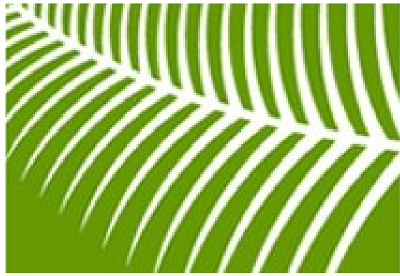

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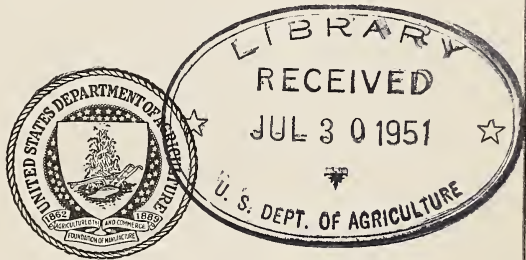
# SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST

Prepared under the supervision of
the Solicitor

by

WELLS A. HUTCHINS, LL. B.

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# PREFACE

Publication of this study of selected problems in the law of water rights in the Western States is rooted in the needs of the Department of Agriculture. For some time the Department has been concerned with this field of the law, particularly in its work in irrigation, drainage, and forest conservation. More recently, in undertaking extensive operations in the control of soil erosion, the stabilization of watersheds in aid of flood control, and the promotion of soil and water conservation, the Department has found these programs to be conditioned to a considerable extent by those legal institutions of the Western States which control the acquisition and exercise of rights to the use of water. Still more recently, in an act approved on August 28, 1937, the Congress charged the Department with responsibility for aiding in the development of facilities for water storage and utilization in the arid and semiarid areas of the United States. Problems in the law of water rights are today familiar grist in the mill as the Department administers its land and water utilization and conservation programs.

There is, however, an additional consideration which influenced the launching of this study. Section 4 of the 1937 Water Facilities Act mentioned immediately above provides that, "as a condition to extending benefits" under the act within any State, the Secretary of Agriculture may, insofar as he may deem necessary for the purposes of the act, require "the enactment of State and local laws providing for soil conserving land uses and practices, and the storage, conservation, and equitable utilization of waters." It is generally agreed in the West that some of the provisions of the State water codes, particularly as interpreted and supplemented by judicial decisions and administrative interpretations, stand in the way of efficient and equitable conservation and utilization of waters. Agreement is far less sure, however, when one seeks to break down this generalization into specific provisions of specific codes that need amendment. The law of water rights is a highly specialized branch of the law, and within the last few years its rate of change has been noticeably accelerated. It happens, also, that the most recent general text on this subject is more than 25 years old. The present study attempts, therefore, to present a current organization and description of the law of water rights in the West, in the hope that it may serve as a common starting point for those in the State and National Governments, in the universities and elsewhere, who seek such changes in these legal institutions as are appropriate to release the waters of the West for their richest contribution to our national life.

By and large, water is plentiful east of the tier of States from North Dakota to Texas. Within those six States and their western neighbors, however, water is scarce and provides a limiting factor on the productivity of the soil. It is understandable, therefore, that the water law of these Western States presents a complexity of pattern and a

fullness of development not to be found in the law relating to waters in the East. The present discussion, therefore, is limited to the 17 Western States. The discussion is further limited to the problems that turn on efforts to acquire, control, and exercise rights to the use of water—a large, related group of problems around which has developed the great bulk of Western water law—and excludes those parts of the law dealing with the organization and internal management of irrigation and drainage districts and companies, regulation of public-utility water companies, valuation of water rights, rights-of-way for ditches and structures, the riddance of unwanted waters, river control in aid of navigation, procedures for negotiating and effectuating interstate compacts, and other special problems. This exclusion is due partly to the fact that the programs of the Department of Agriculture present these questions less directly and less frequently, and partly to the knowledge that others are at work in these fields. Again, these specialized topics are not among those that are the source of those rules of water law that most interfere with wise and equitable water use.

The discussion opens with a definition, classification, and description of available water supplies. The material indicates the importance of recognizing the varying rights which may be obtained to (a) water in watercourses, (b) diffused surface waters, (c) ground waters, and (d) spring waters. A separate chapter is then devoted to each type of water. In the case of ground waters and spring waters the great variety in the several State legal systems has made it seem desirable to present, after a general discussion of the relevant legal rules and practices, a separate discussion summarizing briefly for each State the doctrines which obtain in it. The final chapter contains a discussion of selected problems in the operation of the "appropriation doctrine," a doctrine which prevails exclusively in eight Western States and concurrently with the "riparian doctrine" in the remaining nine. An appendix summarizes, separately for each State, the procedure that must be followed to acquire a right to a designated supply of water.

The table of contents includes considerable detail; this was decided upon in the hope that it may serve as a convenient topical summary. Such a summary may well be of greater aid than the index for ready reference.

The reader who will have occasion to use this book frequently will probably find it to his advantage to read the book through as a whole once, for a general introduction to the field and for the purpose of acquiring a "feel" for the distribution of the material. Thereafter particular parts of the discussion can be much more readily located.

Mr. Hutchins, in writing this study, has performed a difficult task with distinction, and has earned the appreciation of everyone concerned with the law of water rights in the West.

MASTIN G. WHITE,
*Solicitor.*

WASHINGTON, D. C.
*August, 1940.*

## ACKNOWLEDGMENTS

This water-law study was made under the supervision of the Solicitor of the Department of Agriculture in cooperation with the Bureau of Agricultural Economics, the Soil Conservation Service, the Farm Security Administration, and the Water Facilities Board.

The study was planned by a committee in the Department composed of Philip M. Glick (chairman), Lewis A. Sigler, Francis R. Kenney, Charles F. Brannan, S. H. McCrory, W. W. McLaughlin, and the author. The research was conducted and the study prepared in close collaboration with Mr. Glick and Mr. Sigler, of the Solicitor's staff, whose contributions to the study have been invaluable. Mr. Sigler has written several sections of the manuscript and has aided in the preparation of others. Credit is also due to Charles F. Brannan, who prepared comprehensive memoranda upon several subjects included in the study; to Charles H. White, for briefs of the cases on ground waters and spring waters; and to Francis R. Kenney, Warren O. Windle, and William A. Steenbergen, for analyses of the State water codes.

Acknowledgment is due to others, outside the Department, for valuable advice and comments. Frank Adams, A. E. Chandler, S. T. Harding, Henry Holsinger, A. W. McHendrie, and Duane E. Minard have read the original manuscript and have offered helpful suggestions. In addition, in each of the Western States excerpts from the original manuscript relating specially to such State have been reviewed by several public officials and private individuals.

In classifying and presenting the principles dealt with in this study, extensive use has been made of the several texts on water law, as well as the many controlling court decisions and statutes. However, a scrupulous endeavor has been made to cite the source material throughout, and quotations have been included in various instances in which principles aptly stated in earlier authoritative works are equally applicable now.

W. A. H.

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## Chapter 1

# CLASSIFICATION, DEFINITION, AND DESCRIPTION OF AVAILABLE WATER SUPPLIES

Supplies of water required for useful purposes are available on or below the surface of the earth. Waters in the atmosphere, while highly important physically, obviously do not constitute an "available water supply" to which separate rights can attach.

The following classification of available water supplies is offered in as simple form as it seems possible to make it for the purpose of a study of water rights. The classification includes only waters in their natural state available for use, and excludes water in artificial reservoirs and conduits.

### Classification of Available Water Supplies

- *A*. Waters on the surface of the earth.
  - *a*. Diffused surface waters.
  - *b*. Surface waters in watercourses.
    - (1) Waters flowing in well defined channels.
    - (2) Waters flowing through lakes, ponds, or marshes, which constitute integral parts of a stream system.
  - *c*. Surface waters in lakes or ponds (where the evidence fails to indicate connection with a stream system).
  - *d*. Spring waters.
  - *e*. Waste waters.
- *B*. Waters under the surface of the earth.
  - *f*. Ground waters.
    - (1) Waters flowing in defined subterranean channels.
    - (2) Diffused percolating waters.

An available supply of water differs from that of certain other natural resources—such, for example, as deposits of iron ore or precious metals, or even oil—in that it is in a state of continuous or

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intermittent replenishment from other sources of water supply, through the cyclical operation of physical laws. Thus, in the western United States, diffused surface waters and watercourses are fed by precipitation in storms originating principally over the Pacific Ocean, and in some areas, the Gulf of Mexico; diffused surface waters sink into the ground or become concentrated in stream channels, thereby augmenting the supply of ground water or of surface streams; surface streams feed underground supplies at some places and are fed from underground sources at others, and flow into the sea or into lakes without known surface outlets; and water evaporates from all surface supplies and from underground supplies close to the surface and is deposited in the form of precipitation elsewhere.

A water supply, therefore, is almost never in truly static condition, awaiting exploitation by man. Its component parts are generally in motion—they have come from some other water supply or supplies, and are en route to still others. Therefore, diversion of water from a particular source of supply interrupts the natural replenishment of some other available source of supply. Recognition of this fundamental relationship is necessary to an orderly definition of water rights.

The point at which waters are physically appropriated for use—that is, diverted from their natural state and brought under control by artificial devices—determines the legal classification of such waters for such use. Thus, waters taken from a stream into a canal, through a headgate installed on the bank of the stream, are classified at the point of diversion as waters of a watercourse, regardless of their natural origin or subsequent use. Waters diffused over the ground and which if not intercepted would flow over a bank into a stream, but which before doing so are captured by means of an artificial dike and thereby simply detained or directed into a canal, are classified at the point of interception as diffused surface waters. And waters percolating through the soil, which if not intercepted would seep into a surface watercourse through the banks or bottom of the channel, but which are captured and brought to the surface by means of a pumping plant installed some distance away from the stream and its subterranean channel, are classified at the point of interception as diffused percolating waters or as ground waters in channels, depending upon the geological structure through which they are moving.

The rules governing the right to make the several diversions cited as examples in the preceding paragraph are predicated upon the point of diversion of the particular water supply. In many instances these rules have been formulated without due consideration for the physical interrelationships of different sources of water supply. This has come about, for example, because rival claimants to an underground water supply have litigated their rights as between themselves, without intervention by claimants to waters of a surface stream to which the ground waters involved in the litigation were physically tributary; and the result of such decisions has been to establish a rule of property, repeated and reemphasized in subsequent decisions, and therefore difficult to overturn in later years when these physical relationships had become more clearly recognized. As a result, while in some States there has been a measure of correlation between rights to waters of various sources of supply, there has been little or none in others. Furthermore, in some jurisdic-

tions, rights to some of these available sources of supply have not yet been adequately defined.

The following discussion of the various classes of water supplies will emphasize, first, the characteristics of diffused surface waters, and second, the essential elements of a watercourse, and will then consider some of the more important distinctions between diffused surface waters and a watercourse. This will be followed by a brief discussion of such collateral questions concerning the nature of a watercourse as the classification of seepage and waste waters released into a watercourse, continuity of a watercourse, vesting an artificial watercourse with the attributes of a natural channel, and classification of overflows from streams in times of flood. There will then follow a description of the physical aspects of the other available water supplies, viz, surface waters in lakes or ponds, spring waters, waste waters, and ground waters.

## Diffused Surface Waters

### Definition

Diffused surface waters are waters which, in their natural state, occur on the surface of the earth in places other than watercourses or lakes or ponds, exceptions being noted in some jurisdictions in case of flood waters which have escaped from streams. Except where such exceptions prevail, such waters apparently may originate from any natural source. They may be flowing, vagrantly over broad lateral areas or occasionally for brief periods in natural depressions; or they may be standing in bogs or marshes.

The court decisions more frequently use the term "surface waters"; but inasmuch as all waters on the surface of the earth are technically surface waters, it is deemed best to adhere to the more specific term "diffused surface waters."

The essential characteristics of surface waters of this class are that their flows are short-lived, and that the waters are spread over the ground and not yet concentrated in channel flows of such character as to constitute legal watercourses, or not yet concentrated in bodies of water conforming to the definition of lakes or ponds. Watercourses and lakes and ponds are defined and discussed below. The ownership, control, and rights of use of diffused surface waters under Western conditions are discussed in chapter 3.

### Description

Diffused surface waters ordinarily result directly from rainfall, from melting snow in place, and from springs or seepage which break out upon the surface. They may also originate from stream overflows or discharges which have completely and permanently separated from the watercourse, at least if the water has settled in bogs or stagnant places; but there is a conflict in the decisions as to whether flood waters which have escaped from natural watercourses are to be classified as diffused surface waters while still in the process of flowing over the country.

Diffused surface waters are customarily in the process of moving by gravity to a lower elevation. If their flow is not intercepted by arti-

ficial means, these waters retain their characteristics until they (1) enter a watercourse or other body of surface water having definite boundaries, or (2) sink into the ground and eventually in most cases come to the surface again in streams or other bodies of water, or (3) evaporate. On forming or entering a stream which has the necessary characteristics of a watercourse, or on sinking into the ground, they lose their identity as diffused surface waters and become, respectively, either part of a watercourse or ground waters.

Some diffused surface waters, however, are not in motion; for example, waters standing in a marsh, or swamp, or bog (as distinguished from a lake or pond), without current or surface outlet. Such waters may originate from any of the sources indicated above, or from the overflow of a stream to which there is no natural outlet from the marsh after subsidence of the high water in the stream. Controversies over the ownership and use of such immobile diffused surface waters have arisen, but are rare, and the problem is of much less practical importance than is that of the ownership or use of diffused surface waters in a mobile state.

#### Discussion

Cases in the courts, in which definitions of diffused surface waters and of surface waters in watercourses have been important in reaching decisions, have been very numerous and have involved a great deal of repetition. There is not much actual conflict in the definitions, but great variation exists in the physical conditions to which the courts have applied these definitions.

There are two general classes of controversies in which the distinction between these waters has been involved. One class includes actions for damages and injunctions against the obstruction, repulsion, or alteration of the flow of water in such manner as to cause injury to property by flooding it; in these decisions the courts have discussed the common-law and civil-law doctrines relating to diffused surface waters and the so-called "common enemy" theory. The second group consists of actions for injunctions (and damages) against such interference with the flow of water as will substantially injure prior appropriators or owners of riparian land in their rights to the use of water for beneficial purposes. In the first group the parties are endeavoring to get rid of the water, which neither one wants; in the second group, one or both of the parties wish to make use of it. Many of the decisions in each of the groups have cited and adopted the factual distinctions made in the opposite class of cases; this has been true particularly when deciding controversies over rights to use water.

The present discussion is concerned with the right to use water, and not with the right of a landowner to cast waters upon his neighbor's land; nevertheless, it is necessary and desirable to consider some of the cases involving riddance of water insofar as they define and differentiate between diffused surface waters and watercourses. The utility of these cases is found in their application of the definitions and distinctions between waters to the physical facts involved rather than in an analysis of the right of a landowner to obstruct or repel diffused surface waters which he is not attempting to utilize for beneficial purposes. Most of the decisions involved are taken from the courts of Western States, for they appear to cover the subject adequately.

Controversies have arisen over the control and use of waters which admittedly were diffused surface waters; but in many cases the classification of the waters has been in controversy, and the decisions have turned on the classification. The usual question in the latter cases is whether the flow of water in litigation constitutes a watercourse. The courts have advanced numerous definitions of diffused surface waters but few which are really comprehensive. Frequently the definitions have been negative, the tendency being to define the term in the light of facts then before the court and to show that the essential elements of a watercourse were absent. That is, if the water was flowing over the surface, but did not constitute a watercourse, it generally followed that it was diffused surface water. Some of the definitions are incomplete in stating that these waters are derived from certain named sources without stating further that they may come from any source if their present status is clear enough. For example, a statement that diffused surface waters originate from rains or melting snows or springs unquestionably takes in the largest number of situations but overlooks the fact that waters poured over the land from a definite watercourse into a marsh which has no outlet have also been so classified by the courts. The classification of escaped flood waters has resulted in sharp conflicts, as noted below (p. 18); and the California courts in solving this problem have divided surface waters into three classes: (1) (diffused) surface waters, from rain, snow, swamps, or springs, spreading across land before entrance into a watercourse; (2) stream waters, flowing in a natural watercourse, including the accretions of surface (and underground) waters generally; and (3) flood waters, which have escaped in large volume from a watercourse and are "flowing wild" over the country.

The classification of waters flowing as a result of rainfall in broad sheets over lands of fairly uniform topography is simple enough. They have all the elements of diffused surface water. If they continue to flow in that manner until they reach a river, there is no trouble in classifying them. But water does not flow in that manner for great distances. Surface waters from rain and melting snow which flow over lands of gently rolling topography, as well as over rough, broken country, necessarily concentrate in some places as the result of gravitational forces, and concentrations will eventually occur under almost all circumstances. The result of concentrated flows is to cut channels in the soil, whether the surface topography is uniform or broken. The difficulty then is in determining whether such concentrations at a given point have become in legal theory watercourses or whether the circumstances are not yet such as to alter the legal character of the waters as diffused surface waters.

The topics of diffused surface waters and watercourses are so closely related, and the distinctions so dependent upon the nature of a watercourse, that it is best to discuss the distinctions after defining and describing watercourses. At this point, however, a few of the uncontroverted or more obvious classifications of diffused surface water will be mentioned.

In some cases the waters have been held, without controversy over their character, to be diffused surface waters, there being no suggestion of the existence of a watercourse. This has been true, for example,

where rain fell on an extended area of land and moved broadly or in many lines of flow into a depression which became a lake of about 100 acres in wet weather,[1] or where rain water collected in a large surface tank artificially constructed,[2] or where melting snows and rain collected in a draw in broken country and were there impounded by a dam.[3]

In other cases one of the parties claimed that the waters were those of streams, but the court's classification as diffused surface waters was obviously correct; for example, where rainfall flowed across a tract of land in slight depressions, draws, or swales, presumably of short length,[4] or where water directly traceable to rainfall flowed through a valley, but not in a defined channel, and had no contact with a stream also flowing through the valley until it emptied over the banks.[5]

Water discharged from a stream into a marsh, without flowing across or out of it in some kind of a channel, becomes diffused surface water.[6] On the other hand, diffused surface waters lose their identity upon seeping into the ground or flowing into a pond.[7] There appears to be no conflict in the decisions on such facts; but as noted hereinafter (p. 18) there is a divergence of view as to the classification of flood waters which have escaped from a stream and which are in the process of "flowing wild" over the surface of the country. Moreover, seepage water or spring water appearing on the surface of the ground from an unknown source has been held in New Mexico to belong to the landowner and to be not subject to appropriation under the State statute.[8] The court did not call this water diffused surface water,

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[1] *Miller* v. *Letzerich* (121 Tex. 248, 49 S. W. (2d) 404 (1932)). The controversy involved the right to deflect the water while flowing over the land in a diffused state before reaching the depression, and to direct it upon adjoining land in concentrated form, to the injury of that land.

[2] *Republic Production Co.* v. *Collins* (41 S. W. (2d) 100 (Tex. Civ. App. 1931)). The case involved a contract right to use the water collected in the tank.

[3] *Riggs Oil Co.* v. *Gray* (46 Wyo. 504, 30 Pac. (2d) 145 (1934)). This case involved a dispute over the right to use the water impounded. On this point, the court held that it was perfectly apparent that the water in dispute was diffused surface water only, and, as such, might be captured and impounded by the owner of the land over which it flowed and became his absolute property. This right was stated by reference to several text writers (Kinney, Farnham, and Gould), but without analyzing the physical situation in the case before the court.

[4] *LeMunyon* v. *Gallatin Valley Ry.* (60 Mont. 517, 199 Pac. 915 (1921)). The case concerned an interference with the flow of the water by the construction of a railroad embankment.

