

Riparian rights in Arizona? Yes, there are many situations where a surveyor may encounter a riparian boundary in Arizona. The majority of surveyors will run across at least one riparian boundary during their careers. This chapter will discuss the very basics of riparian law so that the surveyor may at least recognize when he is dealing with a riparian boundary.

The chapter on Drainage Law should be read before this chapter since that chapter will discuss the definition of streams and watercourses.

### What is Riparian?

Riparian simply means "of or belonging to a river, or lake, or the sea". A riparian owner is an owner of land along a river, lake or sea. The case of Knapp v. Hansen, 111 N.W.2d. 333 states as follows:

" Briefly, a riparian proprietor is one whose land is bounded or traversed by a natural stream, and riparian rights are those which the proprietor has to the use of the stream or water..the word has reference to the bank, and not to the bed of the stream." 56 Am.Jur. pg. 726, section 273."

Certain rights are inherent in the land which is riparian. Some of these rights are: the right to draw water from the stream (water rights); the right to access the stream for travel; or the right to gain or lose land by accretion or erosion (to be discussed later in this chapter). Each state has different water rights laws and the water rights laws of Arizona will not be discussed. The right to access the river is a given right in most jurisdictions, but this is not of immediate concern to the surveyor. Loss or gain of title to land is of concern to the land surveyor and will be discussed. These rights are a part of the riparian land, and run with the land. The following cases will illustrate this:

"Indeed, the riparian right is in its nature a tenancy in common and not a separate or severable estate." Seneca Consol. Gold Mines Co. v. Great Western Power Co., 209 Cal. 206, 287 P. 93.

"Riparian rights are incident to ownership, not of the bed of the water, but of the shore land." State v. Korrer, 148 NW 617.

"We therefore here reassert the riparian right to be a vested property right inhering in and a part and parcel of the abutting lands." Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 259 P. 444.

" \* \* \* There are certain interests and rights vested in the shore owner which grow out of his special connection with such waters as an owner. These rights are common to all riparian owners on the same body of water, and they rest entirely upon the fact of title in the fee to the shore land." Johnson v. Seifert, 100 N.W.2d. 689.

Often the discussion of whether the stream is navigable or not enters into the picture. However, whether the stream or other body of water is navigable or not has nothing to do with whether riparian rights attach to the shore land. The court in Johnson v. Seifert, supra, stated as follows:

"Whether waters are navigable has no material bearing on riparian rights since such rights do not arise from the ownership of the lakebed but as an incident of the ownership of the shore."

There must be words in a deed to exclude riparian rights from the deed, otherwise the presumption is that riparian rights are conveyed. The case of Seneca Consol. G.M.C. v. Great W.P.C., supra, states as follows:

"The moment a right in a natural stream is specifically defined in a concrete inflexible amount, at that moment the right becomes one of priority and not riparian." \*See also 56 Am.Jur., Waters, section 216.

It is important to understand that Arizona does acknowledge riparian ownership with respect to title, but not riparian ownership of water rights.

Article 17, Constitution of the State of Arizona, section 1, A.R.S. states:

"The common law doctrine of riparian water rights shall not obtain or be of any force or effect in the State."

In the case of State v. Gunther & Shirley Company, 5 Ariz.App. 77, 423 P.2d. 352, the State of Arizona tried to assert the claim that this constitutional provision should be applied to riparian rights as related to gaining title to the land. The court stated as follows:

"While it is true, as appellant contends, that Arizona rejects the doctrine of riparian water rights...We find nothing inconsistent with a law that rejects the riparian right to water in a stream and embraces the riparian right of the land owner to the increase in land by accretion." (underlines added for emphasis).

From the foregoing it is important for the surveyor (or other person interpreting a description of land) to recognize when they are dealing with a "riparian" boundary. The mere fact that a piece of property abutts a "natural stream"(see chapter on Drainage Law) is usually enough to apply the doctrine of riparian rights. It is quite apparent in most situations when the land is described with calls "to the bank" or "along the bank" that there exists a riparian boundary. But, sometimes the surveyor has a description which involves a meander line. Usually when this is the case, the boundary is still to the bank and is riparian in nature. Typically, meander lines, whether surveyed by the government or another private surveyor are only for the purposes of defining the size and extent of the body of water. The case of *Hardin v. Jordan*, 140 U.S. 371 states as follows:

"It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the beds of streams or other bodies of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the federal and state courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered; and the waters themselves constitute the real boundary."

And from the case of *Vavrek v. Parks*, 495 P.2d. 1051:

"These traverse lines are designated meander lines. They are fixed, determinable lines on the surface of the earth and, if lost, can be re-established by any competent surveyor. Their primary role is somewhat historical, to ascertain the acreage enclosed in the original grant of land. They do not ordinarily designate the boundary of the land granted. Unless there is a clear indication to the contrary, the watercourse itself constitutes the boundary of the upland tract." (underlines added for emphasis).

