 United States Supreme Court decision, Schodde v. Twin Falls Land and Water Company*, which refused to enforce a prior appropriation right because it would have required dedicating the entire pre-dam current of the Snake River to lift a small amount of water actually devoted to beneficial use.* Schodde *both cleared a major legal barrier to dam construction and gave rise to the reasonable appropriation rule. After a long period of relative neglect,* Schodde *reemerged as an important precedent as courts, legislatures, and administrative agencies began to appreciate the inefficiencies of prior appropriation in an era of increasing scarcity, a problem that has become more pressing as the region confronts the real stresses of climate change. The case is a*

* A.B. 1962, LL.B., 1965, Stanford University. Distinguished Professor of Law, Chicago-Kent College of Law and Honorary Professor, UNESCO Centre for Water Law, Policy, and Science, University of Dundee, Scotland. The origins of this Article lie in my second year of law school when I was assigned to write a law review note on a Colorado groundwater case. I was struggling with the question of a senior appropriator's right to a fixed water table. My advisor, the late Charles J. Meyers, suggested that I talk with Marian Rice Kirkwood, former dean of Stanford law school and an important California water law scholar. In the course of our meeting, Dean Kirkwood told me to take a look at an "old" Supreme Court of the United States case, *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912), and the case has fascinated me ever since. I am indebted to the very helpful research assistance of Mr. Brian McNamara, J.D. Chicago-Kent College of Law, 2010, in the preparation of this Article and to Professor Michael Blumm, the staff of Lewis & Clark Law School, and the editors of *Environmental Law* for organizing the excellent conference at which a preliminary version of this Article was published.

classic example of the development of a judicially imposed background limitation on a private property title. This tradition is now in doubt as the United States Supreme Court has opened up the prospect of an aggressive judicial takings doctrine. This Article's basic argument is that the sensitive way in which courts have applied Schodde *illustrates that courts can satisfactorily balance the protection of individual expectations about the use of resources of property with changing conceptions about the best use of resources, without the straightjacket of the Fifth Amendment.*

I. INTRODUCTION: THREE *SCHODDE* STORIES

This symposium honors two leading water law scholars who have had quite different scholarly agendas during their long, productive, and distinguished careers. Professor Huffman has devoted much of his career to firming up the federal–state relationship over the control of western waters that emerged in the late nineteenth century and to maintaining the integrity of classic prior appropriation law to trigger water markets.[1] While Professor Huffman has worked diligently to keep water law within its historic envelope, Professor Neuman has tried to push the envelope to adjust water resources allocation to the emergence of environmental protection as a public value and to reform prior appropriation to promote the more efficient use of water to free up supplies for instream use.[2] Both have contributed greatly to western water law scholarship.[3]

[1] *E.g.*, James L. Huffman, *The Federal Role in Water Resource Management*, 17 N.Y.U. ENVTL. L.J. 669, 697–701 (2008).

[2] *E.g.*, Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 975–76 (1998).

[3] Michael C. Blumm, *The Water Law Scholarship of Jim Huffman and Janet Neuman: Prologue to the Festschrift*, 42 ENVTL. L. 1, 1–12 (2012).

This Article tries to straddle both strains of their western water law scholarship by examining a not unknown,[4] but underappreciated[5] 1912 Supreme Court decision, *Schodde v. Twin Falls Land & Water Co.*[6] *Schodde* refused to enforce a prior right because it would have required dedicating the entire pre-dam current of the Snake River to lift the small amount of water actually devoted to beneficial use.[7] This precedent ultimately gave rise to the reasonable appropriation rule. Today, courts, legislatures, and administrative agencies are increasingly relying on *Schodde* as they struggle with the inefficiencies of prior appropriation in an era of increasing scarcity.[8]

There are three *Schodde* stories. The first is a classic David and Goliath tale. A small landowner asked a court to enforce a recognized property right, a senior appropriation, against a subsequent but more powerful right holder.[9] The second story is an important chapter in the late nineteenth century effort to eliminate all vestiges of riparian rights from western water law to allow the triumph of the conservation era[10] dream of efficiently dammed and diverted rivers "reclaiming" vast tracts of arid lands.[11] The third story is the continual judicial, legislative, and administrative adjustment of "frontier" or pure prior appropriation—the economic and social costs of the exercise of a prior right be dammed—to the ever evolving problems of modern western water management.[12] The perpetual problem of scarcity has become more

4 *Schodde* was not included in the list of Idaho cases in Wells A. Hutchins's third volume book, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 261–86 (1977). However, Samuel Wiel included a discussion of the Federal Circuit decision in the second edition of his great treatise. *See* SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES 337 (2d ed. 1908).

5 *Schodde* did not merit inclusion or mention in Professor Sho Sato's materials, 1 WATER RESOURCES ALLOCATION (1962), prepared for his water law class at the University of California, Berkeley School of Law, which also became the source of my introduction to water law. Nor was it included in the late Dean Frank J. Trelease's original pioneering casebook, CASES AND MATERIALS (1967), although the case did later appear in the 1986 fourth edition of the same work. FRANK J. TRELEASE & GEORGE A. GOULD, CASES AND MATERIALS ON WATER LAW 107 (4th ed. 1986). The late Jacob Beuscher also included the case in his important, early casebook, J. H. BEUSCHER, WATER RIGHTS 250–51 (1967).

6 224 U.S. 107 (1912).

7 *Id.* at 125–26.

8 *E.g.*, COMM. ON THE SCIENTIFIC BASES OF COLO. RIVER BASIN WATER MGMT., NAT'L RESEARCH COUNCIL, COLORADO RIVER BASIN WATER MANAGEMENT: EVALUATING AND ADJUSTING TO HYDROCLIMATIC VARIABILITY 73–92 (2007) (summarizing studies of potential water resource impacts of climate change in the Colorado River Basin, and observing that "[a]ny future decreases in Colorado River streamflow . . . would be especially troubling because the quantity of water allocations under the Law of the River already exceeds the amount of mean annual Colorado River flows").

9 *Schodde*, 224 U.S. at 114–17.

10 *See* SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890–1920, at 19–21, 241, 273 (1959).

11 *See* DONALD J. PISANI, FROM FAMILY FARM TO AGRIBUSINESS: THE IRRIGATION CRUSADE IN CALIFORNIA AND THE WEST 1850–1931, at 440–45 (1984); DONALD J. PISANI, TO RECLAIM A DIVIDED WEST: WATER, LAW, AND PUBLIC POLICY, 1848–1902, at 33–38 (1992).

12 *See infra* Parts II–V.

pressing as the region confronts the real stresses of climate change.[13] This Article focuses on the third story.

Schodde is a classic example of the development of a judicially imposed background limitation on a private property title. Western courts have long recognized that at the margin of property rights in water, there is a small space to adjust them to changing conditions and the needs of other users.[14] This exercise of judicial discretion has taken on greater importance in light of the Supreme Court's willingness to recognize judicial takings claims.[15] This Article's basic argument is that the sensitive way in which courts have applied *Schodde* illustrates that courts can satisfactorily balance the protection of individual expectations about the use of resources of property with changing conceptions about the best use of resources, without the straightjacket of the Fifth Amendment.

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[13] *See, e.g.*, Robert H. Abrams & Noah D. Hall, *Framing Water Policy in a Carbon Affected and Carbon Constrained Environment*, 50 NAT. RESOURCES J. 3, 5 (2010); Robert W. Adler, *Climate Change and the Hegemony of State Water Law*, 29 STAN. ENVTL. L.J. 1, 10–17 (2010); Brian E. Gray, *Global Climate Change: Water Supply Risks and Water Management Opportunities*, 14 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1453, 1454–56 (2008); Robin Kundis Craig, *"Stationarity is Dead"—Long Live Transformation: Five Principles for Climate Change Adaptation Law*, 34 HARV. ENVTL. L. REV. 9, 23–27 (2010); Robin Kundis Craig, *Climate Change, Regulatory Fragmentation, and Water Triage*, 79 U. COLO. L. REV. 825, 878–83 (2008); Kathleen A. Miller, *Climate Change and Water in the West: Complexities, Uncertainties and Strategies for Adaptation*, 27 J. LAND RESOURCES & ENVTL. L. 87, 90–93 (2007).

[14] The adjustment started with California's recognition of miners' customs to justify prior appropriation between miners in *Irwin v. Phillips*, 5 Cal. 140, 145–47 (1855), and in *Coffin v. Left Hand Ditch Co.*'s famous invocation of the "imperative necessity for artificial irrigation of the soil." 6 Colo. 443, 449 (1882).

[15] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130B S. Ct. 2592, 2613 (2010). The Court upheld a Florida law which allows the State of Florida to set erosion control lines on the state's beaches. FLA. STAT. ANN. § 161.161(3)–(5) (West 2006). Private littoral rights are frozen landward of the line and the state owns all the renourished land seaward of the line. *Id.* § 161.191. This changed a formerly moveable boundary line to a fixed one. However, littoral owners continue to have access to the ocean as members of the public, but not as common law right holders. *Id.* § 161.201. The landowners argued that the state had taken their right to future accretions and private actions, but all eight justices agreed that the state could classify a beach restoration project as an avulsive event, and thus the state had the right to fill any exposed land. *Stop the Beach Renourishment*, 130B S. Ct. at 2611–13. However, Justices Alito, Thomas, and Chief Justice Roberts agreed with Justice Scalia's plurality opinion that the Fifth Amendment speaks to all three branches of government. *Id.* at 2601. Thus, the Court has put a potentially disruptive new takings doctrine "in play." Michael C. Blumm & Elizabeth B. Dawson, *The Florida Beach Case and the Road to Judicial Takings*, 35 WM. & MARY ENVTL. L. & POL'Y REV. 713, 770 (2011); *see also* Sidney F. Ansbacher et al., Stop the Beach Renourishment *Stops Private Beachowners' Right to Exclude the Public*, 12 VT. J. ENVTL. L. 43, 45–47 (2010); Craig Anthony (Tony) Arnold, *Legal Castles in the Sand: The Evolution of Property Law, Culture, and Ecology in Coastal Lands*, 61 SYRACUSE L. REV. 213, 259–60 (2011); Laura S. Underkuffler, *Judicial Takings: A Medley of Misconceptions*, 61 SYRACUSE L. REV. 203, 211–12 (2011).