[5] *Morrissey* v. *Chicago, B. & Q. R. R.* (38 Nebr. 406, 56 N. W. 946 (1893)). The case was a suit for damages against a railroad for building an embankment across the valley and thereby obstructing the flow of the water and diverting it into Yankee Creek, causing it to overflow plaintiff's land. The court held that the railroad was deflecting only diffused surface water which was not a part of Yankee Creek, which it could legally do even though the result was to cast it into a stream and injure other lands by overflowing the stream.

[6] *Davenport Township* v. *Leonard Township* (22 N. Dak. 152, 133 N. W. 56 (1911)). This was a suit for injunctive relief from the obstruction of an alleged natural watercourse as a result of highway construction.

[7] *Anderson* v. *Drake* (24 S. Dak. 216, 123 N. W. 673 (1909)): Water standing in a well is not diffused surface water, and although it may originally have been diffused surface water, once it sinks into the ground it loses its characteristics as such. *Froemke* v. *Parker* (41 N. Dak. 408, 171 N. W. 284 (1919)): When diffused surface waters collect in a pond where they remain until they evaporate or seep into the soil, or until the excess overflows into a draw, they lose their characteristics as diffused surface waters and become waters of a pond, the same principles of law being applicable as those relating to watercourses; "the principal distinction being that in a pond or lake the waters are substantially at rest, while in a stream or watercourse they are in motion."

[8] *Vanderwork* v. *Hewes* (15 N. Mex. 439, 110 Pac. 567 (1910)). This decision involved "seepage or spring water" which appeared on land from some unknown source. The fact that the waters came to the surface from underground led the court to cite in support cases involving spring water, necessarily of subsurface origin, rather than cases dealing with diffused surface waters coming from sources above the ground. The court does not call these waters diffused surface waters after they reached the surface, in fact the court describes them but does not classify them at all. It is clear that so long as the waters were in the ground they were ground waters, presumably percolating, and that when they reached the surface they became spring waters and remained so as long as they were concentrated in a basin around the spring; but it is equally clear that when they flowed away over the surface in a diffused state, they became diffused surface waters and then were properly subject to the laws applying to waters of that classification, regardless of their origin.

but the action of the water in spreading over the ground in a diffused state brings it clearly within that classification.

## Surface Waters in Watercourses

### Definition

Surface waters in watercourses are waters flowing continuously or intermittently in natural surface channels from definite sources of supply, and waters flowing through lakes, ponds, and marshes which are integral parts of a stream system.

The term "watercourse" is in common use. It means a definite stream in a definite channel with a definite source or sources of supply, and includes the underflow. The term "stream" is sometimes used alone, in which case it is practically synonymous with "watercourse." Rights to the use of water in watercourses in the West are discussed in chapter 2.

### Description

The concept of a surface stream system has long been recognized in discussions of the right to make use of surface watercourses. The stream system consists of the main channel and of all surface channels through which surface waters naturally flow by gravity into the main channel. This concept is particularly important in the determination of rights acquired by prior appropriation and beneficial use in the arid and semiarid West, where the use of water under the appropriation doctrine is not confined to lands contiguous to the stream channels, and where waters may be legally diverted from many different tributaries flowing through either agricultural or nonagricultural country and conveyed to areas from which there will be no natural return to the main channel. The prior appropriator is protected by law against diversions from upstream tributaries under junior rights which would materially interfere with the exercise of his own prior rights. (See ch. 6, p. 328.)

Surface streams or watercourses are fed by the flow in tributary channels, by diffused surface waters flowing over the banks of the stream, and by ground waters seeping into the banks and bed of the channel; [9] and the tributary sources of supply may be natural sources

[9] Tolman, C. F., and Stipp, Amy C., "Analysis of Legal Concepts of Subflow and Percolating Waters," Proceedings American Society of Civil Engineers, vol. 65, No. 10, December 1939, pp. 1687–1706, discuss the legal concepts of ground waters with relation to their physical occurrence, influent and effluent conditions, subsurface stream flow, and the relationships between surface flow and the water table. They state, regarding the subflow:

"Apparently lawyers do not generally appreciate the fact that stream flow occurs over nonsaturated gravels through which water seeps from the surface to the water table. The assertion is made that 'the water from the surface stream must necessarily fill the loose, porous material of its bed to the point of complete saturation before there can be any surface flow.' Often the stream bed is rendered relatively impervious by silt deposited with receding flood flows or by chemical cementation, and subflow occurs only at some distance below the surface stream, supplied by slow influent seepage. In general, materials below stream bed are not uniformly pervious and such conditions do not favor development of water-table mounds in contact with surface flow. It is not uncommon to find the water table at considerable depth below a surface stream, especially in the lower reaches of a desert stream just before the surface flow disappears into the stream gravels."

They point out that the significance of this, as concerns the "subflow" of a stream, is that the surface flow is "supported" by subflow only under effluent conditions, that is, when the ground water is percolating toward the stream and supplying it with water, and not when the ground-water table has been so lowered that it is not in contact with the surface flow. Under the latter condition the material between the ground-water mound and the stream bed is not completely saturated, and a column of influent (downward percolating) seepage transmits the leakage from the stream bed to the ground-water mound. This is not a condition of contact between the surface flow and the subflow; the two may be completely separated.

The authors discuss some of the court decisions in which the legal concepts of ground-water conditions have been formulated, and they conclude that some of the erroneous con-

altogether, such as rains and melting snows, or may and in the irrigated areas usually do include waste and seepage waters or return flow from irrigated lands. The sides and bottom of the channel may be impervious in some places and not in others; where not impervious the soil across and through which the channel is formed necessarily contains water in greater or less degree, and this water-bearing zone may be very limited in extent or may extend to considerable depths and for considerable distances on each side. The water-bearing zone adjacent to a pervious surface channel is called in the court decisions the "underflow" or "subflow" of the surface stream. It may be in contact with the ground-water table in the region through which the stream flows, or may be separated from it. A surface stream throughout part of its course may be discharging water into the ground; elsewhere it may be taking water from the ground; and in other places there may be neither an underground inflow nor outflow, but only a surface flow supported by the water in the subterranean channel or reservoir—a physical balance. At a given point on a stream channel there may be an inflow from the ground at one time and an outflow into the ground at another time.

It follows that the flow in a watercourse does not mean solely the visible surface stream, but includes the underflow as well, where there is an underflow. This is discussed more fully in the description of ground waters below. The underflow is as much a part of the watercourse and as important from the standpoint of rights in the watercourse as is the surface flow: for if the waters within this subterranean area are withdrawn, the surface waters sink into the voids to take their place. The legal implications of this are widely recognized in the court decisions. While the definitions of a surface watercourse seldom refer to associated waters in the ground, nevertheless the underflow is a physical part of the whole and the courts have held it to be a component part.[10]

The association between surface watercourses and diffused surface waters and ground waters is therefore very marked. The legal significance of this association is highly important, although it has not been established in all instances.

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cepts have resulted from inadequate comprehension of geologic and hydrologic factors governing the occurrence and movement of water underground, and that in order to establish a sound classification and to formulate rulings for efficient regulation of ground-water resources greater consideration should be given to principles of ground-water hydrology. Discussions of this paper by various engineers, scientists, and attorneys have appeared in subsequent issues of the Proceedings, and at this writing (September 1940) the discussion has not yet been closed. Some of the discussions refer with approval to the original paper and others take issue with certain statements, particularly some of those which refer to court decisions.

See also Tolman, C. F., "Ground Water" (1938), 593 p., illus.

[10] In *Kansas* v. *Colorado* (206 U. S. 46 (1907)), the Supreme Court, in connection with "the contention on the part of Kansas that beneath the surface there is, as it were, a second river with the same course as that on the surface, but with a distinct and continuous flow as of a separate stream," said that the testimony did not warrant a finding that there was a second and separate stream; that necessarily, unless the bed of the stream is solid rock, there is earth through which water percolates in contact with the surface stream, both directly below the channel and on each side of it; and that testimony regarding the underflow bears only upon the question of diminution of flow caused by upstream surface appropriations. In other words, it was all one stream.

In *Maricopa County Municipal Water Conservation District* v. *Southwest Cotton Co.* (39 Ariz. 65. 4 Pac. (2) 369 (1931)), the Arizona Supreme Court defined underflow as "those waters which slowly find their way through the sand and gravel constituting the bed of the stream, or the lands under or immediately adjacent to the stream, and are themselves a part of the surface stream"; and stated that the test as to whether ground water was physically a part of a stream was whether drawing off the subsurface water tended to diminish appreciably and directly the flow of the surface stream.

### Discussion of the Elements of a Watercourse

Many courts have defined "watercourse," but few legislatures have done so.[11] The great weight of authority appears to be that three elements are needed to subject a particular flow of water to the law of watercourses:

(1) Channel. There must be a definite channel, usually, but not in all cases necessarily, with well defined bed and banks. Any groove in the earth's surface through which water flows is of course from a physical standpoint, a channel for the passage of the water; but the requirements of a watercourse made by many courts are that the channel bear the unmistakable impress of the action of running water, that it be more than just a grassy swale or wide depression. This means, in effect, that the channel must have been created by the flow of the water itself, or enlarged by it, or otherwise so altered by the action of the water as to make it appear to an observer that water has been accustomed to run there with some frequency. The erosive action of water flowing along a depression naturally leaves a bed and banks; hence the frequent criterion that the channel of a watercourse have a bed and banks.

That the channel is a necessary element of a watercourse has been stated in several texts on water law,[12] and this criterion undoubtedly

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[11] The only statutory definition of general application which has come to attention is contained in N. Dak. Comp. Laws, 1913, sec. 5341a: "A water course entitled to the protection of the law is constituted, if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and a defined channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of a permanent character."

Several State legislatures, including those of Kansas, Nebraska, South Dakota, and Colorado, have defined watercourse in connection with specific legislation.

In Kansas, landowners outside the corporate limits of any city may, by constructing reservoirs upon dry watercourses, secure reductions in assessed valuations of the land on which the reservoirs are located. "* * * a watercourse whose constant supply of water consists principally of springs, where the entire drainage area does not exceed ten (10) sections in extent, shall be deemed to be a dry watercourse for the purpose of this act." (Kans. Gen. Stats. Ann. 1935, secs. 82a–401, as amended by Laws 1939, ch. 353, to 82a–404.)

The Nebraska statute providing that individual landowners may drain their land and discharge the water "into any natural watercourse or into any natural depression or draw" contains the following section:

"Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse." (Nebr. Comp Stats., 1929, sec. 31–302.)

This section has been referred to in a number of Nebraska decisions on drainage, but no water-right decisions have been found in which it was involved. In *Miksch* v. *Tassler* (108 Nebr. 208, 187 N. W. 796 (1922)), the definition was applied to a drainage way.

South Dakota has a law authorizing landowners to build dams across any dry draw or watercourse and thereby secure a water right not subject to control by the State engineer. "The words 'dry draw' and 'watercourse', as used in this section, shall be construed to mean any ravine or watercourse not having a flow of at least twenty miner's inches of water during the greater part of the year." (S. Dak. Code, 1939, sec. 61.0133.)

The North Dakota dry-draw law does not define watercourse as such, but authorizes the holders of agricultural land to impound or divert "the flood waters of any draw, coulee, stream or water course, having a flow of not to exceed one-third of one cubic foot of water per second during the greater part of the year." (N. Dak. Comp. Laws, 1913, secs. 8271 to 8274.)

South Dakota also has a statute, similar to that of Kansas above noted, according reductions in assessed valuations on account of the construction of reservoirs on dry watercourses for the collection and storage of surface water, and defining "dry watercourse" in identical language (S. Dak. Laws, 1939, ch. 292).

Colorado provides similarly for reductions in the assessed valuation of land on account of the construction of a dam across "any water course, the channel of which is normally dry, as determined by the State Engineer, and thereby forms upon his own land a reservoir for the collection and storage of unappropriated surface water." Nothing in the act is to be construed as adversely affecting "any presently vested water right, or valid appropriation of water." (Colo. Laws 1937, ch. 185.)

[12] See Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. I, sec. 303, p. 490; Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I. sec. 333, p. 352; Gould, J. M., A Treatise on the Law of Waters, 3d ed., sec. 41, p. 98; Long, J. R., A Treatise on the Law of Irrigation, 2d ed., sec. 40, p. 80, says that it is "often stated" and "usually stated" that there must be a well-defined channel.

appears in many court decisions. However, it should be noted that Farnham has criticised the rule that the channel with definite margins is a distinguishing characteristic,[13] and has stated that while a watercourse must have source, outlet, and channel, all of these are more or less uncertain and undefined and that: [14]

The distinguishing characteristic is the existence of a stream of water flowing for such a length of time that its existence will furnish the advantages usually attendant upon streams of water. * * * The most satisfactory definition is that a water course is the condition created by a stream of water having a well-defined and substantial existence.

The Texas Supreme Court has approved Farnham's view and has stated that the existence of a bed, banks, and permanent source of supply is merely evidentiary that a stream can be used for irrigation or water-right purposes.[15]

The appearance of the channel is important,[16] as well as its local reputation as a watercourse.[17] While the length is of some importance, it is more an aid in reaching a conclusion than an independent criterion. The channel need not continue indefinitely, for the water must have an outlet somewhere.[18]

The whole floor of a great valley through which a river flows is not to be considered the high-water channel of the river simply because in times of flood extensive areas are overflowed.[19] Nor, in a comparable situation, is a great catchment area to be considered a watercourse.[20] To hold otherwise would be an unwarranted extension of the principle that ordinary overflows not permanently separated from the stream remain a part of the stream.

A slough leaving a stream and returning to it some distance below, with substantial indications of a flowing stream, has been held in Idaho to be a watercourse even though the evidence conflicted as to whether only high water passed through.[21] However, a slough leading from a river through which flood waters occasionally escaped to lower lands, as they did at other low places along the banks, has been held in California not to be a watercourse.[22] Long, deep pools in a stream channel, holding large quantities of water after the stream has ceased to flow, were held in Texas to be a part of the stream to which riparian rights attached.[23]

(2) Stream. The stream of water must have a substantial existence.[24] One way of demonstrating this is by showing that it furnishes the advantages usually attendant upon streams.[25] Although, in a controversy over water rights, this question of whether the stream furnishes the usual advantages of a stream appears to be a very practical consideration and useful guide in arriving at the proper classification

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[13] Farnham, H. P., The Law of Waters and Water Rights, vol. II, sec. 456, p. 1557.
[14] Farnham, op. cit., vol. II, sec. 459, p. 1562.
[15] *Hoefs* v. *Short* (114 Tex. 501, 273 S. W. 785, 40 A. L. R. 833 (1925)); *Humphreys-Mexia Co.* v. *Arsenaux* (116 Tex. 603, 297 S. W. 225 (1927)).
[16] *Gibbs* v. *Williams* (25 Kans. 214, 37 Am. Rep. 241 (1881)).
[17] *Geddis* v. *Parrish* (1 Wash. 587, 21 Pac. 314 (1889)).
[18] *Rait* v. *Furrow* (74 Kans. 101, 85 Pac. 934, 6 L. R. A. (N. S.) 157 (1906)).
[19] *Cubbins* v. *Mississippi River Commission* (241 U. S. 351 (1916)).
[20] *Gray* v. *Reclamation District* (174 Calif. 622, 163 Pac. 1024 (1917)). See discussion beginning on p. 18, below, concerning classification of flood overflows.
[21] *Hutchinson* v. *Watson Slough Ditch Co.* (16 Idaho 484, 101 Pac. 1059 (1909)).
[22] *Lamb* v. *Reclamation District No. 108* (73 Calif. 125, 14 Pac. 624 (1887)).
[23] *Humphreys-Mexia Co.* v. *Arsenaux* (116 Tex. 603, 297 S. W. 225 (1927)).
[24] *Geddis* v. *Parrish* (1 Wash. 587, 21 Pac. 314 (1889)).
[25] Farnham, op. cit., vol. II, sec. 459, p. 1562; *Hoefs* v. *Short* (114 Tex. 501, 273 S. W. 785, 40 A. L. R. 833 (1925)); *Humphreys-Mexia Co.* v. *Arsenaux* (116 Tex. 603, 297 S. W. 225 (1927)).

of the flow, it is noteworthy that explicit consideration of this factor in determining the existence of a watercourse appears in but few of the cases.

The size of the stream is not material, if it is in fact a substantial stream as distinguished from mere surface drainage resulting from extraordinary causes.[26]

The inference in one Kansas case [27] is that a wet-weather flow is only a temporary stream, therefore lacks the element of permanence, and consequently does not satisfy the requirements for a watercourse. The great weight of authority, however, is to the effect that the flow need not be continuous in time. It is sufficient that the flow recur with regularity in ordinary seasons.[28] Interpretations of this requirement vary considerably, doubtless due in large measure to the wide range in meteorological conditions throughout the West. To hold that a stream is not a watercourse because the channel is dry half or more of the year would eliminate from this category important sources of supply of many irrigated areas, for in the arid regions cessation of flow of streams during certain seasons of the year is a common phenomenon. During extremely dry cycles some streams carry little or no water for two or more consecutive seasons. A logical measure of recurrence of flow necessary to constitute the stream a watercourse is the condition prevalent in the general area in which the stream is found, and such has undoubtedly guided the courts in many cases. A permanent stream, therefore, may be one that flows intermittently, if that kind of flow is characteristic of the area in question.

The age of the stream is not determinative of the question of permanence if the characteristics of permanence are evident at the time of litigation. It is not necessary that it shall have flowed in its present course from time immemorial, although a long existence undoubtedly lends weight to the element of stability and permanence, and will be important in determining whether the stream has existed long enough to furnish the advantages usually attendant upon a stream.[29]

(3) Source of supply. There must be a definite source of supply, though not necessarily unfailing at all times. Some courts have said that the supply must be permanent, to the exclusion of rain and snow and diffused water generally.[30] To adopt that view generally and literally would result in excluding many definite and substantial streams from the category of watercourses. Consequently, many courts have held that sources of that character which yield large quantities of water over considerable periods of time in regular seasons are definite sources.[31] This is often a rational viewpoint under typical southwestern conditions, in an area distant from sources of supply in high mountains. Many decisions have recognized springs as sources

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[26] *Pyle* v. *Richards* (17 Nebr. 180, 22 N. W. 370 (1885)).

[27] *Rait* v. *Furrow* (74 Kans. 101, 85 Pac. 934, 6 L. R. A. (N. S.) 157 (1906)).

[28] *Lindblom* v. *Round Valley Water Co.* (178 Calif. 450, 173 Pac. 994 (1918)).

[29] It has been held that a stream having a substantial existence and value as an irrigation supply need not have followed its present course for any particular length of time to make it possible for water rights to attach. *Hoefs* v. *Short* (114 Tex. 501, 273 S. W. 785, 40 A. L. R. 833 (1925)). It was held in *Rait* v. *Furrow* (74 Kans. 101, 85 Pac. 934, 6 L. R. A. (N. S.) 157 (1906)), that a stream that had existed for only a year or two was a watercourse if the facts were sufficient to justify the trial court in finding that the stream had become permanent.

[30] *Benson* v. *Cook* (47 S. Dak. 611, 201 N. W. 526 (1924)). See p. 14, below.