Remember that an abutting (upland) owner will be presumed riparian in nature unless there are words to the contrary in the deed.

#### Definitions

Accretion - is the gradual and imperceptible accumulation of land in a river (or sea, or lake, etc.); usually accretion is common along the inside of the bend of a river, where the water moves the slowest and will deposit sediment to build up.

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The case of State v. Jacobs, 93 Ariz. 336, 380 P.2d. 998 states as follows with regards to accretion:

"...is gradual imperceptible addition to land forming the banks of a stream by the deposit of waterborne solids or by the gradual recession of water which exposes previously submerged terrain."

Avulsion - A sudden and perceptible loss or addition to land by the action of a river or sea. This sudden action changes the location of the river or stream very rapidly with respect to time, usually during a flood.

Erosion - The gradual and imperceptible wearing away of land by the action of water. Usually the outside of the bends of rivers is where erosion occurs.

\*\* The main distinction between erosion(or accretion) and avulsion is where:

"...the stream changes its course suddenly or in such a manner as not to destroy identity of land between old and new channels." State v Jacobs, supra.

Reliction - Where a river or the sea recedes to the extent that additional land is exposed. Reliction is encompassed within the definition of accretion.

Thread of stream - the center of the stream as measured from bank to bank (the bank being determined from the ordinary high water mark).

Re-emergence - the doctrine of law whereby when riparian land is lost by erosion, then the stream or river gradually moves back to its former location by either accretion or reliction, the title to the land once lost reverts to the former owner.

According to Bonelli Cattle Co. v. Arizona, 414 U.S. 313, Arizona law recognizes the doctrine of re-emergence, as follows:

"Now that the land has resurfaced in the process of rechannelization, it should return to the estate of the riparian owner."

#### Application of Definitions

In Arizona (as well as other states), riparian ownership can be gained by accretion and lost by erosion. The case of State v. Gunther & Shirley Company, supra, cites United States v. 11,993.32 Acres of Land, D.C., 116 F.Supp. 671, 678(1953), as follows:

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"Hence, the general rule rests upon the equitable idea that a riparian owner should have the opportunity to gain by accretion since he is subject to the hazards of loss by erosion."

Avulsive action will not alter title to riparian boundaries. This is a general rule of law which has been addressed as follows:

"In boundary disputes between states, as in those between riparian owners, the rule is established that where a stream which forms a boundary line suddenly leaves its old bed and forms a new one, by the process of avulsion, there is no alteration of the boundary line."

#### Title to Beds of Streams

From Bonelli Cattle Co. v. Arizona, supra, the court stated:

"When Arizona achieved statehood in 1912, it assumed title to the land beneath the stream of the Colorado River, by virtue of the equal footing doctrine."

and

"The Colorado River has been determined to be a navigable waterway, Arizona v. California, 283 U.S. 423(1931), and, once found to be navigable, it remains so."

In Arizona, title to the beds of navigable waters up to the "ordinary high water mark" belong to the State. The question is what constitutes navigability. This is a very complex issue and varies from the strict requirement that full time commercial use be a requirement, to a lesser requirement that recreational use or even intermittent use of a stream which trappers use canoes on only during certain times of the year, can create a navigable waterway. This issue does not appear to be definitely answered in Arizona. The Colorado River appears to be the only waterway that has been declared navigable by the courts.

The Santa Cruz River from Tucson to Mexico was used for military transport and other commercial use quite regularly in the early 1900's. This was criteria that in many states would be sufficient to declare navigability.

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### The Surveyor's Role

The surveyor must recognize a riparian situation and come to terms with it. Let go of the "record bearings and distances" (the old meander line) and traverse the thread or the bank thus establishing a new meander line. The true boundary line still being the actual top of bank (at the high water mark), or the thread of the stream or river.

Look for avulsion. Accretion and erosion may be presumed, avulsion must clearly be proven. The quote from State v. Bonelli Cattle Co., 11 Ariz.App. 412, 464 P.2d. 999 shows this:

"...where the facts are insufficient to establish the manner in which a navigable river has moved there is a presumption that such movement was by accretion rather than by avulsion."

It is not certain whether this principle would apply between riparian owners on a non navigable river or stream. Other states tend to agree with this.

If the surveyor encounters a riparian boundary and determines that accretion has taken place, a decision as to how to extend the property lines. Do you go radially to the stream? Do you simply extend the property lines? do you go perpendicular to the stream? Do you apportion the length of the new frontage with respect to the original? All of these are proper methods and are discussed in Boundary Control and Legal Principles, Brown, 2nd edition. The court seem to favor apportionment, however, any arbitrary method will be allowed to promote an equitable solution. The method will depend upon the most favorable end result, which is to be fair and equitable to all of the affected parties.