II. THE SUPREME COURT CASE: ORIGINS AND OPINION

A. Irrigation on the Hardscrabble Snake River Plain

Schodde arose from a challenge to a Carey Act[16] dam and irrigation project on the Snake River Plain, that "beautiful [] vast sage plain that falls in great steps from the mountains to the canyon of the Snake, and then rises gradually on the other side to other mountains."[17] Idaho was one of the last areas of the West to be settled. Gold was discovered in Idaho around Boise in 1860, and three years later Congress created the Idaho Territory,[18] although Idaho did not become a state until 1890.[19] After the Civil War, a few adventurous souls settled on the Snake River plain around what is now Twin Falls.[20] It was a hard life where "the heat of summer and lack of water desiccated the once high spirits of Oregon-bound emigrants."[21] Early farmers used water wheels, a legacy of downstream gold mining, to draw water from rivers to irrigate surrounding lands.[22]

This primitive, "customary" water use eventually frustrated the irrigation visionaries. To them, the Idaho Territory was central to the irrigation movement that blossomed in the 1880s.[23] The Snake River Plain's several millions of acres of volcanic soil cried out for cultivation.[24] Potatoes, introduced by Mormon settlers in southern Idaho, flourished on the plain.[25] Irrigated agriculture goes back to the dawn of civilization. In the United States it became a major utopian and political movement after the Civil War, although it took until 1902 to work out a way to finance irrigation outside of Utah and a few colonies in California and Colorado.[26] The railroads and

16 Act of Aug. 18, 1894 (Carey Act), ch. 301, § 4, 28 Stat. 422 (codified at 43 U.S.C. §§ 641–648 (2006)).

17 WALLACE STEGNER, ANGLE OF REPOSE 376 (1971).

18 CARLOS A. SCHWANTES, IN MOUNTAIN SHADOWS: A HISTORY OF IDAHO 49–50 (1991); HUBERT HOWE BANCROFT, 31 THE WORKS: HISTORY OF WASHINGTON, IDAHO, AND MONTANA: 1845–1889, at 393 (1890).

19 SCHWANTES, *supra* note 18, at 134.

20 *Id.* at 101; *see also* CARLOS ARNALDO SCHWANTES, SO INCREDIBLY IDAHO!: SEVEN LANDSCAPES THAT DEFINE THE GEM STATE 81 (1996) ("Few Euro-Americans attempted to settle large parts of the Snake River country until the early years of the twentieth century. Twin Falls, now a major population center in southcentral Idaho, dates only from 1904, when an irrigation boom transformed the dry land.").

21 SCHWANTES, *supra* note 20, at 79.

22 *Schodde*, 224 U.S. 107, 114–15 (1912).

23 *See* MARK FIEGE, IRRIGATED EDEN: THE MAKING OF AN AGRICULTURAL LANDSCAPE IN THE AMERICAN WEST 11, 22–23 (1999); *see also* Hugh T. Lovin, *Dreamers, Schemers, and Doers of Idaho Irrigation*, 76 AGRIC. HIST. 232, 232–33 (2002) (explaining that "what these dreamers, schemers, and doers of Idaho irrigation did over the decades 1880–1940 was shaped by how irrigation was judged nationally").

24 FIEGE, *supra* note 23, at 13–14.

25 SCHWANTES, *supra* note 18, at 102; *see also* FIEGE, *supra* note 23, at 16, 155 (detailing the influence of Mormon migration to the Snake River Valley and the success of potato production in that region).

26 *See* PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 654–55 (1968); U.S. Dep't of the Interior, Bureau of Reclamation, *The Bureau of Reclamation: A Very Brief History*, http://www.usbr.gov/history/borhist.html (last visited Feb. 18, 2012).

promoters enticed many settlers to the empty region with dreams of a good life in a Jeffersonian community. In the 1880s, private irrigation schemes[27] lured settlers to Idaho, but these were undercapitalized and most failed, as the late Wallace Stegner so vividly described in his masterpiece, *Angle of Repose*.[28] In the American West, "[n]inety percent of the private irrigation companies were in or near bankruptcy by 1902."[29]

The early proponents of irrigation realized that government support was necessary. Initially, they believed that irrigation promotion was solely a state function and only urged the succession of federal lands to the states for this purpose.[30] In 1894, Congress responded to the state responsibility argument with the last large-scale distributions of the public domain—the Carey Act ceded one million acres to each of the Desert Lands Act[31] states.[32] In return, the states were to develop irrigation plans based on available water supplies and sell the land to "actual settlers" in tracts of no more than 160 acres.[33] The Carey Act relied on private capital to construct the dams and canals,[34] but this defect was soon cured by the Reclamation Act of 1902[35] which provided federal "loans" for projects.[36] The Carey Act is usually understood as a failed precursor to the Reclamation Act of 1902,[37] but it actually worked in Idaho—the major beneficiary of the Act.[38] The federal government transferred 618,000 acres of desert lands to the new state,[39] and several major projects were built including the dam that wiped out Henry Schodde.

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27 The legal basis of early schemes was the Desert Lands Act, which applied to California, Oregon, Nevada, and the territories of Dakota, Idaho, Montana, New Mexico, Washington, and Wyoming. Act of Mar. 3, 1877 (Desert Lands Act), Pub. L. No. 57-161, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. §§ 321–323, 325, 327–329 (2006)). An entrant could obtain a 640 tract for 25¢ per acre and, if irrigation improvements were made within three years, the land could be purchased for an additional $1.00 per acre. *Id.* § 1, 19 Stat. 377. Fraud was rampant, GATES, *supra* note 26, at 638–41, and Elwood Mead eventually concluded that it was not suitable for corporate enterprise. Elwood Mead, *Rise and Future of Irrigation in the United States*, *in* YEARBOOK OF THE UNITED STATES DEPARTMENT OF AGRICULTURE 1899, at 591, 604 (1900).

28 STEGNER, *supra* note 17, 375–455.

29 GATES, *supra* note 26, at 651.

30 *Id.* at 647–48.

31 Pub. L. No. 57-161, ch. 107, 19 Stat. 377 (1877).

32 Carey Act, 43 U.S.C. § 641 (2006).

33 *Id.*

34 *See* William Cronon, *Landscapes of Abundance and Scarcity*, *in* THE OXFORD HISTORY OF THE AMERICAN WEST 603, 617 (Clyde A. Milner, II et al. eds., 1994) (describing how private investors and states were unwilling to fund financially risky Carey Act projects).

35 Act of June 17, 1902 (Reclamation Act of 1902), ch. 1093, 32 Stat. 388 (codified as amended in scattered sections of 43 U.S.C. §§ 371–498 (2006)).

36 *Id.* § 1, 32 Stat. at 388.

37 *E.g.*, 3 WATER RESOURCES LAW: THE PRESIDENT'S WATER RESOURCES POLICY COMMISSION 181 (1950); *see also* Cronon, *supra* note 34, at 617–19 (describing the history of the Carey Act and Reclamation Act of 1902).

38 JAMES W. DAVIS, ARISTOCRAT IN BURLAP: A HISTORY OF THE POTATO IN IDAHO 164 (1992).

39 *Id.* at 166.

Fig. 1. Milner Dam, Twin Falls Idaho[40]

Sufficient capital was raised for a large private project around Twin Falls. The centerpiece was a dam envisioned by Ira Perrine, a local rancher and resort owner, who chose the site and designed it.[41] He persuaded Stanley B. Milner, a Salt Lake City banker,[42] and Frank Buhl, a millionaire from Pittsburgh who had sold his steel mill to Andrew Carnegie's U.S. Steel, to finance the dam.[43] Buhl formed a company and as president of the Twin Falls Water Company raised $3.5 million from investors.[44] The dam, named Milner

40 Library of Congress, *145. Milner Dam, Twin Falls County, Milner, Idaho; South View of Irrigation Falls*, http://www.loc.gov/pictures/item/id0139.photos.059574p/ (last visited Feb. 18, 2012).

41 Joe Yost, *History of Milner Dam*, http://www.tfcanal.com/milner.htm (last visited Feb. 18, 2012).

42 *Id.* By the late 19th century, Salt Lake City had become a center for raising Eastern and European capital. Keith L. Bryant, Jr., *Entering the Global Economy*, *in* THE OXFORD HISTORY OF THE AMERICAN WEST, *supra* note 34, at 195, 229.

43 Yost, *supra* note 40; Steve Crump, *You Don't Say: Some Frank Talk About, Well, Frank*, MAGIC VALLEY TIMES–NEWS, Aug. 29, 2010, http://magicvalley.com/news/local/article_ccc5158c-8c56-559e-86f2-1dbdba38cf9f.html (last visited Feb. 18, 2012).