[31] *Rait* v. *Furrow* (74 Kans. 101, 85 Pac. 934, 6 L. R. A. (N. S.) 157 (1906)); *Lindblom* v. *Round Valley Water Co.* (178 Calif. 450, 173 Pac. 994 (1918)); *Humphreys–Mexia Co.* v. *Arsenaux* (116 Tex. 603, 297 S. W. 225 (1927)); *Hoefs* v. *Short* (114 Tex. 501, 273 S. W. 785, 40 A. L. R. 833 (1925)).

of supply of watercourses.[32] The origin of the water, however, is of less importance than the fact of substantial supply.[33]

Some definitions of a watercourse have stated that it usually discharges water into some other stream or body of water.[34] That is generally true. Most of the larger western streams belong to systems which eventually discharge into the Pacific Ocean or into bays or gulfs connected with the Pacific or Atlantic Ocean. However, the streams in the Great Basin, and some small streams elsewhere, flow into sumps or lakes with no surface outlets, or disappear into the ground. A stream that has the three elements of a watercourse generally held to be essential—definite channel, substantial stream, and definite source of supply—is not barred from that classification simply because the water eventually disappears into the ground or is discharged into a marsh or lake from which there is no perceptible surface outlet. The character of discharge of the water does not determine the classification of a watercourse and therefore is not properly one of its elements.[35]

### Distinctions Between Watercourses and Diffused Surface Waters

Numerous decisions of the courts have been concerned with these distinctions, where diffused surface waters had collected in channels and claims were made that watercourses had resulted. The distinctions are sometimes fine indeed and the holdings not altogether consistent. That appears inevitable, in view of the often gradual transition between the two kinds of waters. The difficulties encountered in border-line situations in classifying waters as diffused waters or as watercourses can best be illustrated by a series of examples. Consider first those cases where waters concentrated in channels were held to be diffused surface waters, notwithstanding the concentration.

In *Gibbs* v. *Williams* [36] the channel was 3 to 5 feet deep and 30 to 40 feet wide, but there were no sharp and distinct banks and there was no general cut in the soil by the frequent flow of water. Grass grew throughout much or most of its length and mowing machines were run in it. It was referred to in the locality as a ravine, a draw, and a depression. The water flowing in the channel came from the temporary accumulation of rain falling on an area of 1,000 to 1,200 acres and at times constituted a large stream, but there was no constant stream or general flow of water. There were a couple of springs, the flow from which was not sufficient to start even a temporary stream of water. The water was held to be diffused surface water, and stress was laid upon the character of the channel, the source and permanency of supply, and the stream flow being noted but not emphasized. The decision turned upon the classification of the water, and although the

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[32] See chapter 5.

[33] *Pyle* v. *Richards* (17 Nebr. 180, 22 N. W. 370 (1885)); *Rait* v. *Furrow* (74 Kans. 101, 85 Pac. 934, 6 L. R. A. (N. S.) 157 (1906)).

[34] *Hutchinson* v. *Watson Slough Ditch Co.* (16 Idaho 484, 101 Pac. 1059 (1909)); *Sanguinetti* v. *Pock* (136 Calif. 466, 69 Pac. 98 (1902)).

[35] Not necessary, to constitute a watercourse, that the water should be discharged through a channel into another watercourse: *Brown* v. *Schneider* (81 Kans. 486, 106 Pac. 41 (1910)).

To be a stream in a legal sense, it is not necessary that "it must flow on down to a certain place and have a mouth somewhere": *Allison* v. *Linn* (139 Wash. 474, 247 Pac. 731 (1926)).

"Streams usually empty into other streams, lakes, or the ocean, but a stream does not lose its character as a watercourse even though it may break up and disappear": *Mogle* v. *Moore* (16 Calif. (2d) 1, 104 Pac. (2d) 785 (1940)).

[36] 25 Kans. 214, 37 Am. Rep. 241 (1881).

case involved a claim for damages due to obstructing the channel, the case has been frequently cited in controversies over water rights.

In *Walker* v. *New Mexico & S. P. R.*[37] a series of arroyos led from the western mountains across the valley floor of the Rio Grande to the river, the distances being from 4 to 18 miles. The channels were unmistakable, though their precise character was not brought out. The water came entirely from rainfall, particularly in the form of cloudbursts, in the mountains. A railroad company built some embankments near the river. The arroyos completely silted up for a distance of from one-fourth to three-fourths of a mile behind the embankments, so that between the present mouths of the arroyos and the embankments the ground was level. The embankments caused the plaintiff's land to be flooded. The court classified the water as diffused surface water, and described the arroyos as merely passageways for rain rather than running streams, which it regarded as synonymous with natural watercourses. The classification turned primarily upon the origin of the water, and on this one point it is a border line decision which has been so distinguished that it is now of doubtful authority.[38]

In *Turner* v. *Big Lake Oil Co.*,[39] waters polluted with oil and collected in artificial ponds escaped over the surface of the land, collected in Garrison Draw and damaged several stock water holes. Garrison Draw was one-fourth to one-half mile wide and several miles long, draining a considerable area. There was little evidence concerning the nature of the channel, bed and banks, or flow of water, one statement being that it took a good rain to make it run. The court found there was insufficient evidence to establish the existence of a watercourse and that the draw must be considered as a wide valley, a typical west Texas draw, similar to a ravine or swale carrying diffused surface waters. The statute prohibiting the pollution of watercourses was therefore not applicable.

*Sanguinetti* v. *Pock*[40] involved the right of a landowner to protect his land by a levee. A depression several miles in length, averaging 80 feet in width and 6 inches to 2½ feet in depth, entered his land. The banks sloped gently and lost themselves in the surrounding land, which was of generally even slope, almost level. When dry the depression was cultivated to grain and part was in vines. When the river, a mile away, overflowed, the depression and the surrounding land were flooded; otherwise the depression carried only rainwater. Defendant, a lower landowner, built a levee and ditch along his boundary, across the depression, but of insufficient capacity to carry away all the diffused surface waters, so that they flowed back on plaintiff's land. The court held that the depression was not a watercourse, but was "nothing more than a local drainway to a limited amount of land which has neither a definite beginning nor ending, and is like hundreds of similar swales found in land whose surface may be called generally level."

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[37] 165 U. S. 593 (1897).

[38] In *Globe* v. *Shute* (22 Ariz. 280, 196 Pac. 1024 (1921)) the court said: "We find no difficulty in holding that a ravine or wash is a 'natural stream' or 'watercourse,' in the sense of the law, where the rains or snows falling on the adjacent hills run down the ravine or wash in a well-defined channel at irregular intervals."

Cf. *Jaquez Ditch Co.* v. *Garcia,* below at note 45, for a classification of torrential flows in arroyos as watercourses.

If the *Walker case* had emphasized the change in the character of the water after it left the arroyos and then proceeded to spread over the land, it could be justified, but in the light of typical Southwestern conditions the decision is probably out of line.

[39] 128 Tex. 155, 96 S. W. (2d) 221 (1936).

[40] 136 Calif. 466, 69 Pac. 98 (1902).

In *Wyoming* v. *Hiber*[41] a draw extending for only a short distance had no well defined banks or stream channel, but was rather a typical grassy swale which could be crossed in a car at almost any point, was dry most of the time, draining rainfall from a small watershed of about 300 acres, bore no evidence of washing and did not present the casual appearance of a watercourse. The court held that the waters were not those of a stream, but were ordinary diffused surface waters which could be used by the landowner without first appropriating them under the State law. In a very recent case, *Binning* v. *Miller*,[42] the same court held that a draw having no regular stream channel and no banks, and having no great flow of water except upon one occasion, was not a natural stream subject to appropriation under such conditions existing in 1906. Those conditions, however, were differentiated from the situation as of 1936, 30 years later, at which time the continued seepage from surrounding lands had formed a regular, natural stream at the lower end of the draw, the testimony showing that at that point there were then definite channels and banks. While the supreme court was not altogether satisfied on the point, it was held that the water running in the stream was, commencing at least with 1936, subject to appropriation, subject to the right of the owner of land on which the seepage arose to make beneficial use of the seepage water upon such land.

*Benson* v. *Cook*[43] involved a controversy over the right to use for irrigation purposes the water in Ash Coulee. The coulee was a long, shallow draw located in rolling country and extending to the head of a river. It had a bed and banks, a continuous channel, and was definitely waterworn. Its source of supply was melting snow in the spring, seldom lasting for more than a few weeks, and heavy rainfall during the summer. There were a few springs in the coulee, but they were immaterial. The court made an unusual distinction, holding that the channel constituted a "watercourse," but that the lack of a "permanent source of supply" prevented it from being a "definite stream" within the meaning of a special water statute. The decision is an extreme one insofar as it defines a permanent source of supply to exclude rainfall and snow melting over a period of several weeks. It was followed by the same court, however, seven years later in a parallel situation.[44]

Another group of cases illustrates instances in which the classification of waters concentrated in channels was involved, such flows being classified as watercourses rather than as diffused surface waters. In *Jaquez Ditch Co.* v. *Garcia*[45] an obstruction was placed across an arroyo a short distance from the place it emerged from an opening in the hills, whence it proceeded across bottomland to the San Juan River. The arroyo was dry most of the time but carried flood waters from the hills. The court held that an arroyo is not prevented from being a natural watercourse merely because water did not run in it during the entire year, pointed out that surface water originating from rains can form watercourses under some circumstances, that the flow need not be continuous, and classified the arroyo as a watercourse. The *Walker case*, *supra*, was distinguished.

[41] 48 Wyo. 172, 44 Pac. (2d) 1005 (1935).
[42] 55 Wyo. 451, 102 Pac. (2d) 54 (1940).
[43] 47 S. Dak. 611, 201 N. W. 526 (1924).
[44] *Terry* v. *Heppner* (59 S. Dak. 317, 239 N. W. 759 (1931)).
[45] 17 N. Mex. 160, 124 Pac. 891 (1912).

This classification is likewise on the border line, but seems to be a logical one. Aside from the principal rivers, there are comparatively few streams in these large New Mexico valleys that flow much of the time. Sudden flows from cloudbursts are of common occurrence, striking now in one watershed, and now in another, and pouring out of the hills in otherwise "dry arroyos." Inasmuch as the obstruction in this instance was placed within a short distance from the hills, before the water could possibly have had an opportunity to spread out over the comparatively flat ground and become definitely diffused surface water, the application of the doctrine of the *Walker case* would have been unwarranted.[46]

In *Oregon-Washington R. & Nav. Co.* v. *Royer*,[47] Spring Creek had its origin in high hills, traversed rolling country in a canyon for 14 or 15 miles and to within a short distance from the railroad right-of-way, where the ground became flat, and continued in its course to Yakima River. Up to the point where the creek began to widen, the channel, though irregular in width and depth, was well defined and drained 20,000 or 25,000 acres. The water came principally from melting snow, the channel being dry most of the year. Dams in the lower portion of the creek caused the water to overflow and to form an additional channel for a short distance, the two coming together as a single main channel before reaching the railroad culvert, which was an insufficient outlet for the water. The court held Spring Creek to be a watercourse, saying that the fact that the source of the water was melting snow did not prevent it from being a watercourse. The *Walker case* was distinguished.

*Hoefs* v. *Short*[48] involved a controversy over the use of waters flowing in Barilla Creek. The creek had a well-defined channel with banks and bed, extended for 70 miles or more in length, was 3 to 15 feet deep, 40 to 100 feet wide, with a capacity of 4,000 second-feet. It contained boulders and gravel and little, if any, vegetation. The only source of supply was rainfall on a watershed of about 225,000 acres. Water was in the creek from 1 to 22 times each year, at more or less regular seasons, from 1 or 2 days to a "good while" each time. The court held the creek to be a watercourse, adopting the principle that the existence of a bed, banks, and permanent source of supply is merely evidentiary that a stream can be used for irrigation or water right purposes, and that once the fact of utility has been conceded or established the stream is one to which water rights attach, regardless of variations from the ideal stream of physiographers and meteorologists. The court adopted Farnham's view that the distinguishing characteristic of a stream is the fact that it will furnish the advantages usually attendant upon a stream of water. The decision in no way conflicts with that in *Turner* v. *Big Lake Oil Co.*, *supra.*

This brief review of some illustrative cases warrants a few general conclusions. One of the factors which the courts treat with a general lack of uniformity is source of supply. Some of the decisions speak of a permanent source while others speak of a definite source. The latter is more accurate, especially in the West. There is no diffi-

[46] Both the constitution and statutes of New Mexico recognize that waters in watercourses may be either "perennial or torrential," and that such waters are subject to appropriation for beneficial use. N. Mex. Const. Art. XVI, sec. 2; N. Mex. Stats. Ann. 1929, sec. 151–101.

[47] 255 Fed. 881 (C. C. A. 9th, 1919).

[48] 114 Tex. 501, 273 S. W. 785, 40 A. L. R. 833 (1925).

culty in calling a spring a definite source, if the flow is substantial, for the location of a spring is definite and the flow is generally either continuous or recurs with a measure of regularity, depending upon the seasons. Likewise, melting snow in high hills, regularly recurring with substantial runoff lasting a considerable time—say several months—appears to meet the requirement of definiteness; but snowfall on an extremely limited watershed, or so light as to cause only a very small flow, has been ruled out in many decisions. Many courts appear reluctant to consider rainfall alone a definite source, particularly where it comes in localized storms rather than in storms covering large watersheds, and yet an important part of the flows of many southwestern streams is torrential, from localized storms.

The Supreme Court of Oregon differentiated between the two classes by saying that the term watercourse does not include water flowing from hills in ravines only in times of rain and melting snow; but that a stream flow is a watercourse if it originates from rain and melting snow accumulating in large quantities in hills or mountains, descends through long, deep depressions upon lower lands, carves out a distinct channel which unmistakably bears the impress of frequent waterflow, and has so flowed from time immemorial.[49] According to this differentiation, rain and melting snow may constitute the source of a watercourse, but the accumulation must be considerable, there must be an immediately discernible waterworn channel, and the condition must have existed for a long time. This last-named requirement is not made by all courts.

It is evident that in the usual case the whole physical situation presented to the court has been important in influencing the decision. While the source of the water is invariably considered, and some courts speak of permanency of the source, the tendency has been to hold that a watercourse exists, whatever may be the source, where a sizable stream was found to flow in a waterworn channel of considerable length for several months or even a few weeks each year, or that was otherwise characteristic of stream flow in the general area, and that was susceptible of substantially valuable use. On the other hand, the waters have been generally held to be diffused surface waters, even though flowing in a channel, where the drainage area was so extremely small, or the flow so small or of such short duration, or the channel so short, that the situation as a whole, especially when compared with acknowledged streams in the general area in which found, negatived in the mind of the court its idea of what a watercourse really is.

## Collateral Questions Concerning the Nature of a Watercourse

### Seepage Into the Stream

Seepage and waste from irrigated lands, released into a stream with no intent on the part of the owners of the lands or management of the project on which they originate to recapture them, become public waters, a part of the stream.[50] However, such waters collecting in a

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[49] *Simmons* v. *Winters* (21 Oreg. 35, 27 Pac. 7 (1891)).

[50] *Twin Falls Canal Co.* v. *Damman* (277 Fed. 331 (D. Idaho 1920)); *Popham* v. *Holloron* (84 Mont. 442, 275 Pac. 1099 (1929)); see *Binning* v. *Miller* (55 Wyo. 451, 102 Pac. (2d) 54 (1940)).

A line of decisions in Colorado is to the effect that return flow is public water, regardless of attempt to recapture. *Comstock* v. *Ramsey* (55 Colo. 244, 133 Pac. 1107 (1913)); *Trowel Land & Irr. Co.* v. *Bijou Irr. Dist.* (65 Colo. 202, 176 Pac. 292 (1918)); *Fort*

channel within a Federal reclamation project, and which the Bureau of Reclamation definitely had not abandoned, have been held by the United States Supreme Court to be a part of the Government's appropriation and therefore not subject to appropriation by others.[51] There is no imputation of abandonment where an irrigation project utilizes a natural stream channel for conveying its own waters from one place to another.[52]

The question of seepage in relation to rights on watercourses is treated more fully in chapter 6 in the discussion of rights to the use of waste, salvaged, and developed water.

### Continuity of Watercourse

The principle appears to be well established that continuity of a watercourse is not broken by changes in character of the channel which do not permanently interrupt the flow of water. This is important to a water user on the lower part of such a watercourse, for it protects him against diversions from the upper portion by those who seek to show that there are really two or more independent watercourses.

Thus, where the bed of the stream is such that, except during high water flows, the water disappears at various points and comes to the surface lower down, but the testimony shows that there is a connected stream, it is held that there is one watercourse.[53] A prior appropriator will be protected against material interference with his rights to such flow.[54] Water coming from melting snow or springs and flowing in a channel is not deprived of its character as a natural watercourse because it passes through a swampy place.[55] Likewise, continuity of a watercourse is not broken because a stream enters a meadow in one channel and leaves it in another, there being no definite channel across the meadow—simply low depressions and partial channels in which water flows—but the evidence being uncontradicted that the inlet channel is the source of supply of the outlet channel. An appropriator on the outlet will be protected against a junior diversion on the inlet.[56] Nor is continuity broken where the flow from springs leaves its channel and proceeds underground for one-half mile to the surface stream to which it is tributary.[57] The essential feature in such instances is continuity of flow of the water, not of character of the channel.

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*Morgan Res. & Irr. Co.* v. *McCune* (71 Colo. 256, 206 Pac. 393 (1922)). This is not to be confused with the right to use a public stream channel for conveying appropriated waters, where the quantities turned into the stream and mingled with the natural flow and subsequently rediverted from the stream are measured in order to protect those who have rights to the other water flowing in the channel. See ch. 6, p. 358.

[51] *Ide* v. *United States* (263 U. S. 497 (1924)).

[52] *Twin Falls Canal Co.* v. *Damman* (277 Fed. 331 (D. Idaho 1920)).

[53] *In re Johnson Creek* (159 Wash. 629, 294 Pac. 566 (1930)). The court said: "The referee found that Johnson creek is a natural water course, and that the bed of the stream is of such a character that the water rises and sinks along its course, coming to the surface with the bed rock, and sinking in other sections where the soils are porous. In the spring of the year during the snow run-off, water runs on the surface the entire length of the stream. If that finding is correct, then Johnson creek is a stream, even though it does not flow continuously and at times is dry in places."

[54] *Barnes* v. *Sabron* (10 Nev. 217 (1875)).

[55] *Wright* v. *Phillips* (127 Oreg. 420, 272 Pac. 554 (1928)).

[56] *Anderson Land & Stock Co.* v. *McConnell* (188 Fed. 818 (C. C. D. Nev. 1910)). Cf. *Rigney* v. *Tacoma Light & Water Co.* (9 Wash. 576, 38 Pac. 147 (1894)); *Miller* v. *Eastern Ry. & Lumber Co.* (84 Wash. 31, 146 Pac. 171 (1915)).

[57] *Strait* v. *Brown* (16 Nev. 317, 40 Am. Rep. 497 (1881)).

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### Watercourse Originally Made Artificially

It is likewise well settled that a watercourse, though originally made artificially, may become with lapse of time and acquiescence of the parties a natural watercourse in the sense that rights to the use of the water may attach to it. The reasons for this holding have varied considerably. Mainly, the principle is based upon a long-continued use without protest under such conditions that new rights accrue or may be assumed to accrue; or upon a quasi-public dedication; or upon an estoppel in favor of individuals who make improvements, or assume that it is safe to make them, on the strength of the existence of a channel which ostensibly is natural and permanent. The most important elements are lapse of time and implications of permanence. Some decisions have related the elapsed time to the statute of limitations and the demonstration of a prescriptive right and others have not, but in most of the decisions consulted the period would have exceeded the statutory period in any event. Few decisions of this character appear to have rested squarely upon prescription. This question of artificial watercourses is of importance principally in jurisdictions in which riparian rights are recognized, because a controversy will more frequently arise in connection with the claims of an owner of land contiguous to such channels as against the claims of appropriators of water flowing through them, than in connection with the claims of two or more appropriators.[58] However, in a Montana case,[59] it was held that a drainage ditch, the owner of which did not attempt to make beneficial use of the water for 24 years after its construction, had become in contemplation of law a change of the channel of the watercourse into which it discharged its collection of seepage waters; and an appropriator of the flow of water in the watercourse was held to be entitled to the flow in the drainage ditch as against the claim of the owner of the drain.