44 Kuhn v. Buhl, 96 A. 977, 981 (Pa. 1916); C. J. BROSNAN, HISTORY OF THE STATE OF IDAHO 223 (1918); Yost, *supra* note 40. Schodde was initially represented by a young William E. Borah, but his election to the Senate in 1907 precluded further legal representation. *See* Schodde v. Twin Falls Land & Water Co., 161 F. 43, 44 (9th Cir. 1908), *aff'd*, 224 U.S. 107 (1912); BROSNAN, *supra*, at 223.

in honor of the financier who died before its completion, was built between 1903 and 1905 and supplied water to an initial 262,000 acres.[45] The Twin Falls project is generally considered one of the few successful privately financed Carey Act projects and today supplies water for 500,000 acres in the Magic Valley.[46] The dam was listed on the National Register of Historic Places in 1986.[47]

B. A Feisty Settler Challenges the Reclamation Dream

Schodde was a classic conflict between old and new technology triggered by a stubborn German immigrant settler in the Idaho Territory.[48] Schodde was one of the millions of Germans who left Germany in the mid-nineteenth century in search of a better life.[49] He was eighteen years old when he arrived in New Orleans in 1854 and bounced around the Midwest, Utah, and Nevada before becoming one of the first settlers near what is now Burley, Idaho.[50] In 1874, he chose a spot near where the Snake plunged into a 600-foot canyon to grow hay to feed his cattle.[51] The rapids caused by the descending river provided the power for eleven wheels which lifted water to the rim of the Snake to grow hay and grain.[52] Eventually, Schodde had three tracts of land along the Snake which were used both for mining and crops.[53] His water rights totaled 1250 miner's inches and were based on appropriations by an earlier landowner in 1889 and Schodde himself in

45 Yost, *supra* note 40.

46 Twin Falls Canal Co., *History: Development of the Tract*, http://www.tfcanal.com/history.htm (last visited Feb. 18, 2012); Yost, *supra* note 40.

47 Historic Places Database, *Milner Dam and the Twin Falls Main Canal*, http://www.hpdb.org/49481?tab=documentation (last visited Feb. 18, 2012).

48 In modern economic terms, one might call Mr. Schodde an irrational holdout immune to the "compelling" logic of the Coase theorem. Nobel Laureate Ronald Coase posited externality problems can be solved regardless of the initial assignment of property because the parties will bargain to an efficient solution. *See* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 8 (1960). But, there are always "Schoddes" who prefer principle to payout and refuse to bargain. There is vast literature on the Coase theorem. Judge Richard Posner has synthesized this by noting the two major qualifications. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 63–67 (8th ed. 2011). First, Coase assumed that transaction costs are zero. *Id.* at 10, 65. This unrealistic assumption is captured in the joke about an economist on a desert island, who with no available tools, is asked to open a can of food and answers, "First, assume a can opener." Second, the initial assignment of property rights matters because both individual wealth and "the use of resources" are affected. *Id.* at 65. Thus, there is a case for courts to define property rights in such a way to prevent the grossly inefficient use of resources as the Supreme Court did in *Schodde*. *Id.* at 63–67. For example, courts have enjoined the extraction of water and oil extracted for the sole purpose of drying a competitor's well. Gagnon v. French Lick Springs Hotel Co., 72 N.E. 849, 852 (Ind. 1904); Louisville Gas Co. v. Kentucky Heating Co., 77 S.W. 368, 370 (Ky. Ct. App. 1903).

49 *See* Rich Bohn, *More About Burley, Idaho!*, http://sellmorenow.com/burley-idaho/ (last visited Feb. 18, 2012).

50 *Id.*

51 *See id.*

52 *Schodde*, 224 U.S. 107, 114–15 (1912); Bohn, *supra* note 49.

53 *Schodde*, 224 U.S. at 114.

1895.[54] But progress claims losers, and the Milner Dam wiped out Schodde's water wheels, leaving his entire irrigation system useless. He claimed compensation for the loss of the pre-dam, natural current of the Snake River.[55] The Twin Falls Company offered Schodde land in the new irrigation project, but he rejected this offer and chose to stand on his perfected water rights.[56]

Schodde's claim that a property right must be enforced without any consideration of the economic impact of the person who interfered with it was articulated in a contemporary New York Court of Appeals case. In that case, the court refused to balance the equities when it enjoined a large pulp mill that polluted a farmer's stream:[57]

> Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction. Neither courts of equity nor law can be guided by such a rule, for if followed to its logical conclusion it would deprive the poor litigant of his little property by giving it to those already rich.[58]

However, in the arid Intermountain West, Schodde[59] was swimming upstream both legally and economically.

C. A Triple Play: A Loss at Every Judicial Level

His powerful argument was doomed from the start. Idaho opted for exclusive prior appropriation in 1889,[60] and this alone dictated Schodde's defeat in the trial court and the Ninth Circuit. More generally, the drive to reclaim arid lands was reflected by a dynamic water law.[61] "Throughout the West, water law rested on the utilitarian premise that both the unused water and the land through which it flowed would be 'wasted' unless people intervened to ensure their 'reclamation.'"[62] Mr. Schodde sought no less than the re-injection of the discarded natural flow theory of riparian rights as an element of an appropriative right. Had he prevailed, as did a similar party a decade later in California,[63] reclamation projects would have been very

54 *Id.*

55 *Id.* at 116.

56 Bohn, *supra* note 49.

57 Whalen v. Union Bag & Paper Co., 101 N.E. 805, 806 (N.Y. 1913).

58 *Id.*

59 Actually, his widow pursued the litigation because he died while the litigation was pending. *See Schodde*, 224 U.S. at 114.

60 IDAHO CONST. art. XV, § 3 (amended 1928); SCHWANTES, *supra* note 18, at 134.

61 I have argued that the future of prior appropriation is one of constant evolution as the economy of the West changes. A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RESOURCES J. 769, 770 (2001).

62 Cronon, *supra* note 34, at 616–17 (noting use of the word "reclamation" in reference to irrigation did not emerge until the mid-19th century).

63 Herminghaus v. S. Cal. Edison Co., 252 P. 607, 617–18 (Cal. 1926), *superseded by constitutional amendment*, CAL. CONST. art. XIV, § 3, *as recognized in* Gin S. Chow v. City of Santa Barbara, 22 P.2d 5 (Cal. 1933) (reaffirming the rule that a riparian had a right to the

costly, if not impossible, because early and inefficient water right holders could block the construction of any dam by claiming common law rights to spring flows.

Schodde's lawyers persisted nonetheless, asserting that Schodde had a riparian right to the unaltered current necessary to turn his water wheels, which vested when he perfected his appropriation. To support this novel proposition, Schodde asserted that "[w]hile the doctrine of appropriation is . . . independent of that of riparian rights, its principles come to be assimilated to the latter doctrine."[64] Schodde therefore "could fix that right by an appropriation to a beneficial use so as to make it available as against a subsequent appropriator."[65] However, in addition to the general hostility to riparian rights in the Intermountain West, the argument that "a right is a right" begged the question: just what did Schodde appropriate?

Schodde fared no better in the Supreme Court. Justice White's opinion is largely a series of circuit and district court quotes that mix technical and instrumental arguments together.[66] He made short shrift of Schodde's novel riparian assimilation argument. Justice White accepted the Ninth Circuit's conclusion that a ruling for the plaintiff would have "disastrous results" for the public welfare.[67] Thus, the fundamental technical flaw in the assimilation argument was that the right to claim the entire current "would be absolutely destructive of the fundamental conceptions upon which the theory of appropriation for beneficial use proceeds, since it would allow the owner of a riparian right to appropriate the entire volume of the water of the river, without regard to the extent of his beneficial use."[68] Riparian rights exist only

natural flow of a river, thus greatly increasing the costs of the construction of public utility hydroelectric dams). As Justice Shenk's dissenting opinion in *Herminghaus* noted, "In order to have the beneficial use of less than 1 [percent] of the maximum flow of the San Joaquin river on their riparian lands . . . over 99 [percent] of that flow is wasted." *Id.* at 624. Two years later, California voters overturned the decision by adopting a constitutional amendment limiting owners of riparian rights "to such water as shall be reasonably required for the beneficial use to be served," and providing that "such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water." CAL. CONST. art. X, § 2 (amended 1974). For a history of the doctrine of riparian rights in California, see *infra* notes 100–08 and accompanying text, and M. Catherine Miller, *Riparian Rights and the Control of Water in California, 1879–1928: The Relationship Between an Agricultural Enterprise and Legal Change*, 59 AGRIC. HIST. 1 (1985).

64 *Schodde*, 224 U.S. 107, 109 (1912). To support this, the brief argued that a riparian prevails against an appropriator because Idaho had adopted the California dual system when it borrowed the latter's irrigation code. *Id.* It also cited *Hutchinson v. Watson Slough Ditch Co.*, 101 P. 1059, 1062 (Idaho 1909), which held that a riparian could divert water provided that it did not interfere with a prior appropriation. *Schodde*, 224 U.S. at 110. This prioritization is a common early result in exclusive prior appropriation states, 1 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 192 (1971), but the result is the opposite of the California dual system, which provides that riparian rights are superior to appropriative ones. 3 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 203–04 (1977).

65 *Schodde*, 224 U.S. at 112.

66 *See id.* at 114–26.

67 *Id.* at 119–22.