### Classification of Floodwaters Overflowing the Channel Banks

The more generally accepted rule is that floodwaters overflowing the banks of a stream channel, which overflows are not permanently separated from the stream but which will recede into the channel as the floods subside, are classified as a part of the stream and do not become diffused surface waters.[60] Cases in which overflows have been found

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[58] For typical examples of the way in which this problem has arisen and been treated in the courts, see *Matheson* v. *Ward* (24 Wash. 407, 64 Pac. 520 (1901)); *Hollett* v. *Davis* (54 Wash. 326, 103 Pac. 423 (1909)); *Simmons* v. *Winters* (21 Oreg. 35, 27 Pac. 7 (1891)); *Outhouse Cottel* v. *Berry* (42 Oreg. 593, 72 Pac. 584 (1903)); *Harrington* v. *Demaris* (46 Oreg. 111, 77 Pac. 603, 82 Pac. 14, 1 L. R. A. (N. S.) 756 (1904)); *Pacific Live Stock Co.* v. *Davis* (60 Oreg. 258, 119 Pac. 147 (1911)); *Hough* v. *Porter* (51 Oreg. 318, 98 Pac. 1083 1909)); *San Gabriel Valley Country Club* v. *County of Los Angeles* (182 Calif. 392, 188 Pac. 554 (1920)); *Chowchilla Farms* v. *Martin* (219 Calif. 1, 25 Pac. (2d) 435 (1933)); *Santa Rosa Irr. Co.* v. *Pecos River Irr. Co.* (92 S. W. 1014 (Tex. Civ. App. 1906)); *McKenzie* v. *Beason* (140 S. W. 246 (Tex. Civ. App. 1911)); *Patterson* v. *Spring Valley Water Co.* (207 Calif. 739, 279 Pac. 1001 (1929)); *Falcon* v. *Boyer* (157 Iowa 745, 142 N. W. 427 (1913)); *E. Clemens Horst Co.* v. *New Blue Point Min. Co.* (177 Calif. 631, 171 Pac. 417 (1918)).

[59] *West Side Ditch Co.* v. *Bennett* (106 Mont. 422, 76 Pac. (2d) 78 (1938)).

[60] *Cairo Vincennes & Chicago Ry.* v. *Brevoort* (62 Fed. 129, 25 L. R. A. 527 (C. C. D. Ind., 1894)) has been much cited in subsequent decisions and has had considerable influence in developing the doctrine. The case has been cited by Federal courts with approval on this point in *Eastern Oregon Land Co.* v. *Willow River Land & Irrigation Co.* (201 Fed. 203 (C. C. A. 9, 1912)); *Wright* v. *St. Louis Southwestern Ry.* (175 Fed. 845, 851 (1910)); *Oregon-Washington R. & Nav.* v. *Royer* (255 Fed. 881, 885 (C. C. A. 9, 1919)); *Tallahassee Power Co.* v. *Clark* (77 Fed. (2d) 601, 604 (C. C. A. 6, 1935)). The doctrine has been applied by the courts of Kansas, Montana, Nebraska, California, Oregon, Texas and Oklahoma. See: *Clements* v. *Phoenix Utility Co.* (119 Kans. 190, 237 Pac. 1062 (1925)), declaring that the opposite rule, as declared in *Missouri Pacific Ry.* v. *Keys* (55 Kans. 205, 40 Pac. 275

to have separated permanently from the main stream, and therefore to have become diffused surface waters, apparently have not been numerous. None were encountered in the present study. The California courts, however, classify waters which have escaped from natural watercourses as "flood waters"; and this is the case, whether the escape is over the banks as a result of storms, or is through an opening at the end of the watercourse.[61] In this second contingency, obviously, these waters have become permanently separated from the watercourse, but that fact does not convert them in California jurisprudence into diffused surface waters.

This principle governing the classification of floodwaters was developed in connection with actions based upon physical damage to property caused by the obstruction or deflection of the flow of the water and has been of principal importance in determining the liability for such damage. The obstructions were usually caused by railway embankments or by levees built to protect riparian lands from floods. Liability for damage, then, usually depended upon the classification of the flood as ordinary or extraordinary, or the classification of the overflow as part of the stream or as diffused surface water. If the flood was an ordinary flood, and the overflow was classed as part of the stream, there was no right under the general rule (that of California being an outstanding exception) to obstruct or deflect the overflow to the injury of other riparian owners, the rule being otherwise in case of extraordinary floods.[62] (The matter of ordinary versus extraordinary floods is referred to below.) If the overflow was to be classified as diffused surface water, it could be impeded or warded off by reasonable methods without considering the effect upon others; a few courts have so classified the overflows, but this is the minority rule.[63]

Where the classification of floodwaters has been important in connection with water-right controversies—that is, where riparian owners have claimed that natural overflows benefited their lands, as distinguished from cases in which they complained of injury from overflows resulting from obstruction or deflection of the water by others—the classification has turned upon the question as to what portion of the stream flow riparian rights attached to, rather than the question

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(1895)), had been superseded in subsequent cases; *Foster* v. *Kansas Gas & Elec. Co.* (146 Kans. 284, 69 Pac. (2d) 729 (1937)); *Fordham* v. *Northern Pacific Ry.* (30 Mont. 421, 76 Pac. 1040 (1904)); *Wine* v. *Northern Pacific Ry.* (48 Mont. 200, 136 Pac. 387 (1913)); *Brinegar* v. *Copass* (77 Nebr. 241, 109 N. W. 173 (1906)), following the same rule and indicating that flood waters entirely separated and collected in low places would no longer belong to the watercourse; *Murphy* v. *Chicago, B. & Q. R. R.* (101 Nebr. 73, 161 N. W. 1048 (1917)); *Krueger* v. *Crystal Lake Co.* (111 Nebr. 724, 197 N. W. 675 (1924)); *Miller & Lux* v. *Madera Canal & Irr. Co.* (155 Calif. 59, 99 Pac. 502 (1907, 1909)); *Herminghaus* v. *Southern California Edison Co.* (200 Calif. 81, 252 Pac. 607 (1926)); *Price* v. *Oregon Ry.* (47 Oreg. 350, 83 Pac. 843 (1906)); *Sullivan* v. *Dooley* (31 Tex. Civ. App. 589, 73 S. W. 82 (1903)); *Bass* v. *Taylor* (126 Tex. 522, 90 S. W. (2d) 811 (1936)); *Jefferson* v. *Hicks* (23 Okla. 684, 102 Pac. 79 (1909)); *Atchison, Topeka & Santa Fe Ry.* v. *Hadley* (168 Okla. 558, 35 Pac. (2d) 463 (1934)). See note 63 concerning the rule applied in a few States that such water is diffused surface water.

[61] *Mogle* v. *Moore* (16 Calif. (2d) 1, 104 Pac. (2d) 785 (1940)). Under this and previous California decisions, diffused surface waters are those falling upon and naturally spreading over lands but only before entering a natural water course, not after leaving it. Waters which break away from a stream, on the contrary, do not become diffused surface waters, but become flood waters and retain their character as such while flowing wild over the country. While flowing in the stream, such waters are stream waters of a water course.

[62] 16 A. L. R. 629 and 632. The California rule treats ordinary floods as a common enemy against which owners of riparian land can protect their lands, even though the result is to cast more water upon other riparian lands than would naturally overflow them. (16 A. L. R. 642.) This right of self-protection, however, "does not permit of any obstruction of or interference with the natural channel of the stream or diversion of the flow of the water in such channel." (*Weinberg Co.* v. *Bixby*, 185 Calif. 87, 196 Pac. 25 (1921).)

[63] 16 A. L. R. 636. A leading case is *Taylor* v. *Fickas* (64 Ind. 167, 31 Am. Rep. 114 (1878)). See note 64 concerning the application of this theory in Washington.

of whether the overflow was legally part of the stream or had become diffused surface water. The fact is, as stated above, that the Western courts in flood-damage cases have generally accepted the rule that overflows not permanently separated from the stream remain a part of the stream, and the same rule would be expected to be applied in water-right cases. Nevertheless the Washington court has applied the diffused surface water theory to waters overflowing the banks of streams, even though the waters returned to the stream at a lower point by way of a tributary channel, the direction of flow being the same from one flood season to another, and has upheld the right of a landowner to protect his land by dykes even though the effect is to cause an increased flow upon other lands to their injury, so long as he does not change the stream itself or cast diffused surface waters by artificial means from his own land upon other land; yet that court has also held ordinary overflows of the same character to be a part of the stream when claimed by riparian owners, without discussing their possible identity as diffused surface waters.[64] Evidently the distinction is that in the first case they are outlaw waters, and in the second case they are not. The California court reaches the same result by permitting a landowner to embank against flood overflows, but not upon the diffused surface water theory; on the contrary, as California follows the civil-law rule which gives an upper proprietor an easement for the natural flow of diffused surface water upon lower land, waters which have escaped from streams have had to be differentiated from diffused surface waters (and classed as "flood waters") in order to allow a lower landowner to embark against them.

There have been frequent attempts to differentiate between floods which are "usual and ordinary" and those which are called "unprecedented and extraordinary". The distinction was rather widely recognized at one time,[65] but because of the difficulty of making the distinction and the tendency to call most or all floods "usual and ordinary" it has become of much less importance.[66] The distinction has been urged in various Western cases by those seeking to appropriate flood waters as against the claims of owners of downstream riparian lands, in States which recognize the riparian doctrine, the question being as to the character of flood to which riparian rights attach. The riparian owners generally prevailed where they were able to show that they could make a reasonably beneficial use of the water and that the upstream appropriation would substantially injure them; and this matter of substantial benefit to the riparian land from the overflows, rather than the fine distinction between ordinary and extraordinary floods producing the overflow, appears to have been generally the controlling factor.[67] Under the new California State

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[64] Overflow waters from streams are held in Washington to be outlaw or diffused surface waters: *Cass* v. *Dicks* (14 Wash. 75, 44 Pac. 113 (1896)); *Harvey* v. *Northern Pacific R. R.* (65 Wash. 669, 116 Pac. 464 (1911)); *Morton* v. *Hines* (112 Wash. 612, 192 Pac. 1016 (1920)). A landowner may not, by artificial means, convey surface and outlaw waters from his land and deposit them on the land of others to their damage: *Ulery* v. *Kitsap County* (188 Wash. 519, 63 Pac. (2d) 352 (1936)).

A riparian owner has the right to the usual overflows of streams which benefit his land: *Still* v. *Palouse Irr. & Power Co.* (64 Wash. 606, 117 Pac. 466 (1911)); *Longmire* v. *Yakima Highlands Irr. & Land Co.* (95 Wash. 302, 163 Pac. 782 (1917)).

[65] *Cubbins* v. *Mississippi River Commission* (241 U. S. 351 (1916)).

[66] See discussion of the distinction in 16 A. L. R. 634.

[67] The California courts have denied the riparian owner's right to enjoin an upstream diversion of flood waters which were of no substantial benefit to him, or the diversion of which neither diminished nor interfered with his use of the water. See *Edgar* v. *Stevenson* (70 Calif. 286, 11 Pac. 704 (1886)); *Modoc Land & Live Stock Co.* v. *Booth* (102 Calif. 151,

policy of reasonableness of all uses of water, there is no longer any basis for distinguishing between ordinary and extraordinary floods; but even prior to the adoption of the new policy by constitutional amendment, the California courts had ruled out any such distinction on several major streams which regularly overflowed large areas of land and had otherwise narrowed or subordinated it to the question of beneficial use of the flood waters.[68]

In two of the Western States, Nebraska and Texas, the rights of riparian landowners are held to attach only to the ordinary flow of the stream, and the ordinary flow does not include flood or storm waters.[69] Overflows were not involved in the controlling cases, but overflows result from floods, and as heretofore indicated (see footnote 60) the courts of these States in cases in which water rights were not involved have adhered to the general rule that overflows not permanently separated from the stream are classified as a part of the stream.

## Surface Waters in Lakes or Ponds

### Definition

Surface waters of this class are those standing in lakes or ponds, which are compact bodies of surface water substantially at rest, with defined boundaries. They are bodies of water through which perceptible currents may or may not be flowing.

Usually, currents of water flowing through a lake are not perceptible, even where the lake is connected with a stream system, except of course in the inlet and outlet regions. Although the controlling distinction between a watercourse and a lake is that one of the essential elements of a watercourse is a flow of water and that the water of a lake is substantially at rest, nevertheless the existence or nonexistence

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36 Pac. 431 (1894)); *Fifield* v. *Spring Valley Water Works* (130 Calif. 552, 62 Pac. 1054 (1900)); *Gallatin* v. *Corning Irr. Co.* (163 Calif. 405, 126 Pac. 864 (1912)); *Chow* v. *Santa Barbara* (217 Calif. 673, 22 Pac. (2d) 5 (1933)).

The courts in the Pacific Coast States have upheld the riparian owner's right to overflows which substantially benefited his land. See *Miller & Lux* v. *Madera Canal & Irr. Co.* (155 Calif. 59, 99 Pac. 502 (1907, 1909)); *Herminghaus* v. *Southern California Edison Co.* (200 Calif. 81, 252 Pac. 607 (1926)); *Collier* v. *Merced Irr. Dist.* (213 Calif. 554, 2 Pac. (2d) 790 (1931)); *Chowchilla Farms* v. *Martin* (219 Calif. 1, 25 Pac. (2d) 435 (1933)); *Eastern Oregon Land Co. v. Willow River Land & Irr. Co.* (187 Fed. 466 (C. C. D. Ore. 1910), 201 Fed. 203 (C. C. A. 9th, 1912)); *Still* v. *Palouse Irr. & Power Co.* (64 Wash. 606, 117 Pac. 466 (1911)); *Longmire* v. *Yakima Highlands Irr. & Land Co.* (95 Wash. 302, 163 Pac. 782 (1917)).

[68] In the California cases cited in the preceding footnote, the annually recurring flood flows of Fresno, San Joaquin, Merced, and Kings Rivers were all held to be the usual and ordinary flows, and not unexpected or extraordinary in any sense. In the *Collier case* it was stated that there were no extraordinary flood waters in the Merced River. It appears from the various California decisions that in those cases in which the floods were held, expressly or impliedly, to be extraordinary and not part of the usual flow of the stream, it also appeared under the circumstances that the riparian owner would not suffer materially from being deprived of them and consequently could not enjoin their upstream diversion; and that in those cases in which the floods were held to be usual and a part of the ordinary flow of the stream, it also appeared that the riparian would suffer from absence of the high water upon his land, and it was held therefore that he could enjoin an appropriation that substantially interfered with his use of the water. In other words, beneficial use of the flood waters by the riparian owner was the point stressed throughout; character of the flood as ordinary or extraordinary was incidental to the main issue, and had really no value except in determining the matter of benefit of the flood waters to the riparian owner. The classification of flood flows as affecting riparian water rights is no longer of any force in California. The supreme court recently declared, in interpreting the constitutional amendment of 1928 (Calif. Const. art. XIV, sec. 3) imposing a new policy of reasonable use of water: "Also distinctions heretofore made between the unusual or extraordinary and the usual or ordinary flood and freshet waters of a stream are no longer applicable." *Peabody* v. *Vallejo* (2 Calif. (2d) 351, 40 Pac. (2d) 486 (1935)).

[69] *Crawford Co.* v. *Hathaway* (67 Nebr. 325, 93 N. W. 781 (1903)); *Motl* v. *Boyd* (116 Tex. 82, 286 S. W. 458 (1926)); *Chicago, Rock Island & Gulf Ry.* v. *Tarrant County W. C. & I. Dist. No. 1* (123 Tex. 432, 73 S. W. (2d) 55 (1934)).

of a current does not necessarily determine the classification of the body of water in question.[70]

A natural pond is really a small lake. These natural bodies of water, with defined boundaries, belong in the same legal classification.

Lakes and ponds are distinguished from marshes in being definite bodies of standing water, rather than areas of soft, low-lying, waterlogged land which may or may not have water standing in places on the surface.[71] The distinction obviously may be close under some circumstances.

#### Description

Most western lakes are clearly connected with surface stream channels. The lake may constitute the source of a watercourse, or may be the terminus of one or more, or may be so situated that one stream flows into it and another flows out of it. In such cases the waters in the inlet and outlet channels and in the lake itself are directly connected and constitute one source of water supply, for diversions from the inlet channel reduce the quantity of water otherwise available in the lake and its outlet channel, and diversions from the lake itself reduce the available supply flowing in the outlet. From the standpoint of rights to the use of the common water supply, there is no fundamental distinction between such a lake and any wide portion of the main stream channel, where the question of maintenance of the natural water level is not the determining factor; each is an integral portion of the stream system, and in the absence of the question of maintenance of the water level, rights to the use of the water apparently are not affected by the precise characterization of the particular body of water as a lake or as a watercourse.

On the other hand, there are lakes and ponds with no visible tributary channels or outlet channels. They may be fed from precipitation upon the water surface, from diffused surface waters, and from underground sources; and they discharge water into the atmosphere and in many cases into the ground. They may constitute definite sources of water supply to which rights exist or may be acquired independently of rights to other sources of supply.

Controversies over the use of waters of this class have arisen under both the appropriation and riparian doctrines. The right of riparian proprietors to have the lake remain at its natural level has been involved. These water-right doctrines are discussed in chapter 2.

### Spring Waters

#### Definition

Spring waters are waters which break out upon the surface of the earth through natural openings in the ground.

Dr. O. E. Meinzer, of the United States Geological Survey, a recognized authority on ground-water hydrology, has given the following definition of a spring.[72]

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[70] 27 R. C. L. 1186; Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. I, sec. 294, pp. 476–477. See also Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 346, p. 375, to the effect that the chief characteristic of a stream is a flow, and that of a lake a stand or head.

[71] Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2 ed., vol. I, sec. 298, p. 481; sec. 317, p. 515.

[72] Meinzer, O. E., Outline of Ground-Water Hydrology, U. S. Geol. Survey Water Supply Paper 494 (published in 1923), pp. 48, 50.

A *spring* is a place where, without the agency of man, water flows from a rock or soil upon the land or into a body of surface water. * * * A *seepage spring*, or *filtration spring*, is one whose water percolates from numerous small openings in permeable material. * * * Any considerable area in which water is seeping to the surface is called a *seepage area*.

A well, on the other hand, is an artificial excavation. Once excavated, water may or may not reach the surface without pumping.

#### Description

The immediate source of springs, obviously, is water in the ground, having come from some higher elevation. Springs may discharge water continuously, either at fairly uniform or at fluctuating rates; or they may discharge intermittently, and therefore be dry at times.

The discharge from a spring may spread over a limited area and sink into the ground again, or evaporate, without becoming concentrated in any definite channel. Such water after spreading over the ground becomes diffused surface water, and remains so as long as it stays on the ground but without becoming concentrated in a channel which has the characteristics of a watercourse.

The discharge from other springs flows immediately into surface channels, or definite watercourses, or becomes concentrated therein within a short distance of the spring. If the channel flow is so slight that all the water disappears in the ground within a short distance of the spring, the water may be classed either as diffused surface water or as a watercourse, but in the usual case will not be held to constitute a watercourse. If the channel has a bed and banks and the flow is maintained for a considerable distance, it is more likely to become in legal theory a definite watercourse, and various cases have so held. Springs often constitute important sources of supply of surface stream systems, in which case there is now usually little question as to the proper classification of the water flowing from them.

Many controversies have arisen over the right to use spring waters. Usually the contests are between the owners of the land on which the spring arises, and others who claim that they have appropriated the spring waters or that interruption of the flow substantially interferes with the enjoyment of downstream diversions under prior appropriative rights. The rights of use of spring waters in the West are discussed in chapter 5.

### Waste Waters

#### Definition

Waste waters are principally those waters which, after having been diverted from sources of supply for use, have escaped from conduits or structures in course of distribution or from irrigated lands after application to the soil.

#### Description

A portion of the water diverted from natural sources of supply escapes from control before or in course of being applied to beneficial uses. Such waters may leak from canals and structures, or may flow from irrigated lands. These are commonly termed waste

waters. In addition, some water is purposely released from control by the project management, because of the inability of consumers to make complete use of all waters diverted. These waters are also referred to as waste, but in the usual case they are returned to the stream from which diverted, or to some other surface stream, by means of artificial channels controlled by the project, and therefore become available for use by downstream diverters.

Some so-called waste is inevitable, partly because distribution systems are seldom physically perfect, and partly because of the impossibility, especially where many consumers are involved, of synchronizing at all times the exact quantities diverted and the exact aggregate capacities of irrigated lands to take water. During the interval between diversion of water and its application to beneficial use, storms may occur or other factors may alter the relationship. Water pumped from underground into pipe distribution systems is under much more complete control that that diverted by gravity into open channels. Careful technique in applying water tends to keep the amount of waste from irrigated lands to a minimum.

Part of the uncontrolled waste waters sink into the ground and add to the supply of ground water; in many areas this condition has resulted in high water tables and injury to farm lands and the consequent necessity of installing drainage systems to reclaim the lands. Some of the waste waters become concentrated naturally in surface channels; and some are gathered into artificial channels, either to get the waters off the land or to make them available for irrigation use.

Controversies have arisen over the ownership of and the right to capture and utilize waste waters. These questions have involved the right of the project or owner of land on which the waste arises to reuse the waste waters (1) before they leave such land, (2) after they leave the land and before they return to the stream from which diverted, and (3) after they enter the stream and mingle with the natural flow; and the right of others to appropriate the waste under different sets of circumstances or to insist upon its return to the stream from which diverted in the first instance. This is a large subject; it is not developed in this classification of available water supplies other than to indicate that waters of this character released into a watercourse with no intent to recapture become public waters.[73] Rights to the use of waste, salvaged, and developed waters are discussed in chapter 6.

## Ground Waters

### Definition

Ground waters are available water supplies under the surface of the earth, that is, in the ground. Dr. O. E. Meinzer has classified all water that occurs below the surface of the earth as "subsurface water," in contrast to "surface water," and has then subdivided subsurface water into "ground water" (which is synonymous with "phreatic water"), "internal water," "soil water," "fringe water," and "intermediate (vadose) water." Ground water is further

[73] See cases cited in notes 50, 51, and 52. See also U. S. Dept. Agriculture Tech. Bul. 439, Policies Governing the Ownership of Return Waters from Irrigation.

subdivided into "gravity ground water" and "retained water." The upper surface of the zone of saturation (ground water), unless formed by an impermeable body, is called the "water table." [74]

From the standpoint of a discussion of rights to the use of subterranean waters, it is the waters which pass laterally from the subsurface of one land area to that of another that are important. These are "ground waters" as defined by Meinzer—a definition that is standard in the publications of the United States Geological Survey and that has wide acceptance elsewhere. Therefore it is sufficient, for the purpose of this discussion, to classify all available water supplies under the surface of the earth as ground waters.

Ground waters are subdivided, when discussing water rights, into (1) waters flowing in defined subterranean streams and (2) percolating waters.

**Discussion**

In comparison with surface waters, ground waters are particularly difficult to identify, due to the nature of their occurrence—in the ground, therefore out of sight. However, such marked advances in ground-water hydrology have been made in recent years that it is now possible, within reasonable limits of accuracy, to determine the occurrence, origin, and direction and rate of flow of ground waters. In the early stages of litigation over rights to the use of ground waters, lack of knowledge of the true physical conditions and relationships affecting them led to the establishment of principles not always in harmony with physical facts or with prevailing laws governing rights to the use of surface waters. According to Thompson, of the United States Geological Survey, "Much of the classification of ground-waters adopted in many Court decisions and by writers of legal textbooks is not consistent with scientific principles of ground-water hydrology"; furthermore, he states that "except for loss by transpiration and evaporation, nearly all groundwater is moving to maintain the flow of surface streams." [75] However, even though in the light of present knowledge it now appears that the distinction between waters flowing in defined subterranean channels and diffused percolating waters made in court decisions does not always accord with the actual physical conditions involved in the litigation, nevertheless the distinction has been made so widely that it must be taken into account in any discussion of present ground-water law.

Available ground waters occur as the result of precipitation and absorption of surface waters, including those flowing in streams. They are generally in motion, flowing through the interstices of the soil; moving at any given point and at any given time in a definite direction as the result of geological conditions and hydrostatic forces. These waters may or may not be under sufficient pressure to rise above the saturated zone; if the pressure is sufficient to accomplish such result, they become artesian waters. Note that these waters be-

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[74] Meinzer, O. E., Outline of Ground-Water Hydrology, supra.

[75] Thompson, David G., discussion of Harold Conkling's paper on Administrative Control of Underground Water: Physical and Legal Aspects, Transactions American Society of Civil Engineers, vol. 102 (1937). p. 753, at pages 800 and 810. See also Tolman, C. F., and Stipp, Amy C., Analysis of Legal Concepts of Subflow and Percolating Waters, Proceedings American Society of Civil Engineers, vol. 65, No. 10, December 1939, pp. 1687–1706 and discussions of this paper in subsequent issues of the Proceedings. A recent text on groundwater hydrology is Tolman, C. F., Ground Water (1937), 593 pp., illus.

come artesian if they rise above the saturated zone, even though they do not reach the surface. A well may be under artesian head, yet not flow upon the surface. Ground waters may reach the roots of vegetation and be transpired into the atmosphere, or may reach the surface soil and evaporate, or may join the flow of surface streams.

According to Thompson,[76] "a large part of the firm flow of practically all streams of importance in the United States comes from the ground-water reservoir." The underflow of a river may follow the course of the surface channel; but part of the underflow may leave the surface channel at some point and may or may not join it again. The connection between a surface stream and its underflow, in other words, is more assured where the stream is traversing a mountain valley than after it has debouched upon a broad plain; in the latter case, part of the underflow may follow an ancient channel of that stream, now covered by depositions of soil of such surface contour that the present surface stream is directed elsewhere than immediately above its ancient path. Water now flowing in such ancient channel, now underground, conforms to the classification of ground water flowing in a defined channel. Other water flowing underground in the general region and in the same direction as the surface stream may not, strictly speaking, be traversing a definite underground channel, and may more properly conform to the definition of diffused percolating water; but it may be equally important to the maintenance of flow of that surface stream. The court decisions in the Western States are far from uniform in their holdings on the right of use of these diffused percolating waters. This question is discussed in chapter 4.

[76] Id. at p. 807.

# Chapter 2

# WATER IN WATERCOURSES

## Nature of a Water Right

### The Water Right Is a Right of Use

The water right which attaches to a watercourse is a right to the use of the flow, not a private ownership in the corpus of the water.[1] This is the case, whether the water right is grounded upon ownership of riparian land or upon the statutory right of appropriation, discussed hereinafter. And this right of use is a property right, entitled to protection to the same extent as other forms of property.

Wiel [2] quotes the following from two California cases:

It is laid down by our law-writers that the right of property in water is *usufructuary*, and consists not so much of the fluid itself as the advantage of its use.

A right may be acquired to its use which will be regarded and protected as property, but it has been distinctly declared in several cases that this right carries with it no specific property in the water itself * * * In regard to the water of the stream, his rights (an appropriator's), like those of a riparian owner, are strictly *usufructuary*, and the rules of law by which they are governed are perfectly well settled.

The Utah Supreme Court has stated: [3]

Water flowing in a natural stream or in a ditch is not subject to ownership, so far as the corpus of the water is concerned. The right to use it is a hereditament appurtenant to land.

A California case contains this statement: [4]

The true reason for the rule that there can be no property in the *corpus* of the water running in a stream is not that it is dedicated to the public, but because of the fact that so long as it continues to run there cannot be that possession of it which is essential to ownership.

And a recent California decision, in criticising the trial court's use of the term "own," reaffirmed the principle that the riparian does not own the water of a stream, but "owns" only a usufructuary right—the right of reasonable use of the water on his riparian land when he needs it.[5] The Nevada Supreme Court states, further, that no title can be acquired to public waters by capture or otherwise, but only a usufructuary right can be obtained therein.[6] An early Kansas decision held that an owner of land riparian to a navigable

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[1] *Wall* v. *Superior Court* (53 Ariz. 344, 89 Pac. (2d) 624 (1939)); *State ex. rel. Mungas* v. *District Court* (102 Mont. 533 59 Pac. (2d) 71 1936)); *Albuquerque Land & Irr. Co.* v. *Gutierrez* (10 N. Mex. 177. 61 Pac. 357 (1900)); *Redwater Land & Canal Co.* v. *Reed* (26 S. Dak. 466. 128 N. W. 702 (1910)); *Texas Co.* v. *Burkett* (117 Tex. 16, 296 S. W. 273 (1927)); *Garner* v. *Anderson* (67 Utah 553, 248 Pac. 496 (1926)).

[2] Wiel, S. C., Water Rights in the Western States. 3d ed., vol. I, sec. 18, pp. 18–19.

[3] *Bear Lake & River Waterworks & Irr. Co.* v. *Ogden* (8 Utah 494. 33 Pac. 135 (1893)).

[4] *Palmer* v. *Railroad Commission* (167 Cal. 163, 138 Pac. 997 (1914)).

[5] *Rancho Santa Margarita* v. *Vail* (11 Cal. (2d) 501, 81 Pac (2d) 533 (1938)).

[6] *State ex rel. Hinckley* v. *Sixth Judicial District Court* (53 Nev. 343, 1 Pac. (2d) 105 (1931)).

stream did not own the ice forming on the stream adjacent to his land, and that without first taking possession of it he could not restrain a stranger from cutting and removing the ice.[7]

### The Water Right Is Real Property

The right to the flow and use of water being a right in a natural resource, is real property. There are many decisions to this effect.[8] As stated by Wiel:[9]

> This usufructuary right, or "water-right," is the substantial right with regard to flowing waters; is the right which is almost invariably the subject matter over which irrigation or water power or similar contracts are made and litigation arises; and is real property. It is as fundamental under the law of riparian rights as under the law of appropriation.

An exception is noted in Montana cases in which the interpretation of a taxation statute was involved.[10] The statute defined "real estate" and "improvements" for purposes of taxation, everything else subject to ownership being "personal property." The court stated that a water right, a right of use, is a wholly intangible thing, not a right or claim to land nor the possession or ownership of land; as it did not conform to any of the other items listed under real estate and improvements, it must of necessity be personal property for purposes of taxation. However, the Montana court has also stated that a suit to adjudicate water rights is in the nature of an action to quiet title to realty.[11]

### The General Rule, California Being a Notable Exception, Is That Water Diverted From a Natural Source and Reduced to Physical Possession Becomes Personal Property

While the corpus of the water flowing in a stream is not the subject of private property, and while the right of use of such water is held by most courts for most purposes to be real property, yet when the water has been diverted from its natural course and reduced to possession by means of artificial devices, the general rule (California being a notable exception) is that it becomes the personal property of the riparian owner or appropriator. Thus:[12]

> Just as wild animals, by capture becoming private property, are personalty, so likewise running water, severed from its natural wandering, and confined under private control in a reservoir, or other works of man that reduce it to possession, is also personal property.
>
> The individual particles of water so impressed by diversion into an artificial structure or waterworks that confine it, and become *private* property, possess none of the characteristics of immovability that go with ideas of real estate; they are still always moving though privately possessed, having, as particles, the characteristics of personal property.

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[7] *Wood* v. *Fowler* (26 Kan. 682, 40 Am. Rep. 330 (1882)).

[8] See Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II. sec. 769, p. 1328, and cases cited. Typical recent decisions are: *Comstock* v. *Olney Springs Drainage Dist.* (97 Colo. 416, 50 Pac. (2d) 531 (1935)); *Bothwell* v. *Keefer* (53 Ida. 658, 27 Pac. (2d) 65 (1932)): *Nenzel* v. *Rochester Silver Corpn.* (50 Nev. 352. 259 Pac. 632 (1927)); *New Mexico Products Co.* v. *New Mexico Power Co.* (42 N. Mex. 311, 77 Pac. (2d) 634 (1937)); *Madison* v. *McNeal* (171 Wash. 669, 19 Pac. (2d) 97 (1933)).

A permit to appropriate water is not real property, but is merely the consent given by the State to construct and acquire real property: *Big Wood Canal Co.* v. *Chapman* (45 Ida. 380, 263 Pac. 45 (1927)).

[9] Wiel, S. C., Water Rights in the Western States. 3d ed., vol. I. sec. 18. p. 20.

[10] *Helena Waterworks Co.* v. *Settles* (37 *Mont.* 237, 95 Pac. 838 (1908)), cited in *Brady Irr. Co.* v. *Teton County* (107 Mont. 330, 85 Pac. (2d) 350 (1938)), to support the statement that a water right considered alone for purposes of taxation is personal property.

[11] *Sherlock* v. *Greaves* (106 Mont. 206, 76 Pac. (2d) 87 (1938)).

[12] Wiel, op cit., sec. 35, p. 33.

This is the majority view of the western courts in considering the character of water in reservoirs or pipe lines from the standpoint of its sale, theft, and taxation. Examples of the circumstances under which this conclusion has been reached are as follows:

The Supreme Court of Washington, in a case involving foreclosure of a mortgage on a system of waterworks, observed that while water in a stream is deemed in law a part of the land over which it flows, nevertheless after diverted from the original channel and conveyed elsewhere in pipes for distribution or sale, it loses its original character and becomes personal property.[13] That court held in a later case that water in an artificial ditch is private and personal property and as such, is subject to an agreement for its sale or use and may be a consideration for exchange of the right-of-way for a ditch.[14] The New Mexico Supreme Court has held that water impounded and reduced to possession by artificial means is personal property and may be the subject of purchase and sale or of larceny.[15] The Utah Supreme Court held that water in the pipes of a distributing system, being personal property and not appurtenant to any land, is not exempt from taxation under a statute exempting the right to water flowing in a stream from taxation in cases where the land to which it is appurtenant is subject to taxation;[16] in an action for damages for injury to fishponds, stated that such property is "personal property pure and simple";[17] and held, in a case involving the right of a mutual-company stockholder to have water delivered into a private pipe line for domestic use outside of the area irrigated by the company, that when a stockholder has the water to which he is entitled delivered into his private pipe line, it becomes his personal property subject to his own disposal so long as the rights of others are not interfered with.[18] The Supreme Court of Oregon stated that water becomes personal property after being appropriated and diverted from a natural stream into ditches, canals, or other artificial works and consequently cannot be appropriated by others from such works.[19] The Kansas Supreme Court held that as the water flowing in a stream was not a part of the estate of one who built a dam to impound the water, the accumulation of water behind the dam was in a sense the reducing of personal property to possession, much like the collection of a crop of ice; hence the transfer of the water or ice so accumulated is not required by deed.[20]

The rule in California, however, is that water in canals and other artificial conduits or reservoirs does not become personalty as soon as it is diverted from its natural channel or situation, but usually retains its character as realty until severence from the artificial conduits is completed by delivery therefrom to the consumer.[21] It is further well settled in California that water in use in irrigation is not per-

[13] *Dunsmuir* v. *Port Angeles Gas, Water, Elec. Light & Power Co.* (24 Wash. 104, 63 Pac. 1095 (1901)).

[14] *Methow Cattle Co.* v. *Williams* (64 Wash. 457, 117 Pac. 239 (1911)); see also *Madison* v. *McNeal* (171 Wash. 669, 19 Pac. (2d) 97 (1933)).

[15] *Hagerman Irr. Co.* v. *McMurry* (16 N. Mex. 172, 113 Pac. 823 (1911)).

[16] *Bear Lake & River Waterworks & Irr. Co.* v. *Ogden* (8 Utah 494, 33 Pac. 135 (1893)); see also *Utah Metal & Tunnel Co.* v. *Groesbeck* (62 Utah 251, 219 Pac. 248 (1923)).

[17] *Reese* v. *Qualtrough* (48 Utah 23, 156 Pac. 955 (1916)).

[18] *Baird* v. *Upper Canal Irr. Co.* (70 Utah 57, 257 Pac. 1060 (1927)).

[19] *Vaughan* v. *Kolb* (130 Oreg. 506, 280 Pac. 518 (1929)).

[20] *Johnston* v. *Bowerstock* (62 Kans. 148, 61 Pac. 740 (1900)).

[21] *Fudickar* v. *East Riverside Irr. Dist.* (109 Cal. 29, 41 Pac. 1024 (1895)); *Stanislaus Water Co.* v. *Bachman* (152 Cal. 716, 93 Pac. 858 (1908)).

sonal property.[22] The distinction made between irrigation and certain other uses in this connection is that severance from the realty, in case of water used for domestic purposes, takes place when the water is taken from the pipes (which are fixtures, part of the realty) by the consumer; but that severance, in case of water delivered in pipes or ditches for irrigation, does not take place at all, for by such use the water permeates the soil and remains a part of the realty.[23] Following this distinction, it has been held recently by the district court of appeal (hearing denied by the supreme court) that water from wells, upon delivery to an oil company for industrial purposes became personalty; that it no more partook of the characteristics of realty than does water delivered by a municipality for domestic or industrial purposes.[24]

## Two Opposing Doctrines in the West: Riparian and Appropriation

The Western law of water rights embraces two diametrically opposite principles—the common-law doctrine of riparian rights, and the statutory doctrine of prior appropriation. Under the riparian doctrine, the owner of land contiguous to a stream has certain rights in the flow of the water, by virtue of such land ownership. Under the appropriation doctrine, the first user of the water acquires a priority right to continue the use, and contiguity of land to the watercourse is not a factor.

### The Riparian Doctrine Has Been Recognized in Some of the Western States and Has Been Abrogated in Whole or in Part in Others

The right of an owner of land riparian to a stream to use the water of that stream for irrigation on his riparian land, solely by virtue of ownership of the land, has been upheld by the courts of most of the States lying on the one-hundredth meridian—North Dakota, South Dakota, Nebraska, Kansas, and Texas—and in California and Washington bordering on the Pacific Ocean. In Oklahoma it has been assumed that the riparian doctrine is in effect, but the right of a riparian owner as against an appropriator of the water of the same stream has not yet been defined by the supreme court. Oregon started out with the riparian doctrine, but has practically discarded it; in other words, various decisions—principally early ones—stated that riparian owners had rights to the use of water, but the right has been restricted to actual beneficial use by the statutes and court decisions and has been so construed as to amount to a virtual abrogation of the riparian doctrine except as to various early rights based upon beneficial use. In some of the States in which the doctrine is recognized, it has been greatly restricted in application by the court decisions; in others it is of moderate importance; and in still other States it is of real significance, both legally and economically.

The riparian doctrine has been specifically repudiated *in toto* in the group of States lying between these Eastern and Western tiers, viz., Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming.

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[22] *Fawkes* v. *Reynolds* (190 Calif. 204, 211 Pac. 449 (1922)); *Relovich* v. *Stuart* (211 Calif. 422, 295 Pac. 819 (1931)).
[23] *Copeland* v. *Fairview Land & Water Co.* (165 Cal. 148. 131 Pac. 119 (1913)).
[24] *Lewis* v. *Scazighini* (130 Cal. App. 722, 20 Pac. (2d) 359 (1933)).