68 *Id.* at 122. Judge Morrow's Ninth Circuit opinion offered a more elegant technical explanation: "There can be no right to the current of a stream as appurtenant to a diversion of the flowing waters of the stream. The two rights in such case would be equal and of the same

in situations: 1) where they control non-consumptive use disputes, and 2) as a license to withdraw that can be superseded by an appropriation on the stream.[69]

The Court accepted the water company's argument, based on dicta in *Basey v. Gallagher*,[70] that Idaho had adopted the doctrine of prior appropriation, and—ironically—this served as the basis for a theory of correlative appropriative rights.[71] Justice White agreed with the circuit court's assertion that "the right of appropriation must be exercised with some regard to the rights of the public."[72] Thus, the quantity of water appropriated must be "reasonable" and must give due regard to the "general condition of the country and the necessities of the people," or else the appropriation is void.[73] The reason was the imperative of aridity. In an era when the sustained settlement of the Intermountain West aside from a few places was in doubt, the courts understood the "felt necessities of the time."[74]

> In this arid country, where the largest duty and the greatest use must be had from every inch of water in the interest of agriculture and home-building, it will not do to say that a stream may be dammed so as to cause subirrigation of a few acres, at a loss of enough water to surface irrigate ten times as much by proper application.[75]

Schodde is best understood as a classic example of Progressive Era jurisprudence.[76] Obsessed with the need to promote the efficient use of

character and quality, and one such right cannot be appurtenant to the other. Lord Coke says []: 'A thing corporeal cannot properly be appurtenant to a thing corporeal nor a thing incorporeal to a thing incorporeal.'" Schodde v. Twin Falls Land & Water Co., 161 F. 43, 45 (9th Cir. 1908) (quoting Lord Coke's A READABLE EDITION OF COKE UPON LITTLETON, at Co. Litt. 121b (Thomas Coventry ed., Saunders & Benning 1830)). This reasoning is very much in line with views of three Ninth Circuit judges at that time who agreed that the law should promote western resource development at the expense of the environment and, in Schodde's case, those who threatened to retard it. *See* DAVID C. FREDERICK, RUGGED JUSTICE: THE NINTH CIRCUIT COURT OF APPEALS AND THE AMERICAN WEST, 1891–1941, at 114–15 (1994).

69 *See Hutchinson*, 101 P. at 1061–63 (allowing a riparian, who had relied upon an appropriator's diversion, to prevent that appropriator from diverting the water elsewhere when it was not in use because the appropriator's right to use the water does not completely abrogate the rights of downstream riparian users, at least to the extent that they "do not come in conflict with the rights of appropriators").

70 20 U.S. (1 Wall.) 670 (1874).

71 *See Schodde*, 224 U.S. at 121–22.

72 *Id.* at 120 (quoting *Schodde*, 161 F. 43, 47 (9th Cir. 1908)).

73 *Id.* at 121 (quoting *Schodde*, 161 F. at 47).

74 O.W. HOLMES, JR., THE COMMON LAW 1 (1881) (originating the quoted phrase). Although Holmes is credited for the origination of this phrase, its fullest exposition is found in BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112–19 (1921).

75 *Schodde*, 224 U.S. at 124–25 (quoting Van Camp v. Emery, 89 P. 752, 754 (Idaho 1907)).

76 *See* Charles M. Haar & Michael Allan Wolf, Commentary, Euclid *Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2192–93, 2195–96 (2002) (describing the juxtaposition and interplay in Progressive Era jurisprudence between respect for private property ownership, on one hand, and deference to local, social reform-oriented land-use regulations adopted to serve community needs on the other).

resources and to prevent the "monopolization" of resources at the expense of a broader community of users, courts were open to the imposition of a reasonable use constraint on property rights.

III. WIEL GETS IT RIGHT

The need to limit prior appropriation lies in the era of posted notices and quickly dug ditches. After the application of the doctrine quickly led to overappropriated streams, legislatures and courts realized that the creation of property rights had to be tempered by doctrines which allowed access to the maximum number of users on a stream.[77] During the Progressive Conservation Era, these arguments had considerable resonance, as Judge Morrow's Ninth Circuit opinion illustrates.[78] The dominant themes of the era were rational resource development and the prevention of waste.

The leading water law treatise writer of the time, Samuel Wiel, immediately recognized that the Ninth Circuit Court of Appeals decision was a significant departure from classic prior appropriation law. He concluded that the decision was "really based upon a modification of the law of appropriation, rather than under it,"[79] and embraced it because it fit with a theory that he had recently articulated, a doctrine of reasonable priority. Wiel's 1909 *Harvard Law Review* article argued that priority should not be enforced against subsequent users if it would be unreasonable as to those users.[80] The rule that an appropriator could take the full amount of a stream provided that the use was beneficial was a relic of the frontier era that Frederick Jackson Turner had declared over in 1890.[81] To Wiel, a more enlightened postfrontier justice demanded "an equitable co-relation of the users for the common good."[82]

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77 *Cf.* Daphna Lewinsohn-Zamir, *More Is Not Always Better Than Less: An Exploration in Property Law*, 92 MINN. L. REV. 634, 666 (2008) (discussing the reasons for granting limited rather than absolute property rights is to reduce the incident of low-valuing owners).

78 Judge Morrow served on the Ninth Circuit almost from its founding. He was a former Republican Congressman and district judge before his elevation to the newly created circuit court of appeals. FREDERICK, *supra* note 68, at 26–28.

79 1 SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES 310 (3d ed. 1911). Wiel contrasted *Schodde* with the famous *Cascade Town Co. v. Empire Water & Power Co.*, 181 F. 1011 (D. Colo. 1910), discussed *infra* notes 87–90 and accompanying text, which he characterized as a clear adoption of the riparian doctrine. WIEL, *supra*, at 398.

80 Samuel C. Wiel, "*Priority" in Western Water Law*, 18 YALE L.J. 189, 190, 195–97 (1909) (describing reasonable priority as a "growing doctrine," and noting several prominent judges, including Judge Morrow, who had ascribed to it).

81 Wiel quoted the strong anti-monopoly analysis of Judge Morrow. *Id.* at 197. *See also* Frederick Jackson Turner, *The Significance of the Frontier in American History*, *available at* http://us.history.wisc.edu/hist102/pdocs/turner_frontier.pdf. Much is known about Judge Morrow, but little is available, at least through the Internet, about Samuel Wiel. However, it is not unreasonable to speculate that they were well acquainted with each other in San Francisco.

82 Wiel, *supra* note 80, at 194.

Schodde is therefore an important representative of the anti-monopoly, collective strain in prior appropriation.[83] The reasonable appropriation doctrine is consistent with the correlative nature of all water rights. Riparian rights have always been seen as correlative rights because the reasonableness of one use can only be determined in relation to other users. Appropriation rights are, of course, not strictly correlative because they are "exclusive to the extent of the priority," and thus cannot be partially displaced by subsequent users.[84] However, rules such as beneficial use and the protection of junior rights when water is transferred illustrate that appropriative rights have always been sensitive to the interests of all users from a common source which was assumed to be consistent with the broader social welfare of the state.

IV. THE FIRST THREE DECADES: *SCHODDE* INCONSISTENTLY APPLIED

Wiel's prediction that the reasonable means of diversion principle would blossom into a powerful doctrine was not initially fulfilled. *Schodde*'s only Supreme Court citation is Justice Sutherland's opinion in *California Oregon Power Co. v. Beaver Portland Cement Co.*,[85] and the case is cited only as additional support for his holding that the Desert Lands Act allowed the western states complete discretion to choose between the common law and prior appropriation.[86]

Several early cases presented similar facts, but state and lower federal courts choose to distinguish *Schodde*. For example, *Schodde* was soon cited by the Eighth Circuit in *Empire Water & Power Co. v. Cascade Town Co.*[87]

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83 *Cf.* David B. Schorr, *Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights*, 32 ECOLOGY L.Q. 3, 66 (2005) (defining priority rights in Colorado as the end of "opening the opportunity to appropriate water to all comers, not just a narrow class of landowners near the stream").

84 2 SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES 1076 (3d ed. 1911).

85 295 U.S. 142, 160 (1935) (describing *Schodde* as holding that common law riparian rights were incompatible with prior appropriation).

86 The Desert Lands Act provides that "all surplus water over and above such actual appropriation and use . . . shall remain and be held free for the appropriation and use of the public for irrigation." Pub. L. No. 57-161, ch. 107, 19 Stat. 377, 377 (1877). Courts in California and Washington had held that, as the owner of the public domain, the federal government possessed riparian rights and these rights passed to federal patentees subject only to prior appropriations. Note, *Federal–State Conflicts over the Control of Western Waters*, 60 COLUM. L. REV. 967, 972–75 (1960), details the diversity of state court views about the relationship between federal ownership of the public domain and water rights. These states limited the surplus waters language of the Act to Desert Lands Act entries. San Joaquin & Kings River Canal & Irrigation Co. v. Worswick, 203 P. 999, 1006–07 (Cal. 1922); Still v. Palouse Irrigation & Power Co., 117 P. 466, 468–69 (Wash. 1911). Justice Sutherland rejected the theory that the federal water rights passed to federal patentees by holding that the Desert Lands Act severed all western waters from the public domain and allowed the states to choose whatever allocation theory was thought best for the climate and soils of the individual state. *Cal. Or. Power Co.*, 295 U.S. at 160–61.