**The Appropriation Doctrine Is in Effect, Concurrently With the Riparian Doctrine, in Some Western States, and to the Exclusion of the Riparian Doctrine in Others**

The appropriation doctrine has been adopted in all of these 17 Western States. In the States which recognize the riparian doctrine, or at least the existence of some riparian rights—these States have some agricultural areas of considerable and some of scant rainfall—the appropriation system was originally superimposed upon an underlying riparian doctrine; but it should be made clear here, as brought out later in more detail, not only that the basic riparian doctrine has been modified in greater or less degree in most of these States, but that in several jurisdictions, while recognized as the basis of various existing rights, it has been largely or wholly superseded as to future uses of water by the doctrine of appropriation.

The two-fold system is often referred to as the "California doctrine," and the exclusive appropriation system as the "Colorado doctrine." This has come about because of the underlying theories of ownership of water of natural streams in these two States.[25] The view developed by the California courts was that the right to appropriate water on the public domain was derived from the United States as owner of the land, and not directly from the State. The appropriation constituted a grant from the United States, as owner of the public domain and the waters thereon, to the appropriator, the grant having been originally implied and later confirmed by Congressional legislation. (See p. 70, below.) Waters thus appropriated by individuals were reserved for their use, as against the claims of subsequent grantees of public lands. But the right to waters not so reserved by virtue of prior appropriations passed as a riparian right with each grant of land riparian to a stream; and this riparian right was superior to appropriations from that stream thereafter made.

The Colorado doctrine, on the other hand, rests upon the theory that the water of all natural streams is the property of the public or of the State; that the common-law doctrine of riparian rights is unsuited to semiarid conditions and never obtained in a State such as Colorado; that the United States in its proprietary capacity has no rights not accorded to private landowners, and therefore no grantee of the United States can have riparian rights, which never existed in the jurisdiction; consequently the right to the use of water of streams may be obtained only by appropriating the water—the property of the public or the State—under the law of the State. The fundamental distinction between the two rules is thus summarized by Wiel:[26]

> While the California courts started with a Federal title and deduced the law of riparian rights from that, the Colorado doctrine started from a rejection of riparian rights, and deduced a rejection of Federal title from that, since the United States holds its public land like other landowners in this respect.

The most recent development in the California theory of ownership of waters is a recognition by the Supreme Court of that State that the excess waters of all streams—that is, all stream waters above

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[25] The statement of the two theories here presented is summarized from the able discussion by Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, pp. 173–228.

[26] Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 168, p. 186.

the quantities required for existing riparian and appropriative rights—are public waters of the State, subject to appropriation and use under State control.[27]

**Riparian and Appropriative Rights Are Equally Entitled to Protection of Law. While the Doctrines Are in Conflict, Adjustments Are Made in Specific Instances by the Courts**

The adjustment of these conflicting principles, in States which recognize both doctrines, has been the subject of much litigation. The common-law riparian right vests at the time the land, of which it is a part, passed to private ownership. The appropriative right vests when the appropriation is made. The exercise of either right, to the extent to which it is determined by the court to be a valid accrued right, is entitled to as full protection as is that of the other.

The Supreme Court of Nebraska stated:[28]

> From what has been said, it must not be inferred that the rights of an appropriator for beneficial purposes contemplated by statute are not as sacred and as much entitled to the equal protection of the law as is the property right of riparian proprietors. * * * The two doctrines are not necessarily so in conflict with each other as that one must give way when the other comes into existence. The common-law rule of riparian rights is underlying and fundamental and takes precedence of appropriations of water if prior in time. The two doctrines stand side by side. They do not necessarily overthrow each other, but one supplements the other. * * * The time when either right accrues must determine the superiority of title as between conflicting claimants.

The Nebraska appropriation statute was held to have abrogated the riparian doctrine except as to rights which had already accrued. Subsequent Nebraska decisions further restricted the operation of the riparian doctrine by limiting the remedy of a riparian owner to such damages as he could prove to have resulted from invasion of his right, and holding that such damages could not be increased by reason of his expenditures in constructing irrigation works after the accrual of either upstream or downstream appropriations.[29]

In California, which also recognizes both doctrines, the decisions are positive to the effect that the common-law rule is underlying and fundamental; furthermore, that riparian rights in unentered public lands were not abrogated by the appropriation statutes. The protection of the water right has been thus stated by the Supreme Court in a decision recognizing the duty of the court to cause the water law "to conform to the state policy now commanded by our fundamental law" as expressed in a constitutional amendment upheld and interpreted as imposing reasonable use upon the exercise of all water rights:[30]

> There is and should be no endeavor to take from a water right the protection to which it is justly entitled. The preferential and paramount rights of the riparian owner, the owner of an underground and percolating water right, and the prior appropriator are entitled to the protection of the courts at law or in equity. When there is no substantial infringement of the right, that is, when there is no material diminution of the supply by reason of the exercise of the

[27] *Meridian* v. *San Francisco* (13 Calif. (2d) 424, 90 Pac. (2d) 537 (1939)).

[28] *Crawford Co.* v. *Hathaway* (67 Nebr. 325, 93 N. W. 781 (1903)).

[29] *McCook Irr. & Water Power Co.* v. *Crews* (70 Nebr. 109, 115, 96 N. W. 996 (1903), 102 N. W. 249 (1905)); *Cline* v. *Stock* (71 Nebr. 70, 79, 98 N. W. 454 (1904), 102 N. W. 265 (1905)).

[30] *Peabody* v. *Vallejo* (2 Calif. (2d) 351, 40 Pac. (2d) 486 (1935)).

subsequent right, the owner is entitled to a judgment declaring his preferential and paramount right and enjoining the assertion of an adverse use which might otherwise ripen into a prescriptive right. * * * If the exercise of the appropriative right cause a substantial diminution of the supply the owner is entitled to compensation for the resulting damage to his lands. But the technical infringement of the right is not actionable * * * except to establish priority. This is but another way of saying that the appropriator may use the stream surface or underground or percolating water, so long as the land having the paramount right is not materially damaged. Any use by an appropriator which causes substantial damage thereto, taking into consideration all of the present and reasonably prospective recognized uses, is an impairment of the right for which compensation must be made either in money or in kind, and in the event public use has not attached the owner of the paramount right is entitled to injunctive relief.

Under the Nebraska rule as above stated the time element is controlling, as between riparian and appropriative claimants on the same stream, in the matter of accrual of the water right, and has an important bearing upon the value of a riparian right actually accrued but not yet exercised by putting the water to use.

Under the California rule the time element is controlling to this extent: The rights of a riparian owner are subject to appropriative rights in waters on the public domain vested and accrued, as the result of diversion, prior to the entry upon riparian lands;[31] and this applies even where the public land upon which the appropriative diversion is made lies upstream from the subsequently acquired riparian land.[32] In such case the upstream appropriator's rights need not rest upon adverse use as against the downstream entryman, but vest immediately as against subsequent entrymen by reason of the Congressional legislation discussed hereinafter in connection with the growth of the appropriation doctrine. But according to this last-cited decision, an appropriation of water of a stream, diverted on *privately* owned lands for use on such land, gives no rights as against the riparian rights of a subsequent purchaser from the United States of Government land situated upon the stream above the point of diversion. The exercise of a riparian right, in other words, is not necessary to hold it superior to appropriations on private lands, in the absence of prescriptive rights acquired against it; and future use may be insured against the vesting of prescriptive rights by the securing of a declaratory judgment.

The result of this conflict of rights, in a jurisdiction in which both the riparian and appropriation doctrines are recognized but in which the riparian doctrine is the paramount rule and rights thereunder are protected to the extent that they are in California, is that the riparian right attaches to a tract of land at the time such land passes to private ownership; such right is co-equal with the right of every other riparian owner on the stream, regardless of the relative dates on which the several riparian tracts passed to private ownership; such right is inferior to appropriative rights previously acquired on public land; but as to appropriative rights to the waters of the stream subsequently initiated, the riparian

[31] *Haight* v. *Costanich* (184 Calif. 426, 194 Pac. 26 (1920)).
[32] *San Joaquin & Kings River C. & Irr. Co.* v. *Worswick* (187 Calif. 674, 203 Pac. 999 (1922)).

right is superior. Once the riparian right has vested in a particular tract, it obviously cannot be destroyed by a later statutory appropriation. Appropriators thereafter take only at the sufferance of the holders of established riparian rights; the later appropriator may use water to which the riparian owner is entitled, but only during the periods in which the riparian does not choose to make use of it. That is, while a late appropriative right may be enriched by reason of the abandonment of an early appropriative right or a failure on the part of an early appropriator to use the water for a period of years prescribed by statute, it is not enriched as the result of the failure of a riparian owner to exercise his riparian right; for a riparian right is not destroyed by nonuse. It is true that an appropriator may acquire a prescriptive right as against a riparian owner by virtue of an upstream diversion which actually deprives the riparian of water to which he is entitled, but that involves an entirely different legal principle; if the appropriator's diversion is downstream from the riparian land, his use is not actually adverse to the riparian owner's possible use, and in such case he cannot acquire a prescriptive right. The point is that aside from the interposition of some rule affecting the loss of property rights in general, such as prescription, the riparian right is (1) coordinate with the rights of other riparian owners, (2) subordinate to appropriative rights previously acquired on public land, and (3) paramount to appropriative rights subsequently acquired.

The foregoing statement expressly refers to a jurisdiction in which the riparian doctrine is the paramount rule. The common-law rule, while still retained in various western jurisdictions, has been so modified in some of them as to make the riparian doctrine no longer the paramount rule of water law. This is shown more fully in the discussion of the riparian doctrine, below in this chapter.

#### Rights to the Use of Water of Watercourses Are Largely a Matter of State Law

Aside from Texas, and the extensive areas in other parts of the Southwest included in Spanish and Mexican grants, the Federal Government originally owned most of the land in these Western States. However, western water law has developed primarily in the State courts and legislatures. The early State legislation gave customs the sanction of law. The important congressional acts dealing with water rights on public lands recognized local customs, laws, and court decisions, and thus facilitated the application of State laws to such rights.

The United States Supreme Court has repeatedly recognized the right of each State to adopt its own system of water law, regardless of whether or not public lands were involved.[33] The Court has also held that a right claimed by riparian ownership, asserted to have been secured by the Treaty of Guadalupe Hidalgo, as against the pueblo right of a city, does not present a Federal question.[34]

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[33] *United States* v. *Rio Grande Dam & Irr. Co.* (174 U. S. 690 (1899)); *Clark* v. *Nash* (198 U. S. 361 (1905)); *Kansas* v. *Colorado* (206 U. S. 46 (1907)); *Connecticut* v. *Massachusetts* (282 U. S. 660 (1931)); *California-Oregon Power Co.* v. *Beaver Portland Cement Co.* (295 U. S. 142 (1935)).

[34] *Los Angeles Farming & Mill. Co.* v. *Los Angeles* (217 U. S. 217 (1910)).

**The Appropriation Doctrine Applies Generally to Navigable as Well as to Nonnavigable Watercourses, Subject to the Paramount Right of the Federal Government to Control Navigation. The States Which Recognize the Riparian Doctrine Are Not Uniform in Applying That Doctrine to Navigable Waters**

Navigation is a superior use of the waters of a navigable stream, and its protection is exercised by the Federal Government in the interest of interstate commerce.

The Supreme Court recently stated:[35]

> The power to regulate interstate commerce embraces the power to keep the navigable rivers of the United States free from obstructions to navigation and to remove such obstructions when they exist.

The Supreme Court has consistently upheld the paramount right of the United States to control navigable streams, and the matter is not a moot question. In *United States* v. *Chandler-Dunbar Water Power Co.*[36] the power of Congress over the improvement of navigable rivers was stated to be "great and absolute," derived from the power to regulate commerce between the States and with foreign nations, and to be "unfettered"; but the Court has also stated that legislation which has no real or substantial relation to the control of navigation or appropriateness to that end may not arbitrarily destroy or impair the rights of riparian owners.[37] In *Arizona* v. *California*[38] the Boulder Canyon Project Act was considered; as it provided, among other things, for the purpose of "improving navigation and regulating the flow" of the Colorado River, and as that stream was held to be a navigable stream, the means provided by the act were held to be not unrelated to the control of navigation, and the fact that purposes other than navigation would also be served was stated not to invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of congressional power. The Federal Government was held to be under no obligations to submit the plans and specifications for its dam to a State engineer under a State statute.

In the very recent decision in *United States* v. *Appalachian Electric Power Co.*[38a] the Supreme Court reaffirmed the absolute power of Congress over improvements for navigation upon waters which are capable of use as interstate highways. It was held that while the navigability of a stream is a factual question, it involves the application of legal tests which must take into consideration variations in uses, and that a waterway is not barred from classification as navigable merely because reasonable improvements are required to make it available for traffic; that when once found to be navigable, a waterway remains so. Further, the constitutional power of the United States over its waters is not limited to control for navigation; flood protection, watershed development, and recovery of the cost of improvements through utilization of power are likewise parts of commerce control, and navigable waters are subject to national planning and control in

[35] *Ashwander* v. *Tennessee Valley Authority* (297 U. S. 288 (1936)).
[36] 229 U. S. 53 (1913).
[37] *United States* v. *River Rouge Impr. Co.* (269 U. S. 411 (1926)).
[38] 283 U. S. 423 (1931).
[38a] 61 S. Ct. 291 (1940).

the broad regulation of commerce by the United States. The power of Congress to regulate commerce, it was stated, is so unfettered that its judgment as to whether a structure is or is not a hindrance is conclusive; and the exclusion of riparian owners from the benefits of a navigable stream, without compensation, is entirely within the Government's discretion. Hence, Congress may make the erection or maintenance of a structure in a navigable water dependent upon a license.

Notwithstanding the superior use of navigable streams for purposes of navigation, rights to the use of such waters for irrigation and other purposes may generally be acquired, to the extent that navigability of the stream is not interfered with. The Supreme Court held in 1899 [39] that while the power to change the common-law rule as to streams within its dominion belonged to each State, two limitations must be recognized: (1) In the absence of specific authority from Congress, a State cannot destroy by legislation the right of the United States to the continued flow of waters necessary for the beneficial uses of Government property in connection with its lands bordering on a stream; and (2) the State's right is limited by the superior power of the United States to secure the uninterrupted navigability of all navigable streams within the limits of the United States. Further, by the desert land legislation, Congress did not intend to confer upon any State the right to appropriate all the waters of a tributary stream which unite into a navigable watercourse, and thus destroy the navigability of that watercourse. Regardless of any such intention, however, Congress in the act of September 19, 1890, had prohibited the creation of obstructions to the navigable capacity of any waters in respect of which the United States has jurisdiction; and this was held, without disturbing the prior statutes regarding the appropriation of nonnavigable waters, to be an exercise by Congress of its recognized power over the control of navigable streams. It was made clear that this prohibition did not apply to all obstructions upon navigable watercourses, but only those obstructions which interfered with their navigable capacity.

The Desert Land Act of 1877,[40] which, the Supreme Court has held, separated the land and the water on the public domain,[41] provided that the surplus unappropriated water of sources on the public domain and not navigable, should be available for appropriation and use by the public for irrigation, mining, and manufacturing purposes. Thus Congress, while subjecting nonnavigable waters on the public domain to appropriation by the public, has reserved its control over the maintenance of navigability of navigable watercourses. As above noted, the Supreme Court has stated that such control was not surrendered with respect to tributaries which unite into navigable watercourses; [42] and the Oregon Supreme Court stated subsequently that the Desert Land Act was not intended to permit appropriators to deplete the flow of streams to such an extent as to impair materially the navigation of rivers to which such streams are directly or indirectly tributaries.[43]

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[39] *United States* v. *Rio Grande Dam & Irr. Co.* (174 U. S. 690 (1899)).
[40] 19 Stat. L. 377 (March 3, 1877).
[41] *California-Oregon Power Co.* v. *Beaver Portland Cement Co.* (295 U. S. 142 (1935)).
[42] *United States* v. *Rio Grande Dam & Irr. Co.* (174 U. S. 690 (1899)).
[43] *Hough* v. *Porter* (51 Oreg. 318, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 729 (1909)).

Subject, then, to the paramount right of the Federal Government to control navigation and to protect the navigability of navigable streams, the right to appropriate such waters is generally recognized throughout the West.

The water of navigable streams may be appropriated as well as the water of those not navigable. * * * The rights on navigable streams are in general all that can be exercised without being inconsistent with the public easement of navigation.[44]

Many diversions under appropriative rights are made from such streams. The effect of acquisition of an appropriative right on a navigable stream is to establish the appropriator's right to make his diversion during the periods in which the navigable capacity of the stream is not impaired by the diversion. Concerning the probable operation of this limitation, Harding [45] states:

While the legal right of navigation to take precedence over other uses is well established, its exercise has been based on questions of public policy, and it is not to be expected that the legal preference of navigation will be enforced to prevent other uses except where navigation represents a greater public interest than such other purposes. Other methods of transportation are generally available, while alternate sources of water supply for irrigation are seldom obtainable. It is not to be expected that the rights of navigation will be asserted in the future to an extent that will restrict irrigation or other developments affecting navigable streams.

However, the South Dakota appropriation statute exempts navigable waters from appropriation,[46] and the North Dakota statute did so until amended in 1939.[47] The South Dakota Supreme Court has not yet had occasion to define a navigable stream in relation to the right to appropriate waters for consumptive uses, but has defined navigable waters in an action to quiet title and to determine conflicting rights to an island in an inland lake,[48] and in an action to enjoin the cutting and removal of hay in a dry lake bed within the meander line contiguous to the land of a riparian owner.[49] The conclusion reached was that the test as to whether waters are navigable depends upon the natural availability of such waters for public purposes, taking into consideration the natural character and surroundings of the lake or stream, being equivalent to a classification of public and private waters. The term "navigable" was held to imply not merely the idea that the waters could be navigated, but also the idea of public use—that is, use by the public for fishing, fowling, boating, and other like purposes—so that waters are deemed navigable if they are more reasonably adapted to public than to private uses.

The States which recognize the riparian doctrine so far as nonnavigable waters are concerned are not uniform in extending that doctrine to the use of the waters of navigable streams for irrigation purposes, but the weight of authority in such western jurisdictions seems to be in favor of applying the rule to navigable waters. The Supreme Court of California, in a fairly early case,[50] held that the question of navigability of a nontidal stream would not affect the riparian owner's right, so far as such right was not inconsistent with

[44] Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 339, p. 360, and cases cited. In a fairly recent case, *In re Crab Creek and Moses Lake* (134 Wash. 7, 235 Pac. 37 (1925)), it was stated that the rights of appropriators do not depend upon the navigability or nonnavigability of the water appropriated.

[45] Harding, S. T., Water Rights for Irrigation—Principles and Procedure for Engineers, p. 14.

[46] S. Dak. Code 1939, sec. 61.0101.

[47] N. Dak. Comp. Laws 1913, sec. 8235, amended by Laws 1939, ch. 255.

[48] *Flisrand* v. *Madson* (35 S. Dak. 457, 152 N. W. 796 (1915)).