87 205 F. 123, 129 (8th Cir. 1913) (recognizing that *in situ* uses can be beneficial). Conversely, the Oregon Supreme Court held that the appropriation of water for power generation was a beneficial use, and rejected the argument that *Schodde* suggested otherwise

This well-known case involved a conflict between a resort owner, who claimed that he had appropriated the flow of a waterfall, and a power company that wanted to impound the creek above the falls.[88] The Eighth Circuit first seemed to apply *Schodde* when it stated that the resort owner could not "hold to all the water for the scant vegetation which lines [his] banks but must make the most efficient use by applying it to his land."[89] However, this limitation on the right to appropriate was not applied because the resort owner had extensively improved his land in reliance on the flow of the falls and was thus entitled to rely "upon an efficient application by nature."[90]

The Idaho Supreme Court refused to follow *Schodde* in a similar claim by senior downstream appropriators to the natural flow of a stream prior to the construction of an upstream dam and reservoir.[91] The court held that the appropriators were entitled to the full natural flow and distinguished *Schodde* because the reservoir interfered with the availability of water whereas Schodde was not deprived of water but of use of the current.[92] Montana also refused to apply *Schodde* in the well-known *State ex rel. Crowley v. District Court of Sixth Judicial District*.[93] An irrigation company impounded the entire flow of the Madison River above plaintiff's diversion dam and therefore prevented him from diverting his senior right by gravity flow.[94] The district court cited *Schodde* for the proposition that the plaintiff was not entitled to relief because there can be no vested right in the means of diversion.[95] But, the state supreme court, unlike the United States Supreme Court, saw the case as a collective David and Goliath tale. Montana's small farmers could not be expected to install more efficient diversions, and thus it refused to adopt a rule which would result in "few, if any, irrigation water rights in the state of Montana."[96] *Schodde* was again distinguished by confining the precedent to its narrowest reading—it was a claim to the current, which was never part of his appropriation, and not to a specific amount of water.

The Ninth Circuit did apply *Schodde* to a similar factual situation. An Idaho farmer, whose land straddled the Bear River, brought a nuisance action against an upstream power company whose lawful releases prevented him from fording the river "as had been his wont."[97] The Ninth Circuit

based on the fact that *Schodde* held that the full current could not be appropriated. *In re* Water Rights of Deschutes River & Tributaries, 286 P. 563, 581 (Or. 1930), *modified by* 294 P. 1049 (Or. 1930).

88 *Empire Water & Power Co.*, 205 F. at 124–25.

89 *Id.* at 129 (citing *Schodde*, 224 U.S. 107 (1912)).

90 *Id.*

91 Arkoosh v. Big Wood Canal Co., 283 P. 522, 526 (Idaho 1929).

92 *Id.* ("Here it is charged that the waters to which the respondents are entitled are not available and have been entirely lost and diverted and the court so found.").

93 88 P.2d 23, 28–29 (Mont. 1939).

94 *Id.* at 24.

95 *Id.* at 28.

96 *Id.* at 27.

97 Johnson v. Utah Power & Light Co., 215 F.2d 814, 815 (9th Cir. 1954).

refused to find a nuisance[98] because to recognize the nuisance claim would acknowledge a riparian right to the natural flow which had been implicitly and correctly rejected in *Schodde*.[99]

Ironically, *Schodde* was cited in the sole dissent to the last of Justice John Wesley Shenk's precedent-setting California Supreme Court opinions[100] interpreting the 1928 California constitutional amendment[101]—which replaced the natural flow with the reasonable use theory of riparian rights.[102] Justice Schenk's opinion eliminated the exercise and enjoyment of "abstract" riparian rights.[103] In *Meridian v. City & County of San Francisco*, a large ranch on the west side of the San Joaquin Valley challenged San Francisco's plans to expand Hetch Hetchy reservoir.[104] The El Solyo Ranch claimed both riparian and appropriative rights to the San Joaquin just below its confluence with the Tuolumne, the source of San Francisco's Hetch Hetchy water rights.[105] The trial court recognized the ranch's superior riparian rights under California's dual system and enjoined the City from storing additional waters in O'Shaughnessy Dam, although the ranch was unable to prove that it would be deprived of the water consistent with its past diversions.[106] With one dissent, the supreme court modified the trial court order because "the constitutional amendment of 1928 released such excess waters from the former restrictions and limitations . . . and have made them available for further beneficial uses."[107] One justice dissented because the City would not need the water for several decades, citing *Schodde* for the proposition that "a proposed waste of water by a litigant precludes him from seeking the aid of a court of equity which will never declare a right or aid the accomplishment of a purpose violative of law or public policy."[108]

98 *Id.* at 816.

99 *Id.* ("[E]ven assuming the possible persistence in that state of the doctrine of riparian rights side by side with the doctrine which that state has so long espoused . . . the Schodde case supplies a complete answer to appellant's contentions.").

100 Meridian v. City & Cnty. of San Francisco, 90 P.2d 537, 555, 557 (Cal. 1939) (en banc) (Edmonds, J., dissenting).

101 CAL. CONST. art. X, § 2 (amended 1974).

102 Justice Shenk dissented in *Herminghaus v. S. Cal. Edison Co.*, 252 P. 607, 624 (Cal. 1926), and authored all the seminal opinions interpreting the 1928 California constitutional amendment as wiping out any form of the natural flow theory and thus allowing the appropriation and storage of surplus waters. *E.g.*, Gin S. Chow v. City of Santa Barbara, 22 P.2d 5, 18 (Cal. 1933); Peabody v. City of Vallejo, 40 P.2d 486, 498–99 (Cal. 1935).

103 *E.g.*, *Herminghaus*, 252 P. at 625–27 (Shenk, J., dissenting).

104 *Meridian*, 90 P.2d at 539–41.

105 *Id.* at 539.

106 *See id.* at 546–47.

107 *Id.* at 554–55.

108 *Id.* at 557. The dissenting judge may have been ahead of his time. In *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 170 P.3d 307, 309 (Colo. 2007) (en banc), a water court awarded two small districts in southwestern Colorado a conditional water right for 29,000 acre-feet of water, plus return flows, with the right to continuously refill a reservoir based on a 100-year planning horizon. The Colorado Supreme Court remanded the decision due to the water court's failure to make sufficient findings concerning the area's future growth projections. *Id.* at 309–10. Citing a National Research Council study regarding population forecasting, the court

V. *SCHODDE* REEMERGES

A. The Lessons Initially Ignored as Groundwater Conflicts Intensify

Schodde reemerged in the 1960s as courts first began to confront the use of high capacity pumps to extract groundwater. In the nineteenth and early twentieth centuries, western irrigators relied almost exclusively on surface sources except in a few artesian areas. Groundwater use generally came only after senior surface irrigation rights were established because the technology for high capacity wells did not develop until after World War II.[109] Increased groundwater use required courts and legislatures to define the nature of an appropriative groundwater right because classic prior appropriation does not work well to adjust conflicts among pumpers. Classic appropriation also exposes serious problems when used to integrate ground and surface water rights. There are three basic problems which relate to the reasonableness of diversions.

First, each pumper in a common aquifer contributes to the lowering of the water table, thereby affecting all users. Prior appropriation was designed for surface diversions, but does not work well for groundwater where the issue is pressure level and not the availability of "wet" water. A junior's upstream surface diversion can have an immediate adverse impact on a senior's use of water, but this can be quickly remedied since headgates can be shut.[110] When this actually occurs on small ditches and canals, the justice is generally understood and accepted. Thus, prior appropriation rightfully blames the junior for the senior's injury. The justice of selectively shutting down wells, however, is not so easy to determine. All groundwater pumpers can mutually injure each other by jointly lowering the water table.[111] Thus, a fair and efficient solution requires that all pumpers share the costs of a

held that municipalities' statutory exemption from the need to have a vested legal interest in the lands served does immunize governmental water supply agencies from the State's antispeculative doctrines. *Id.* at 311–12 (citing NAT'L RESEARCH COUNCIL, BEYOND SIX BILLION: FORECASTING THE WORLD'S POPULATION 188–90 (John Bongaarts & Rodolfo A. Bulatao eds., 2000)). According to the court in *Pagosa Area Water & Sanitation Dist.*, an agency must demonstrate three elements to make a nonspeculative appropriation: "(1) what is a reasonable water supply planning period; (2) what are the substantiated population projections based on a normal rate of growth for that period; and (3) what amount of available unappropriated water is reasonably necessary to serve the reasonably anticipated needs of the governmental agency for the planning period, above its current water supply." 170 P.3d at 313. Governmental applicants must also demonstrate that the agency will put the water to actual beneficial use within a reasonable period of time. *Id.* In a later case, the Colorado Supreme Court rejected the argument that municipal conditional appropriations are legislative acts. Pagosa Area Water & Sanitation Dist. v. Trout Unlimited, 219 P.3d 774, 788 (Colo. 2009) (en banc).

109 DAVID M. FREEMAN, IMPLEMENTING THE ENDANGERED SPECIES ACT ON THE PLATTE BASIN WATER COMMONS 111 (2010).

110 Douglas L. Grant, *The Complexities of Managing Hydrologically Connected Surface Water and Groundwater Under the Appropriation Doctrine*, 22 LAND & WATER L. REV. 63, 74 (1987).

111 *See* Allen v. Cal. Water & Tel. Co., 176 P.2d 8, 18–19 (Cal. 1946) (en banc).

lowered water table, but the administrative costs of implementing and enforcing any such scheme are substantial.[112]

Second, the strict application of priority to include the water level at the time of the appropriation in effect allocates the aquifer exclusively to early pumpers even though sufficient water exists to support greater pumping and thus can produce an inefficient allocation of water.[113]

The third related problem arises from the difficulties of integrating surface and groundwater priorities. Among the western states, only New Mexico got a head start on conjunctive management and has long maintained the water budget of the Rio Grande by conditioning new groundwater appropriations on the retirement of senior surface rights.[114] The justice of shutting junior wells to protect senior surface users is more contested. For example it takes time—sometimes a long time—for the effects of reducing a cone of depression to be felt by surface users.[115] Physical solutions are often preferable to the strict application of priorities.