[49] *Hillebrand* v. *Knapp* (65 S. Dak. 414, 274 N. W. 821 (1937)).

the public easement for navigation; and the Texas courts have held to the same effect.[51] The Nebraska Supreme Court in a leading decision on riparian rights indicated a belief that such rights would not attach to the waters of "the larger streams of the state, such as may be classed as interstate rivers, and along the banks of which meander lines have been run by the government in its survey of the public lands," but left the determination of such question to a proper case in which it might be presented and fully considered.[52] The implication was that a meandered stream would be permissibly classified as navigable, in which case its waters would not be subject to riparian claims by adjoining landowners. A recent decision [53] pointed out that those statements were not necessary to the decision, discussed the relation of meander lines to riparian boundaries, and concluded that abutting owners on the Platte River, a meandered stream, who initiated title prior to 1889 acquired title to its bed and riparian rights in its waters. The question of riparian rights in navigable streams in Nebraska apparently has not been squarely decided, but the strong inference seems to be that riparian rights would not be recognized in navigable waters.

The Supreme Court of Washington has held definitely that owners of uplands bordering upon navigable waters cannot assert riparian rights as against the claims of appropriators.[54]

## The Riparian Doctrine

### The Riparian Doctrine Was Accepted in Various States as a Part of the Common Law

The rule that an owner of land contiguous to a stream has certain rights in the natural flow of water in the stream is a part of the common law of England, but apparently has become such only in modern times. The decisions of those Western States which recognize the riparian doctrine have based such recognition upon the State's adoption of the common law, although the Texas Supreme Court has held that the riparian doctrine was in force in that jurisdiction even under the Mexican and independent regimes prior to American statehood.[55] It is therefore interesting to note the conclusion of Mr. Samuel C. Wiel, a recognized authority on water law, that: [56]

> * * * the common law of watercourses is not the ancient result of English law, but is a French doctrine (modern at that) received into English law only through the influence of two eminent American jurists.

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[50] *Heilbron* v. *Fowler Switch Canal Co.* (75 Calif. 426. 17 Pac. 535 (1888)).
It was held by the district court of appeal in *Los Angeles* v. *Aitken* (10 Calif. App. (2d) 460, 52 Pac. (2d) 585 (1935; hearing denied by the Supreme Court)), that the constitutional amendment (art. XIV, sec. 3) imposing reasonableness upon all uses of water applies to lakes as well as to flowing streams, and that the question of navigability does not alter the application of the policy.

[51] *Barrett* v. *Metcalfe* (12 Tex. Civ. App. 247, 33 S. W. 758 (1896): writ of error refused, 93 Tex. 679); *Bigham Bros.* v. *Port Arthur Canal & Dock Co.* (91 S. W. 848 (Tex. Civ. App. 1905), 100 Tex. 192, 97 S. W. 686 (1906); *Motl* v. *Boyd* (116 Tex. 82, 286 S. W. 458 (1926).

[52] *Crawford Co.* v. *Hathaway* (67 Nebr. 325. 93 N. W. 781 (1903)).

[53] *Osterman* v. *Central Nebraska Public Power & Irr. Dist.* (131 Nebr. 356, 268 N. W. 334 (1936)).

[54] *State ex rel. Ham, Yearsley & Ryrie* v. *Superior Court* (70 Wash. 442, 126 Pac. 945 (1912)).

[55] *Motl* v. *Boyd* (116 Tex. 82. 286 S. W. 458 (1926)).

[56] Wiel, S. C. Waters: American Law and French Authority. Harvard Law Review, vol. XXXIII, No. 2, p. 147. See also by the same author, Waters: French Law and Common Law, California Law Review, vol. VI, p. 245 et seq. and 342 et seq.

He points out that at the beginning of the nineteenth century, and as late as 1831, the English law granted the right of use of water flowing through one's land to the first who appropriated it, the modern doctrine being laid down (but without using the term "riparian") in *Mason* v. *Hill* [57] in 1833. Several years earlier Story and Kent had expounded the civil-law doctrine of "riparian" proprietorship, with emphasis upon the French sources; but neither court nor counsel in *Mason* v. *Hill* cited either the American jurists or the French code. From then on until 1849, according to Wiel, the English law wavered, being set at rest in *Wood* v. *Waud* [58] wherein the ruling in *Mason* v. *Hill* was reiterated and the term "riparian" was apparently first used in English decisions, main reliance being placed upon Kent and Story. Continuing, after noting subsequent cases: [59]

> We are therefore referred, by the English reports themselves, to these American jurists for the designation of the doctrine as a "riparian" one, and for the most approved expression of the doctrine, by the aid of which the English courts were enabled to lay contention at rest. The American usage arose through Story and Kent, both of whom at about the same time took the name and doctrine from the French civil law.

The doctrine of the correlative rights of riparian landowners in the use of water of watercourses having become a part of the common law of England, the Western States which adopted the common law adopted also that doctrine of rights in watercourses, in the absence of existing or subsequent constitutional or statutory provisions abrogating the riparian doctrine or court decisions holding that it was not a part of the State law. However, the common-law rule was developed under climatic and landed conditions vastly different from those in the Western United States. Consequently, even in the Western States which have recognized riparian rights as a basic doctrine, the application and development of the rule in the new environment have resulted during the past half-century or more in principles and limitations which had not been announced in the eastern and English decisions. This was an unavoidable consequence, for a strict application of the common-law doctrine would have been impracticable in an irrigated region, while in the more arid States the doctrine has been discarded entirely.

### General Statement of the Riparian Doctrine

Under the riparian doctrine in its strict sense, the owner of land contiguous to a watercourse is entitled to have the stream flow by or through his land, undiminished in quantity and unpolluted in quality, except that any riparian proprietor may make whatever use of the water he requires for domestic and household purposes and the watering of farm animals. In its modified sense, the doctrine allows each proprietor to make such use of the water for the irrigation of his riparian land as is reasonable in relation to the similar requirements of other proprietors of land riparian to the same stream; and under the more recent developments, the riparian owner's use of water must

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[57] 5 Barn. & Adol. 1. 110 Eng. Reprint 692 (1833).

[58] 3 Exch. 748. 154 Eng. Reprint 1047 (1849).

[59] Wiel. S. C. op. cit. See also case note to *Heath* v. *Williams* (43 Am. Dec. 269 et seq.) concerning the adoption and early application of the riparian doctrine in various Eastern States.

be reasonable with respect to the needs of appropriators of the water for use on nonriparian land.[60]

The question of riparian rights has arisen and the strict doctrine has been adhered to in various cases in which a riparian landowner has sought to enjoin another from backing up the water of a stream to such an extent as to injure the upper owner's land, or to enjoin the pollution of a stream with resulting detriment to the value of downstream riparian land. Controversies of that character are to be distinguished from those in which a landowner claims a common-law right to the use of the stream water for irrigation.

The basic principles are further stated in the leading California case of *Lux* v. *Haggin*,[61] a decision which has had a marked influence on the development of the riparian doctrine in California and some other jurisdictions in the West:

> By the common law the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it. The right in each extends to the natural and usual flow of all the water, unless where the quantity has been diminished as a consequence of the reasonable application of it by other riparian owners for purposes hereafter to be mentioned. * * * We need not add that rights to the use of water may be acquired by grant, under some circumstances by *assent*, and by adverse user and possession.

The riparian right arises by operation of law, as an incident to the ownership of riparian land, of which the right is part and parcel. Acquisition of the right requires no act other than acquisition of the land. Riparian land necessarily is land contiguous to or abutting upon a natural stream or lake; and the general rule is that land for which riparian rights may be claimed must lie within the watershed of the stream or body of water to which it is contiguous,[62] and that the riparian land is further bounded by the original grant from the Government. Land cut off from contiguity to the water source by subsequent conveyances is thereby deprived of its riparian right, unless reserved in the conveyance. Under some circumstances riparian water may be used on nonriparian land. The courts of certain States have denied the claims of cities to the use of water for the purpose of supplying their inhabitants, where such claims were based solely upon municipal ownership of land riparian to a stream, or have held the city's rights to inhere only in its own land and not in lands owned by its inhabitants; but in Texas a city was not only allowed to exercise a riparian right but was given a preference for domestic purposes over uses for irrigation by other riparian owners. The different State rules on these matters are noted in the discussions of riparian rights in the several States, below, in this chapter.

The riparian right includes the right to make use of the water for irrigation. This has been the uniform holding in the Western States which accept the doctrine. The use of the water for irrigation, furthermore, must be reasonable in relation to the needs of other

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[60] For a good statement of the riparian doctrine, see Long, J. R., A Treatise on the Law of Irrigation, 2d ed., sec. 31, p. 66.

[61] 69 Calif. 255, 10 Pac. 674 (1886).

[62] An exception is noted in the early Oregon case of *Jones* v. *Conn* (39 Oreg. 30, 64 Pac. 855, 65 Pac. 1068 (1901)), to the effect that lands bordering a stream are riparian without regard to their extent or to the question of when or from whom title was acquired.

riparian owners. No riparian owner, therefore, has the right to abstract all the water of a stream for irrigation purposes if other riparian owners wish to make use of the water at such time; although it appears that the riparian owner may take the whole stream if necessary for so-called "natural uses"; that is, "those arising out of the necessities of life on the riparian land, such as household use, drinking, watering domestic animals * * * leaving none to go down to lower riparian proprietors." [63]

The California and Washington courts have denied the right of a riparian owner to store water for future use without making an appropriation therefor, but the Texas courts have sanctioned such right, as noted in the discussions for those States. A Kansas statute, as noted in the appendix, provides that any person entitled to the use of water for the irrigation of lands or other purposes may store the same for use "presently thereafter," and does not limit the privilege to holders of water rights of any particular character.

It follows that the riparian right, in contrast with the right of prior appropriation, is not so far as irrigation is concerned an exclusive right. The quantity of water which any one riparian owner may divert for irrigation purposes in a given season from the stream to which his land is contiguous is, in theory and practice, an exceedingly variable quantity, depending upon the natural flow at a given time and the needs of all others having similar rights who wish to make use of the flow at that time. The problems of adjustment are well stated by the California Supreme Court [64]:

> The larger the number of riparian proprietors whose rights are involved, the greater will be the difficulty of adjustment. In such a case, the length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each,—all these, and many other considerations, must enter into the solution of the problem; but one principle is surely established, namely, that no proprietor can absorb all the water of the stream so as to allow none to flow down to his neighbor.

The riparian right does not depend upon use of the water and therefore is not lost by nonuse alone. However, the right of use may be lost by upstream adverse use of the part of others, and even by downstream adverse use under circumstances that amount to an actual interference with the upstream landowner's rights.[65] In the usual case a downstream diversion by a lower riparian proprietor or appropriator does not prevent those riparian owners whose lands lie above him on the stream from making use of the water; hence for this practical reason prescriptive rights as a general rule do not run upstream. (See discussion of loss of appropriative water rights in ch. 6, pp. 389, 397, 399.)

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[63] Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 740, p. 795.

[64] *Harris* v. *Harrison* (93 Calif. 676, 29 Pac. 325 (1892)).

[65] In *Smith* v. *Nechanicky* (123 Wash. 8, 211 Pac. 880 (1923)), it was held that a riparian owner may obtain a prescriptive right against an upper riparian owner, but only by actual interference with the rights of the upper proprietor. But a downstream use that in no way interferes with the natural flow of the water above and that in no way invades any rights of the upper proprietor cannot be the basis of a prescriptive title to the flow of the stream. See discussion by Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 863, p. 916 et seq., and cases cited. See also the discussion of prescriptive rights to spring waters in Washington, below, p. 296.

### The Trend Has Been Toward Restricting the Application of the Common-Law Doctrine, Thus Increasing the Opportunities for Development Under the Statutory Appropriation Doctrine

The doctrine of riparian rights to the use of water has been completely abrogated in Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming, and has been abrogated in Oregon except as to certain early rights based upon actual beneficial use. The status of the doctrine in Oklahoma is uncertain. In most of the other Western States, although their courts recognize the doctrine in greater or less degree, the privileges of a riparian owner are less extensive than formerly, and the general trend in most of those States has been definitely toward placing increasing restrictions upon the exercise of the riparian right. These restrictions necessarily operate in favor of the opposite rule—the appropriation doctrine; and they have resulted generally from decisions in controversies between claimants of riparian rights on the one hand and appropriative rights on the other, facilitated or directed in certain cases by statutory or constitutional declarations. In the situations in which controversies between the two groups of claimants were numerous, it became increasingly apparent that the riparian doctrine had less to offer to the conservation and utilization of water resources than the doctrine of appropriation. The latter, with its specific code provisions, lent itself more readily to public control over water uses—the acquisition and administration of water rights. It is true that claims to excessive use of water have been made frequently by appropriators, as well as by riparians, and it is equally true that the proper use of water on riparian land is as much in the public interest as the proper use on nonriparian land. Nevertheless the principles for which riparian owners have so often contended—such as their right to prevent the use on nonriparian land of water the full beneficial use of which was not being made on riparian land—have appeared in a sufficient number of cases to obstruct development, rather than to promote it, to lead to various redefinitions of the riparian right which in large measure have lessened or removed the superiority it formerly enjoyed.

It is important to note, in discussing restrictions upon the riparian doctrine, not only that the doctrine has been wholly rejected in some of the Western States, but that in some other States the result of court decisions concerning the application and effect of the congressional Desert Land Acts has been to reduce greatly the acreage of land that might otherwise successfully claim vested riparian rights for irrigation purposes.

The limitations upon the riparian doctrine effected in the several States are briefly outlined in the ensuing summaries below. For example, the Nebraska Supreme Court held that the appropriation statute, while not affecting accrued riparian rights, operated to prevent their future accrual; and this court later so limited the remedies of an owner of riparian land who had not exercised his right, as against accrued appropriative rights, as to reduce materially the advantage of location of the riparian land. The Oregon legislature limited vested riparian rights to the extent of actual application of water to beneficial use prior to passage of the act or within a reasonable time thereafter. The Oregon courts upheld the validity of this provision, and held further that the riparian rights of public lands entered after enact-

ment of the congressional desert land legislation were limited to water for domestic and farm livestock uses; and the United States Supreme Court, in a case arising in Oregon, held that patents to lands entered after such congressional legislation carried of their own force no common-law riparian rights. Still further, the Oregon State adjudications of water-right claims have been made on an appropriative basis, to the exclusion of riparian rights, on the ground that a riparian claim cannot be adjudicated as such under the statutory procedure but must be based upon beneficial use of a specific quantity of water with a fixed date of priority, which necessarily converts it into an appropriative right; so that for practical purposes the riparian doctrine has been abrogated in Oregon except as to early vested rights kept alive by beneficial use. The South Dakota court followed the lead of the Oregon court in restricting the riparian right of such public lands, entered after the desert land legislation, to the use of water for domestic purposes, but in a very recent decision has reversed this ruling. The Washington courts have refused to recognize riparian rights in navigable waters, as against appropriators, nor the right of riparians as against each other to store water for future use without making an appropriation therefor; and have further held that riparian rights are only those which can be beneficially used within a reasonable time, and that an appropriation of water cuts off the riparian rights of public lands subsequently entered. The Texas court has recognized riparian rights in lands granted prior to the appropriation statute, but has limited the riparian right to the ordinary flow and underflow of streams. The California decisions from 1886 to 1928 not only recognized riparian rights as paramount but rather consistently extended the effective limits of such rights as against appropriations on private lands, although denying the right of a riparian to store water for future use; riparian owners not being held as against appropriators to a reasonable use of water. However, the voters in 1928 adopted a constitutional amendment which limited riparian as well as other water rights to reasonable beneficial uses under reasonable methods of diversion; and the supreme court has accepted this mandate as a declaration of State policy which must guide the courts in future decisions.

The Kansas and North Dakota courts have recognized the riparian doctrine as paramount and have not yet followed the lead of other Western States in substantially restricting its operation as against appropriators, and a recent Kansas decision has forcefully restated the riparian rule as applied to lands granted prior to enactment of the appropriation statute. In Oklahoma the state of the law is uncertain, and the rights of a riparian owner as against an appropriator have not yet been defined by the supreme court. Comparatively little litigation on this subject in these three States has yet reached the courts of last resort. The South Dakota court, as above stated, has (in 1940) reversed its ruling in limitation of riparian rights on public lands entered after the desert land legislation, the effect of which apparently is to strengthen materially the riparian doctrine in that State.

It thus appears that in the majority of the Western States which recognize the riparian doctrine as applicable to the use of water of watercourses, including those States in which litigation between riparian and appropriative claimants has been most extensive, there

have been marked departures from the common-law concept of the riparian right and even from the early western definitions. The general trend is to hold vested riparian rights to reasonable use, thus rendering such uses more nearly comparable to those under the appropriation doctrine, and in several States to prevent the accrual of riparian rights not yet vested.

The practical result of limiting the claims of riparian owners is of course to enlarge the opportunities for development under the doctrine of appropriation. As a matter of fact, development of irrigation under the riparian doctrine has been a minor contributing factor in the growth of irrigation in the West, as contrasted with that under appropriative rights. In California, where both doctrines are in effect and where the riparian doctrine has been so extensively upheld, most of the widespread development under gravity diversions has been accomplished by virtue of upstream appropriative rights which became effective, as against downstream riparian rights, by lapse of time—for the larger part, in spite of the riparian doctrine rather than because of it.

### Application of the Riparian Doctrine in the Several States

The extent to which the riparian doctrine has been recognized in the Western States, and some of the more important features and implications, are briefly summarized below, separately for each State.

*California.*—The riparian doctrine is of outstanding importance in California water law. The principle has been affirmed in a long line of decisions, many of which involve conflicts between riparian owners and intending appropriators. The reasons why the courts have adhered so firmly to the rule, and why notwithstanding the rule, irrigation development has been able to proceed so extensively on nonriparian land, were thus stated by Chief Justice Shaw of the California Supreme Court, in an address before the American Bar Association at San Francisco, August 9, 1922:[66]

> If the doctrine of riparian right had been strictly enforced in all cases by the abutting land owners, it is obvious that it would have prevented all use of the waters of streams passing through lands in private ownership, on any nonriparian land. The rightful use of such waters on nonriparian land would have been impossible, for such land owners could not lawfully take out the water without infringing upon the right of every riparian owner along the stream to have the water flow as it was accustomed to flow. The opponents of the doctrine of riparian rights had pointed out these results with much emphasis and repetition in the political campaigns prior to the decision in *Lux* v. *Haggin*, and they are still referred to as evidence that the doctrine is contrary to a sound public policy in states having the arid climate of California. The obvious answer on the question of policy is that the objection comes too late, that it should have been made to the legislature in 1850, prior to the enactment of the statute adopting the common law. When that was done, the riparian rights became vested, and thereupon the much more important public policy of protecting the right of private property, became paramount and controlling. This policy is declared in our constitutions, has been adhered to throughout our national history, and it is through it that the remarkable progress and development of the country has been made possible.
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> Notwithstanding the existence of these vested rights, there has been a very general use of water on nonriparian land. This has been made possible by several causes. The most important and effective cause of a legal nature is the common-law rule, now expressed in section 1007 of the Civil Code, that a title by pre-

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[66] Shaw, Lucien. The Development of the Law of Waters in the West, 10 Calif. Law Rev. 443, 455; 189 Calif. 779, 791.

scription, good against all owners of private property, may be acquired by adverse occupancy for the period of five years continuously. Other causes arise from natural conditions. Any person who does not own land on a stream may obtain access to the water thereof by purchasing the right to do so from the owner of any parcel of riparian land. Usually the banks of the larger streams are so high that the owner of a small tract cannot bring the water upon his land, except by a diversion on land above him, to which, of course, he must have the consent of the owner thereof. Such owners frequently made little use of the water for irrigation and were indifferent to their riparian rights therein. Hence they usually made no objection to a diversion therefrom until five years had elapsed. The large diversions, almost without exception, have been made near the point of emergence of the streams from the mountains, where land had little value for any purpose, and where the diversion would have little effect on the land near by and were so far from the land seriously affected thereby that they provoked no immediate opposition. In these ways and for these reasons, innumerable prescriptive rights to the use of the water of streams have been acquired from the riparian owners of private land, either without objection, or by successful litigation. As a net result the irrigated land in the state is almost all nonriparian, and the existence of the riparian right has not prevented the beneficial use of the greater part of the waters of the streams.