In the first round of right to lift cases, courts tried to rely on prior appropriation and ignored the broader meaning of *Schodde*. The first Idaho case to address the issue concluded that a senior appropriator had a right to the level of static pressure at the time of appropriation.[116] *Schodde* was not cited or discussed and the Idaho Supreme Court rejected any argument that a reasonable groundwater appropriation included a duty to install pumps when an artesian field was lowered.[117] It analogized the junior's pumping to an illegal change of the point of diversion.[118] Utah followed suit over twenty years later,[119] accepting the right to static head pressure as a component of a groundwater appropriation and pronouncing it "universally recognized in other states."[120] One justice, Justice Crockett, dissented. Although he did not mention *Schodde*, his opinion captured the broad rationale of the case in his assertion that the recognition of an absolute right to static pressure "does

112 *See* Alan E. Friedman, *The Economics of the Common Pool: Property Rights in Exhaustible Resources*, 18 UCLA L. REV. 855, 876–87 (1971).

113 *Id.* at 876–78.

114 *See* IRA G. CLARK, WATER IN NEW MEXICO: A HISTORY OF ITS MANAGEMENT AND USE 312 (1987) (explaining a New Mexico Supreme Court holding that new groundwater appropriations can be conditioned on the retirement of senior surface water rights to prevent overuse of water resources).

115 *See* Grant, *supra* note 110, at 74.

116 Noh v. Stoner, 26 P.2d 1112, 1113–14 (Idaho 1933), *superseded by statute*, IDAHO CODE ANN. § 42-226 (1951), *as recognized in* Baker v. Ore-Ida Foods, Inc., 513 P.2d 627 (Idaho 1973). *See infra* text accompanying notes 130–33 for a discussion of the legislature's modification of *Noh*.

117 *Id.* at 1113 ("An earlier appropriator is not required to bear the expense incident or necessary to secure a flow of water to a later appropriator.").

118 *Id.*

119 Current Creek Irrigation Co. v. Andrews, 344 P.2d 528 (Utah 1959).

120 *Id.* at 532. To support this statement, the court cited *inter alia* both *Noh*, 26 P.2d 1112 and *State ex rel. Crowley*, 88 P.2d 23 (Mont. 1939); and also cited two cases that did not support the proposition: Pima Farms Co. v. Proctor, 245 P. 369, 374–75 (Ariz. 1926), and City of Lodi v. E. Bay Mun. Util. Dist., 60 P.2d 439, 452–53 (Cal. 1936).

not work to serve the necessary purpose of maximum development and use of water."[121]

B. Colorado Applies and Extends Schodde

Schodde emerged first in Colorado as the powerful, general principle that Wiel envisioned. Utah soon followed suit and Idaho eventually embraced it, albeit with some backsliding. Before Colorado began the legislative process of integrating ground and surface water rights, a senior appropriator in an artesian aquifer sued a junior municipal pumper who lowered the water table below the senior well's intake level.[122] In reversing an injunction against the juniors,[123] *City of Colorado Springs v. Bender* cited *Schodde* for the proposition that "each diverter must establish some reasonable means of effectuating his diversion. He is not entitled to command the whole or a substantial flow of the stream merely to facilitate his taking the fraction of the whole flow to which he is entitled."[124] The *Bender* court's application of *Schodde* to a situation different from an appropriator who claimed the whole flow to support a modest use is a major step toward the broad principle that there is a reasonableness limitation built into all appropriations.

Justice Crockett's view that individual groundwater rights must be balanced against the more efficient use of plentiful groundwater ultimately prevailed a decade later in Utah. A municipal appropriator replaced seven old wells with a new well that took water more efficiently, but at the expense of five small domestic well owners.[125] The State Engineer required the city to replace their lost water at the level of their prior use.[126] Now writing for the majority, Justice Crockett distinguished *Current Creek Irrigation Co. v. Andrews*[127] because this was a change of use rather than a new withdrawal and invalidated the condition.[128] Justice Crockett concluded:

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121 *Current Creek Irrigation Co.*, 344 P.2d at 535; *see infra* notes 127–29 and accompanying text.

122 The "flowing" aquifer was tributary to a creek and thus part of a natural water course subject to appropriation. City of Colo. Springs v. Bender, 366 P.2d 552, 554 (Colo. 1961) (en banc).

123 *Id.* at 556.

124 *Id.* at 555. In remanding the case, the court suggested that at some point it would be economically unreasonable to make the senior bear the expenses of well deepening. *Id.* at 556.

125 Wayman v. Murray City Corp., 458 P.2d 861, 862 (Utah 1969).

126 *Id.*

127 *Id.* at 863.

128 *Id.* at 863, 867. In spite of *Wayman*, the Utah Supreme Court cannot seem to let go of *Current Creek*. *Current Creek*'s holding was reiterated in *Bingham v. Roosevelt City Corp.*, 235 P.3d 730, 744 (Utah 2010). Although the court refused to apply it to a group of landowners who claimed they had been damaged when the city lowered the water table beneath their land, the court adopted a rationale fully consistent with *Schodde*. The court held that the landowners had no property right to saturated soil and suffered no injury because they "are capable of obtaining all of the water to which they are entitled in the same manner in which they have been diverting it." *Id.* at 744.

> [T]he rights of each individual should be to some degree subordinate to and correlated with reasonable conditions and limitations thereon which are established by law for the general good. We believe that reflection will demonstrate that if this principle is applied with wisdom and restraint, in due consideration for the rights of all concerned, it will be seen that the result will much better serve the group (all users and society) by putting to beneficial use the greatest amount of available water, and ultimately also for each individual therein, than would any ruthless insistence upon individual rights which simply results in competitive digging of deeper and deeper wells.[129]

In 1953, Idaho amended legislation limiting senior pumpers to "reasonable ground water pumping levels."[130] After a trial court limited pumping in an aquifer to four senior wells, the Idaho Supreme Court in *Baker v. Ore-Ida Foods, Inc.*[131] affirmed the injunction "to the extent that the additional pumping of the juniors' wells [including Ore-Ida Foods' wells] will exceed the 'reasonably anticipated average rate of future recharge,'" but noted that "senior appropriators are not necessarily entitled to maintenance of historic pumping levels."[132] It justified the holding as consistent with hard priority law by reasoning that, "although a senior may have a prior right to ground water, if his means of appropriation demands an unreasonable pumping level his historic means of appropriation will not be protected."[133] *Schodde* was indirectly referenced through the court's citation to *Bender*.[134]

Schodde's re-emergence accelerated after Colorado courts turned to it to uphold legislation integrating ground and surface water rights in the Arkansas basin. *Fellhauer v. People*[135] reversed a division engineer's order shutting down junior wells connected to the Arkansas River because there was no causal connection between the well and injury to any senior surface user.[136] However, the court announced that *Bender*'s invocation of *Schodde* signaled the need to integrate the protection of vested rights with "the new drama of *maximum utilization*" of the water of the state.[137] Thus, factors such as the efficiency of the diversion facilities were relevant in enforcing priorities.[138]

Fellhauer's linking of *Schodde*'s reasonable means of diversion standard with maximum water utilization was more fully articulated in *Alamosa-La Jara Water Users Protection Ass'n v. Gould*.[139] To meet its Rio Grande Compact[140] obligations to New Mexico, the Colorado State Engineer

129 *Wayman*, 458 P.2d at 865.

130 IDAHO CODE ANN. § 42-226 (2003); 1953 Idaho Sess. Laws 278.

131 513 P.2d 627 (Idaho 1973).

132 *Id.* at 630, 635–37.

133 *Id.* at 636.

134 *Id.* at 633 (citing *Bender*, 366 P.2d 552, 555–56 (Colo. 1961) (en banc), regarding the adequacy of seniors' method of diversion).

135 447 P.2d 986 (Colo. 1968) (en banc).

136 *Id.* at 993, 997.

137 *Id.* at 994.

138 *Id.* at 993–94.

139 674 P.2d 914, 932–34 (Colo. 1984) (en banc).

140 Pub. L. No. 76-96, ch. 155, 53 Stat. 785 (1939).

ordered the phase-out of many wells tributary to the Conejos River in the San Luis Valley.[141] The water court reversed the order and held that the reasonable diversion rule required senior surface users to supplement their right with tributary groundwater before they could curtail junior rights.[142] On appeal, groundwater users invoked *Schodde* to "argue that it is not unreasonable to require surface diverters to deepen their headgates if the water from the stream is beneath their feet."[143] The State Engineer defended his order on the ground that a 1971 case limiting *Fellhauer*'s maximum utilization policy precluded any consideration of the reasonableness of surface diversions,[144] but the supreme court expressly overruled that case to the extent it precluded "reasonable-means-of-diversion . . . as a method of maximizing utilization," and implicitly affirmed *Fellhauer* on this ground.[145] It upheld the water court's conclusion that surface owners could be required to withdraw tributary groundwater to satisfy their rights.[146] More importantly, it remanded the rules to the State Engineer and ordered him to consider a wide range of factors, including environmental and economic, to determine "whether the reasonable-means-of-diversion doctrine provides . . . a method of achieving maximum utilization of water."[147]

Ten years later in *A-B Cattle Co. v. United States*,[148] *Schodde* was one of two primary cases cited for the proposition that an appropriator does not have a right to the quality of water at the time of his appropriation to perpetrate an inefficient use.[149] In *A-B Cattle Company*, the Bureau of Reclamation's construction of Pueblo Dam and filling of Pueblo Reservoir inundated the headgates of Bessemer Company's ditch.[150] The Bureau offered substitute water, but the company objected because it was clear water, not silty, and thus would not line its ditches.[151] The court rejected Bessemer's argument, stating that "[i]n using its leaky ditches the Bessemer Co. has not attempted to make maximum utilization of the water."[152]

Similarly in *City of Thornton v. Bijou Irrigation Co.*,[153] the Colorado Supreme Court relied on *Bender* and *Schodde* to reject Eastman Kodak's objection to an exchange program that would provide a substitute water

141 *Gould*, 674 P.2d at 916–17, 919.

142 *Id.* at 917, 920, 931, 935.

143 *Id.* at 934.

144 *Id.* at 932 (discussing the State Engineer's reliance on Kuiper v. Well Owners Conservation Ass'n, 490 P.2d 268 (Colo. 1971) (en banc)).

145 *Id.* at 934–35 (overruling Kuiper v. Well Owners Conservation Ass'n, 490 P.2d 268 (Colo. 1971) (en banc), and holding that a surface owner could not be compelled to use groundwater before making a call on junior rights).

146 *Id.* at 935.

147 *Id.* The court approved the State Engineer's suggestion that juniors might be assessed the cost of the new senior wells. *Id.*

148 589 P.2d 57 (Colo. 1978) (en banc).

149 *Id.* at 67–68.

150 *Id.* at 58–59.

151 *Id.* at 59.

152 *Id.* at 61.

153 926 P.2d 1 (Colo. 1996) (en banc).

supply for water diverted upstream of Kodak's manufacturing plant.[154] The City of Thornton's water exchange program would take water above Kodak's plant and return it into the river below the plant.[155] The water remaining in the river would still allow Kodak to divert its decreed appropriation.[156] But, Kodak also wanted the court to set a minimum instream flow to save it the additional expense of treating its waste discharges as the projected flow would be below the level of which its effluent limitations were based.[157]

C. Idaho Takes a Large Step Forward and a Half Step Back

Schodde has returned to its roots. In the twentieth century, Idaho's Snake River Plain became one of the West's most productive yet overappropriated irrigated areas. Idaho has long struggled with the tension between the demands of senior surface appropriators and junior groundwater pumpers and the difficulties of implementing the teachings of hydrologists that these two sources of water are often one and therefore should be managed conjunctively.[158] However, it is difficult and costly to fit conjunctive management into prior appropriation which was not designed for the hydrological complexities and scale of the Snake River Plain. Today, over 3 million acres are currently under irrigation in this plain, many of them supplied by groundwater.[159] Some of these groundwater rights were originally surface appropriations that were converted to groundwater rights with an early priority, but many other groundwater rights are original appropriations junior to many older surface or converted rights.[160]

> The [Snake River Plain] is a classic example of the false dichotomy between ground and surface water. Most of the groundwater is pumped from the Eastern Snake Plain Aquifer, which is hydrologically connected to the river. . . . Idaho, along with [Colorado and] other states, allowed two separate systems to develop and is now playing catch-up. Idaho has long applied prior appropriation to groundwater, but is only now confronting the difficulty of real integration of two water sources that were long treated as separate. . . . The increasing sophistication of groundwater models undercut this 'out of sight, out of mind mentality' as the costs of ignoring reality [have begun] to mount.[161]

154 *Id.* at 90, 94.

155 *Id.* at 90.

156 *Id.*

157 *Id.*

158 David H. Getches & A. Dan Tarlock, *Water Law and Management: An Urbanizing and Greener West Copes with New Challenges*, *in* THE EVOLUTION OF NATURAL RESOURCES LAW AND POLICY 316, 339 (Lawrence J. MacDonnell & Sarah F. Bates eds., 2010).

159 *Id.*

160 *Id.* at 339–40.

161 *Id.* at 340–41.

The price for a Big Mac and fries is depleted aquifers, springs, and river flows.[162] In the 1990s, Idaho aggressively began to embrace conjunctive management,

> [O]nly to discover that the principles of prior appropriation look better on paper than they do on the ground. In theory, a junior groundwater pumper is just another junior right that must yield to a senior in a dry year. However, junior pumpers have the incentive and power to resist the theory's literal application. [163]

Groundwater pumpers have both equity and economics on their side.[164] They also have the resources to offer physical solutions that provide substitute water to seniors. "Not surprisingly, courts and administrators are beginning to step back from the view that prior appropriation is a fair and easy-to-administer system and is as imperative for the West as it was when the California and Colorado courts created the doctrine out of whole cloth."[165]

A major conflict arose in 1993 when senior surface irrigators in the Hagerman Valley made a call on junior pumpers.[166] This initial "call was avoided when enough irrigators agreed to reconvert their rights to surface diversions."[167] In 2005, however, the problem resurfaced:

> [T]rout farms in the Magic Valley, in the south central part of the state, made a call and rejected an initial offer of 45,000 acre-feet of replacement water. The Idaho Department of Water Resources eventually threatened to shut pumps for 41,000 acres and several towns and industries in the valley.[168]

It was reluctant to actually do this.[169] Instead, the Department adopted conjunctive use regulations which relied on the futile call doctrine[170] and the reasonable appropriation principle of *Schodde* to give them the discretion to decide when to honor a call.[171] One section of the rules limited a senior appropriator's storage rights to less than the full right.[172] Thus, senior appropriators could not insist on the full right to store water for future dry years, but had to use some of the stored water in lieu of a call on junior pumpers.

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162 *Id.* at 341.

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.* at 342.

167 *Id.*

168 *Id.*

169 *Id.*

170 IDAHO ADMIN. CODE r. 37.03.11.020.04 (2011). The futile call doctrine allows an administrator to reject a call to enforce priorities if shutting down a junior diversion would not in fact benefit a senior. A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY 188 (6th ed. 2009). The doctrine is semi-mythical as it has been seldom applied. *See* State *ex rel.* Cary v. Cochran, 292 N.W. 239, 248 (Neb. 1940).

171 Getches & Tarlock, *supra* note 158, at 342.

172 IDAHO ADMIN. CODE r. 37.03.11.042.02 (2011).

A trial judge struck down the regulations because they imposed too high a burden on senior surface delivery call and thus were inconsistent with the constitutional right to appropriate. In *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*,[173] the supreme court reversed the decision and made the accurate but surprising— especially for the Idaho Supreme Court—observation that "[w]hile the Constitution, statutes and case law in Idaho set forth the principles of the prior appropriation doctrine, those principles are more easily stated than applied. These principles become even more difficult, and harsh, in their application in times of drought."[174] *Schodde* was cited and applied broadly to uphold the storage rules:

> Idaho law does not allow curtailment of vested junior rights when the senior does not need additional water to achieve the authorized beneficial use. They cite to [*Schodde*], which held that water rights must be exercised with "some regard to the rights of the public" and "necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual." It is [intervenor, Idaho Ground Water Appropriators, Inc.] IGWA's position based on *Schodde*, that even vested water rights are not absolute; rather, such rights are limited to some extent, by the needs of other water users and thus, it is in accordance with Idaho law to place a "reasonable" limit on the amount of water a person may carryover for storage. The point of the reasonable carry-over provision, argues IGWA, is to determine whether the senior has a sufficient water supply to meet its actual needs, rather than routinely permitting water to be wasted through storage and non-use. . . . To permit excessive carryover of stored water without regard to the need for it, would be in itself unconstitutional. The [Conjunctive Management] Rules are not facially unconstitutional in permitting some discretion in the Director to determine whether the carryover water is reasonably necessary for future needs.[175]

In short, the Court signaled that it is better to have the Department of Water Resources make a scientifically informed decision about the extent of injury to the senior than to make a speedy priority enforcement.

VI. CONCLUSIONS: WHAT CAN WATER LAWYERS LEARN, IF ANYTHING, FROM *SCHODDE*'S REEMERGENCE?

It would be tempting to draw even broader conclusions from *American Falls Reservoir District No. 2*, but the course of water disputes and water law is anything but linear. Nonetheless, I offer three possible ones. The first possible lesson is that when prior appropriation creates a large class of losers and the economic stakes are high, there are pressures on courts and administrators to make a crude cost-benefit analysis and step back from

173 154 P.3d 433 (Idaho 2007).

174 *Id.* at 440.

175 *Id.* at 450–51 (citations omitted).

strict enforcement by finding the seams in the doctrine that blunt its harshness.

A 2010 New Mexico Court of Appeals decision illustrates both the increasing frustration of some courts with prior appropriation and their simultaneous reluctance to try and fix it. Explosive exurban development in New Mexico exposed the incompleteness of state permit systems.[176] As is usually the case, domestic wells are exempt from the prior appropriation net.[177] Various permit holders challenged the exemption because the cumulative volume of the pumped water interfered with their senior rights.[178] A New Mexico district court held that the statutory exemption from prior appropriation for these wells was unconstitutional because it interfered with senior appropriative rights on overappropriated streams.[179] However, the court of appeals reversed and held that the exemption was constitutional.[180] The primary justification for the lack of integration of all water uses was the presumption of validity afforded in the existing statutory scheme.[181] The court stressed the need for a legislative solution,[182] and cavalierly dismissed the interests of valid appropriation permits with the dicta that "[t]he Constitution's priority doctrine establishes a broad priority principle, nothing more."[183] This language, but not the result, would have delighted the legendary Stephen Reynolds, a longtime opponent of prior appropriation.[184]

176 *See* Bounds v. State, 252 P.3d 708, 722 (N.M. Ct. App. 2010), *cert. granted sub nom.* Bounds v. Dantonio, 263 P.3d 902 (N.M. 2011) ("Amici New Mexico Association of Counties and City of Santa Fe express land-use concerns. The Counties point to a 'great deal of growth in counties throughout the [S]tate of New Mexico particularly on the urban fringe of the larger metropolitan areas' and to long-established agricultural use in rural areas." (omission in original)).

177 *See id.* at 710.

178 *Id.*

179 *Id.*

180 *Id.* at 721.

181 *See id.* at 720–21 ("We must [] presume that the Legislature has considered and weighed the burdens of expense and proof when assessing whether to require applicants for domestic well permits to initially prove that the use will not impair existing rights or whether to leave to senior water rights owners the burden of showing that a permitted use will impair their rights.").

182 *Id.* at 721.

183 *Id.* at 719.

184 For the best partial biography of Reynolds, see generally G. EMLEN HALL, HIGH AND DRY: THE TEXAS–NEW MEXICO STRUGGLE FOR THE PECOS RIVER (2002). "Em" Hall worked for Reynolds and later taught at the University of New Mexico School of Law and wrote: "Basic twentieth-century New Mexico water law was built on two bedrock principles, beneficial use and priority of appropriation. . . . Reynolds believed in the first principle and disliked the second so much that he disregarded it." *Id.* at x, xii, 119–20. Reynolds was State Engineer from 1955–1990 and used his office to litigate vigorously a number of intra- and interstate water cases to uphold his power to shape prior appropriation to the 20th century by squeezing the maximum use out of the state's limited water resources and accommodating growth in the Rio Grande corridor. *See generally* G. Emlen Hall, *Steve Reynolds—Portrait of a State Engineer as a Young Artist*, 38 NAT. RESOURCES J. 537 (1998) (discussing Reynolds's tenure as State Engineer). The character of Norman Bookman was modeled after Reynolds in JOHN NICHOLS, THE MILAGRO BEANFIELD WAR (1974). *See* Charles F. Wilkinson, *The Law of the American West: A Critical Bibliography of the Nonlegal Sources*, 85 MICH. L. REV. 953, 982 (1987).

Fig. 2. Clear Springs Foods Box Canyon Farm, Buhl, Idaho[185]

The second lesson is that courts will resist even modest innovation. Idaho stood by classic prior appropriation in *Clear Springs Foods, Inc. v. Spackman*,[186] which arose near the site of *Schodde* and was a challenge to a call by two spring-fed trout farms in the Magic Valley against junior groundwater right holders.[187] In contrast to *American Falls Reservoir District No. 2*, the supreme court repeated all the familiar catechisms of prior appropriation and upheld the curtailment order.[188] Any consideration of economic impact was rejected as inconsistent with the "first in time, first in right" principle.[189] Not surprisingly, the groundwater users invoked *Schodde* and the principle that the full economic development of water resources required the conversion of surface to groundwater rights to argue that "as long as the Aquifer is not being over-drafted, priority of water rights as between surface and ground water users is not to be considered."[190]

The court found no support for disregarding priorities in the relevant conjunctive management statutes. *Schodde*, as applied in *American Falls Reservoir District No. 2*, was limited to a senior's "means of diversion" and did not apply to its "priority of water rights."[191] Thus, a junior must challenge

185 Debbie Hummel, *The Trout Equation: Fish Farms Help Sustain the Magic Valley and Respect the Water They Use*, SUN VALLEY MAGAZINE, Summer 2010, http://www.sunvalleymag.com/Sun-Valley-Magazine/Summer-2010/The-Trout-Equation/ (last visited Feb. 18, 2012) (including photography courtesy of Clear Springs Foods).

186 252 P.3d 71 (Idaho 2011).

187 *Id.* at 75–77.

188 *Id.* at 95–97.

189 *See id.* at 84.

190 *Id.* at 85, 90.

191 *Id.* at 90.

the means of diversion, although the Court upheld the discretion of the Director of the Department of Water Resources to consider the efficiency of the system and demand a switch from surface to groundwater.[192] The case, however, is perhaps only a minor retrenchment. The Director had found that the trout farm's diversion system, with one exception, was reasonably efficient and that it would not be reasonable to require it to drill horizontal wells.[193] The juniors offered no "concrete evidence" to contradict the conclusion and did not appeal the holding.[194] The court narrowed the *Schodde* principle, but signaled that it still permits further administrative application.

The third lesson is that courts should simply enforce priorities because as the costs of applying the catechism of priority rise, out-of-the-box solutions will emerge such as land retirement and set aside pools.[195] And, to fund these solutions, water users will partially shift the costs of mitigation to state and federal taxpayers.[196] For a while, it looked as though this was happening in the Magic Valley, and thus a bitter, ugly conflict would be diffused. In 2007, the Idaho Department of Water Resources was poised to send out 771 curtailment letters to pumpers.[197] Groundwater pumpers obtained an injunction, but the order was lifted, as is often the case, at the last minute as additional water was found to avoid a shutdown.[198] Idaho then authorized an $80 million program to be matched, of course, by hoped-for federal funds, for fallowing and land retirement payments.[199] A $100 million aquifer restoration plan was also floated.[200] In 2009, the legislature funded a $2 million first phase of the restoration plan, but in 2010 the legislature had to face the new fiscal reality and announce that it was unable to fund the plan.[201] The predictable result is that the parties have not reached agreement on alternative ways to fund a restoration plan. Recent wet years have kept pumps pumping, but litigation rather than cooperative action has reemerged as the preferred "management" option. In 2009, another curtailment order was issued, but a district court enjoined its enforcement after groundwater

192 *Id.* at 90–91.

193 *Id.* at 91.

194 *Id.*

195 The late and much missed Dean David Getches and I explored the evolution of prior appropriation from hard rules to background principles for stakeholder-driven solutions. Getches & Tarlock, *supra* note 158, at 342.

196 *Id.* at 343.

197 Ag Weekly, *FLASH - Water Director Orders Curtailment in Thousand Springs Area*, AG WEEKLY, June 15, 2007, http://www.agweekly.com/articles/2007/06/15/news/ag_news/news32.txt (last visit Feb. 18, 2012).

198 Carol Ryan Dumas, *IDWR Director Calls Off Water Curtailment*, AG WEEKLY, July 6, 2007, http://www.agweekly.com/articles/2007/07/06/news/ag_news/news41.txt (last visit Feb. 18, 2012).

199 Getches & Tarlock, *supra* note 158, at 343.

200 Laura Lundquist, *Aquifer Management Plan Dead in the Water*, MAGIC VALLEY TIMES–NEWS, Jan. 17, 2011, http://magicvalley.com/news/local/article_63d9093a-f3a2-5c49-b308-9b702ecc69cb.html (last visit Feb. 18, 2012).

201 *Id.*

pumpers agreed to late season recharge.[202] This injunction was overruled by the supreme court in the *Clear Springs* case discussed above. The Magic Valley Times–News sardonically observed in early 2011 that "the best lawyers—not the best policy for Idaho as a whole—could prevail."[203]

The fourth and final lesson is that courts need not fear the judicious application of *Schodde.* A property right, including a water right, is generally thought of as a relatively static relationship between a person and a thing. Once a person's right legitimately comes into existence by an original acquisition or transfer, the primary function of the law is to maintain the security of the holder's title by decreasing the risk that other right holders or the state will disturb the title or the holder's enjoyment of the right. But these expectations have always been more limited for water right holders compared to those of land right holders.[204] Water rights are inherently incomplete because full exclusive possession is both physically impossible and socially undesirable. Thus, water right holders must live with a certain level of risk that the use and enjoyment of water will not remain constant over time. Although the risk is bounded by the title security protections of prior appropriation, the Fifth Amendment, and judicial self-restraint, *Schodde* illustrates that there is a narrow space in which courts, legislatures, and administrators[205] can constitutionally adjust existing water rights to promote more efficient use of the resource. Thus, it may be possible to cope with scarcity, at least in part, by requiring senior water users to take reasonable steps to enjoy their entitlements in ways that do not require the curtailment of junior uses and, I would argue, by requiring water users to take reasonable steps to adapt to changed conditions such as climate change.

202 Cindy Snyder, *Both Sides Continue to Work on Aquifer Issues*, AG WEEKLY, Sept. 8, 2009, http://www.agweekly.com/articles/2009/09/16/news/irrigation/irrigation88.txt (last visit Feb. 18, 2012).

203 Lundquist, *supra* note 200.

204 *But see* Scott Andrew Shepard, *The Unbearable Cost of Skipping the Check: Property Rights, Takings Compensation & Ecological Protection in the Western Water Law Context*, 17 N.Y.U. ENVTL. L.J. 1063, 1068 (2009).

205 *Am. Falls Reservoir Dist. No. 2*, 154 P.3d 433, 451 (Idaho 2007) ("While the prior appropriation doctrine certainly gives pre-eminent rights to those who put water to beneficial use first in time, this is not an absolute rule without exception. As previously discussed, the Idaho Constitution and statutes do not permit waste and require water to be put to beneficial use or be lost. Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director.").