The earliest leading California case on riparian rights is *Lux* v. *Haggin*,[67] decided in 1886, which became the cornerstone of the rule as applied in this State. The court said:

By our law the riparian proprietors are entitled to a reasonable use of the waters of the stream for the purpose of irrigation. What is such reasonable use is a question of fact, and depends upon the circumstances appearing in each particular case.

In *Herminghaus* v. *Southern California Edison Co.*,[68] decided in 1926, the rule was applied to the entire natural flow of a stream, which in that instance was held to include the annual flood flows as well as the usual low-water flows, all such waters being the "ordinary, usual, periodical, and natural flow." Previous decisions relating to the flows of various San Joaquin Valley streams, as was this one, had supported the position thus taken by the court; but the effect of the *Herminghaus* decision was to give the riparian owner, as against an appropriator, a right to the full flow of the stream in order to support a flow, over the riparian lands, of only a small fraction of the total stream. The implications were such that an amendment to the State Constitution was adopted in 1928, declaring that the general welfare requires that the water resources of the State be put to the greatest possible beneficial use, waste and unreasonable use or method of use prevented, and conservation of water exercised in the interest of the public welfare, and specifically limiting riparian and other rights to watercourses to the portion of the flow useful for reasonable and beneficial purposes, under reasonable methods of diversion.[69]

In *Peabody* v. *Vallejo*[70] the foregoing amendment was upheld as not subject to attack under the Federal Constitution, and was declared to be effective in all controversies relating to the use of water, and to limit such use to a reasonable beneficial use under reasonable methods of diversion and use; and in subsequent decisions the courts have been guided by this declaration of State policy.[71] How-

[67] 69 Calif. 255, 10 Pac. 674 (1886).
[68] 200 Calif. 81, 252 Pac. 607 (1926).
[69] Calif. Const., art. XIV, sec. 3.
[70] 2 Calif. (2d) 351, 40 Pac. (2d) 486 (1935).
[71] See, for example, *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.* (3 Calif. (2d) 489, 45 Pac. (2d) 972 (1935)); *Lodi* v. *East Bay Municipal Utility Dist.* (7 Calif. (2d) 316, 60 Pac. (2d) 439 (1936)); *Rancho Santa Margarita* v. *Vail* (11 Calif. (2d) 501, 81 Pac. (2d) 533 (1938)).

ever, the riparian owner has a prior and paramount right to this reasonable beneficial use, and if necessary to effectuate it he is entitled to the full natural flow of the stream or its equivalent undiminished in quantity and unimpaired in quality; for the constitutional amendment safeguards this right.[72] But, according to this *Meridian* decision, rendered in 1939, the amendment also means

> that when the law has guaranteed to the riparian owner the use of the waters of the stream to the full extent to which he may put the same for all present and prospective useful and beneficial purposes, and has made available to him the means of protecting the rights so guaranteed, he has received the full measure of benefit and protection to which he is entitled, and can claim no more.

The court went on to state that the riparian proprietor, after his rights have been so satisfied, has no further right to require that water in excess thereof shall flow past his lands unused to the sea, and is not entitled to an injunction to control the use of water by an appropriator in the exercise of a right admittedly subordinate but in no way injurious to the riparian right; for excess waters above the quantities to which riparian and other lawful rights attach are the public waters of the State and are to be used, regulated, and controlled by the State or under its direction. When existing rights, whether riparian or appropriative, have been fully protected, the holder thereof cannot complain of nor prevent nor control the storage of waters in the upper reaches of the stream for flood control, stabilization and equalization of the flow, and other beneficial uses.

The use of water under the riparian right is limited to riparian land, and it has been stated recently [73] to be well settled that the extent of lands having riparian status is determined by three criteria: (1) The land in question must be contiguous to or abut on the stream, with certain exceptions, and the length of frontage on the stream is an immaterial factor; (2) the riparian right extends only to the smallest tract held under one title in the chain of title leading to the present owner; (3) the land, in order to be riparian, must be within the watershed of the stream. The size of the drainage area and amount of runoff have no bearing upon the riparian status of land; it is the situation of land within the watershed that is material.

In determining the relative rights of riparian lands, lands on separate tributaries of a stream system—that is, contiguous to separate branches above their confluence—are to be considered as lying in separate watersheds so far as their respective rights as against each other are concerned; otherwise the return flow from water taken from one tributary watershed into another for use in the latter would be lost to

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[72] *Meridian* v. *San Francisco* (13 Calif. (2d) 424, 90 Pac. (2d) 537 (1939)).

The district court of appeal held in *Los Angeles* v. *Aitken* (10 Calif. App. (2d) 460, 52 Pac. (2d) 585 (1935; hearing denied by supreme court)), that the constitutional amendment does not mean that the riparian rights of landowners are only those under which the water is actually used in irrigating land or consumed for domestic purposes; it does not authorize the appropriation of littoral rights to land bordering on the margin of a lake without payment of just compensation therfor, when the very value of the land depends on the maintenance of the lake in its natural condition. Nor, under the facts and as between the parties in *Elsinore* v. *Temescal Water Co.* (36 Calif. App. (2d) 116, 97 Pac. (2d) 274 (1939), does not apply to the use of water for maintenance of the level of a lake used for recreational purposes, where the prosperity of a city on the lake shore depends largely upon catering to the wants of those using the lake for recreational purposes, so as to preclude the city, on the ground that water would be wasted, from enforcing by injunction its right to water under contract with the water company.

[73] *Rancho Santa Margarita* v. *Vail* (11 Calif. (2d) 501, 81 Pac. (2d) 533 (1938)).

the riparian lands in the first watershed.[74] On the other hand, as to riparian lands downstream from the confluence, the watersheds of the tributaries and of the stream below their confluence are held to constitute but one watershed, inasmuch as the reason for considering them separately is then obviated.[75] Whether, in such latter case, the conveyance of water from one tributary watershed to another would constitute a reasonable beneficial use of the water will depend upon all the circumstances involved.[73]

The conveyance to another of a part of a tract of riparian land, which renders the portion so conveyed no longer contiguous to the stream, cuts off the riparian right of the land so conveyed, unless the conveyance declares to the contrary, even though the owner of the original tract again acquires the portion thus cut off from the stream.[76] Preservation of the riparian tract in parcels thus cut off from the original riparian tract may be effected by deed, however.[77] It may also be effected by conveyance of the water rights to a mutual water company and sale of the parcels of land to individuals, accompanied by their proportional part of the mutual-company stock.[78] Furthermore, when a riparian tract is partitioned by a decree which is entirely silent as to riparian rights, the noncontiguous parcels do not lose their riparian status; each tenant in common retains his proportionate interest in the riparian rights, except that his interest is now in severalty.[79]

Riparian rights "are not of a political nature, but are private rights," and vest only in the ownership of the abutting land; hence a city may claim a riparian right for municipally owned land riparian to a stream, but not for privately owned land in the city, such rights if riparian belonging to the individual landowners.[80]

The riparian right, while including the right to detain water temporarily in forebays or reservoirs for power purposes, does not extend to a detention of surplus water above immediate needs from a wet season to a dry one—in other words, it does not include the right to store water for future use.[81] Seasonal storage, therefore, is not a proper riparian use but constitutes an appropriation of the waters.[82] Nor are so-called "foreign waters" (waters originating in a watershed other than that of the stream to which land is riparian) the subject of riparian rights; such waters being subject to appropriation.[82a] (See p. 377, below.)

By a decision in 1922 [83] it was held that whether or not the purpose of the congressional desert land legislation [84] was to divest the desert lands of riparian rights and devote the waters to public use, concerning which no opinion was expressed, that act did not affect lands other

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[73] *Rancho Santa Margarita* v. *Vail* (11 Calif. (2d) 501. 81 Pac. (2d) 533 (1938)).
[74] *Anaheim Union Water Co.* v. *Fuller* (150 Calif. 327, 88 Pac. 978 (1907)).
[75] *Holmes* v. *Nay* (186 Calif. 231. 199 Pac. 325 (1921); *Crane* v. *Stevinson* (5 Calif. (2d) 387. 54 Pac. (2d) 1100 (1936)); *Rancho Santa Margarita* v. *Vail* (11 Calif. (2d) 501, 81 Pac. (2d) 533 (1938)).
[76] *Anaheim Union Water Co.* v. *Fuller* (150 Calif. 327. 88 Pac. 978 (1907)).
[77] *Miller & Lux* v. *J. G. James Co.* (179 Calif. 689. 178 Pac. 716 (1919)).
[78] *Copeland* v. *Fairview Land & Water Co.* (165 Calif. 148. 131 Pac. 119 (1913)).
[79] *Rancho Santa Margarita* v. *Vail* (11 Calif. (2d) 501. 81 Pac. (2d) 533 (1938)).
[80] *Antioch* v. *Williams Irr. Dist.* (188 Calif. 451. 205 Pac. 688 (1922)).
[81] *Herminghaus* v. *Southern California Edison Co.* (200 Calif. 81. 252 Pac. 607 (1926)); *Seneca Consol. Gold Mines Co.* v. *Great Western Power Co.* (209 Calif. 206. 287 Pac. 93 (1930)).
[82] *Colorado Power Co.* v. *Pacific Gas & Elec. Co.* (218 Calif. 559. 24 Pac. (2d) 495 (1933)); *Lodi* v. *East Bay Municipal Utility Dist.* (7 Calif. (2d) 316. 60 Pac. (2d) 439 (1936)).
[82a] *Crane* v. *Stevinson* (5 Calif. (2d) 387. 54 Pac. (2d) 1100 (1936)); *Bloss* v. *Rahilly* (16 Calif. (2d) 70. 104 Pac. (2d) 1049 (1940)).
[83] *San Joaquin & Kings River C. & Irr. Co.* v. *Worswick* (187 Calif. 674, 203 Pac. 999 (1922)).
[84] 19 Stat. L. 377 (March 3, 1877).

than desert lands. This question of water rights on public lands, with the recently expressed views of the United States Supreme Court, is discussed below in connection with development of the appropriation doctrine. In the foregoing discussion of conflicts between riparian and appropriative rights, reference is made to the matter of time of vesting of such rights (see p. 33).

*Kansas.*—The riparian doctrine has been recognized in various decisions, including two within very recent years, and appears to be the paramount rule of water law in this State.

Several early decisions stated and applied the common-law doctrine of the use of stream waters.[85] In one of these cases the principle was stated that a city may not supply its inhabitants with water from a stream solely by virtue of ownership of land riparian to that stream, and this has been upheld in a more recent decision.[86] It was held in 1917 that a railway company as a riparian owner has a right to make reasonable use of the water of the stream for the purpose of supplying its engines and operating the railroad.[87]

In the leading case of *Clark* v. *Allaman* (1905),[88] the development in Kansas of the common law and of the rule of riparian rights was exhaustively reviewed, and it was held that the riparian doctrine prevailed throughout the State, but while fundamental, "it has been modified by various statutes enacted for the laudable purpose of encouraging irrigation." Proceedings under these statutes, however, could not "operate to the destruction of previously vested common-law rights." The court referred to the appropriation practices which had grown up on the public domain in the far West and considered them alien to the history of Kansas, local customs to that effect being invalid in that State, and held that the first authority for the accrual of rights of that character was contained in the statute of 1886. Reference was made to the Nebraska decision in *Crawford Co.* v. *Hathaway* [89] for a demonstration that "the doctrine of appropriation may exist in the same state with the doctrine of riparian rights."

It was held further, that a lower riparian owner cannot acquire a right by prescription as against upper proprietors, inasmuch as the latter lost all property in the water when it left their land. Nor, so long as the supply is sufficient for all, can upper proprietors acquire prescriptive rights as against lower riparians.

Riparian land was held to be land lying along a watercourse and within the watershed. The limitation to governmental subdivisions—that is, the requirement that land entitled to riparian rights cannot exceed the area acquired by a single entry or purchase from the Government—indicated in *Crawford Co.* v. *Hathaway*, was not adopted.

In a case decided in 1936 [90] the Kansas Supreme Court stated that there had been no departure from the common-law rule of riparian rights by that court. It was held that the appropriation statute of 1886 was ineffective as conferring upon a riparian owner any right of priority in water as against other owners of riparian lands held under

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[85] *Shamleffer* v. *Council Grove Peerless Mill Co.* (18 Kans. 24 (1877)); *Wood* v. *Fowler* (26 Kans. 682, 40 Am. Rep. 330 (1882)); *Campbell* v. *Grimes* (62 Kans. 503, 64 Pac. 62 (1901)).

[86] *Emporia* v. *Soden* (25 Kans. 588, 37 Am. Rep. 265 (1881)); upheld in *Wallace* v. *Winfield* (96 Kans. 35. 149 Pac. 693 (1915)).

[87] *Atchison, Topeka & Santa Fe Ry.* v. *Shriver* (101 Kans. 257, 166 Pac. 519 (1917)).

[88] 71 Kans. 206, 80 Pac. 571 (1905).

[89] 67 Nebr. 325. 93 N. W. 781 (1903).

[90] *Frizell* v. *Bindley* (144 Kans. 84, 58 Pac. (2d) 95 (1936)).

United States land patents which antedated the statute. A portion of the syllabus by the court states:

> 2. The rights and privileges of riparian landowners, holding under valid titles antedating the statute of 1886, were and are prescribed and governed by the common law, according to which each riparian landowner has a primary right to use all the water he may require for domestic use and to water his livestock; and after all other riparian landowners have been served by such primary uses of water, they are all equally entitled, but without precedence, to a fair and equal share of whatever water may remain in the stream for irrigation purposes.

The court took judicial notice of the fact that in 1886 a large amount of land in western Kansas was still part of the public domain, to which private rights of proprietorship had not attached. Further,

> We are not now called on to decide whether the statute of 1886 is valid as applied to such lands afterwards patented or not. In *Clark v. Allaman*, supra, that possibility was recognized. Paragraph 9 of the syllabus reads: "The doctrine of prior appropriation may exist in the same state with the common-law doctrine or riparian rights."
>
> But where they do coexist it must be by valid legislation, not by judicial decree.

In a still more recent decision [91] the right of a lower riparian landowner to enjoin an upper riparian landowner from maintaining a dam which permanently diverted the waters of a stream was upheld as being essentially an action for the determination of a right or interest in the land itself, the riparian right being part and parcel of the land.

*Nebraska.*—The riparian doctrine is recognized by the courts of this State; but as between riparian rights not put to actual use and accrued appropriative rights, the effect of the decisions has been to reduce substantially the practical importance of the riparian doctrine and to increase correspondingly that of the doctrine of appropriation.

Several early decisions recognized the existence of the common-law doctrine, as modified by the irrigation statutes.[92] The decision on rehearing in the leading case of *Crawford Co.* v. *Hathaway* [93] held as follows: The common-law riparian doctrine was not inapplicable to conditions prevailing in Nebraska simply because irrigation was necessary in some portions of the State, and the riparian and appropriation doctrines could and did exist concurrently in the State. The Irrigation Act of 1889 abrogated the riparian rule and substituted prior appropriation, so that the rights thereafter acquired to waters flowing in natural channels are to be tested and determined by the doctrine of prior appropriation; but such legislation had the effect only of preventing the acquisition of riparian rights in the future; it could not abolish riparian rights already accrued. Accrual of any riparian right prior to the statute took place when the land to which the right was incident passed into private ownership. Likewise, the rights of appropriators may have vested prior to the passage of the act of 1889, based upon well-recognized customs which were later recognized by State laws; for the right to appropriate water for agricultural purposes in the areas in which irrigation is necessary has existed since the early settlement of the State. The time when

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[91] *Smith* v. *Miller* (147 Kans. 40, 75 Pac. (2d) 273 (1938)).

[92] *Eidemiller Ice Co.* v. *Guthrie* (42 Nebr. 238, 60 N. W. 717 (1894)); *Clark* v. *Cambridge & Arapahoe Irr. & Impr. Co.* (45 Nebr. 798, 64 N. W. 239 (1895)); *Slattery* v. *Harley* (58 Nebr. 575, 79 N. W. 151 (1899)).

[93] 60 Nebr. 754, 84 N. W. 271 (1900); 61 Nebr. 317, 85 N. W. 303 (1901); 67 Nebr. 325, 93 N. W. 781 (1903).

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either an appropriative or riparian right accrued must determine preference as between conflicting claimants.

This decision also stated several principles affecting the extent and operation of a riparian right: The riparian owner is entitled to only so much of the ordinary and natural flow of the stream as is necessary for his use, and cannot lawfully claim, as against an appropriator, the flow of the flood waters. Nor can he acquire a prescriptive right to receive water as against upper owners, for in the nature of things his use of the water cannot be adverse against them; but he can make adverse use against lower proprietors by diverting water, beyond the limit of his common-law rights, which otherwise would flow downstream from his land. The riparian right is applicable only to riparian lands; such land cannot exceed the area acquired by a single entry or purchase from the Government, although the maximum area so affected was left undecided. (See below, p. 51.)

The rule of riparian rights was likewise thoroughly considered in the opinion in *Meng* v. *Coffee*,[94] filed on the same day as that in *Crawford Co.* v. *Hathaway*.

Two decisions rendered within a few years afterwards dealt with the remedies of riparian claimants and actual appropriators as against each other. It was held in one decision [95] that an appropriator might enjoin an upstream diversion of water by a riparian owner, made long after the appropriative right had accrued and had been adjudicated under the State procedure; and that the right of the riparian proprietor to damages, if any, to his riparian estate by reason of being denied the reasonable use of the water when such use interfered with plaintiff's appropriation, was problematical and would have to be determined in an action brought by such riparian; furthermore, the question of substantial damages for invasion of such riparian right would depend upon the state of proof. "This right may prove to be so infinitesimal that the law would not take note of it. The damages may be nominal only." The court did not believe that the riparian owner who constructed ditches with full knowledge of existing appropriative rights should be entitled to greater compensation by reason of his expenditures in constructing irrigation works after the accrual of either upstream or downstream appropriations. The court distinguished this situation from one in which the riparian owner might actually have diverted water to irrigate riparian lands before the rights of an appropriator attached. Where, as here, the appropriative right had ripened into a legal estate, the law would afford a remedy for any invasion of or injury to the right. So the order of injunction was affirmed, without prejudice to the right of the defendant to recover damages if any had been sustained.

The other decision [96] was in an action brought by a lower riparian owner, who alleged diversions of water by the upstream defendants but who did not state what their claim of right was; and who alleged riparian ownership in himself, prescription, and that if the doctrine of appropriation were held to prevail, priority of his own appropriation in point of time. Demurrers were sustained, and the trial

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[94] 67 Nebr. 500, 93 N. W. 713 (1903).

[95] *McCook Irr. & Water Power Co.* v. *Crews* (70 Nebr. 109, 115, 96 N. W. 996 (1903), 102 N. W. 249 (1905)).

[96] *Cline* v. *Stock* (71 Nebr. 70, 79, 98 N. W. 454 (1904), 102 N. W. 265 (1905)).

court was upheld in refusing to allow an injunction. The supreme court stated:

If these defendants had made due application to the state board, and had obtained the adjudication of that board giving them the right to appropriate a given quantity of the public water of the state for irrigation purposes, and, in pursuance of such adjudicated right, had constructed irrigation works, and had, during all that time, actually appropriated and used the amount of water allowed them under such appropriation, in the same manner and to the same extent that they propose to use the water in the future, a lower riparian owner could not enjoin the continued use of such water, but must rely upon his action at law to recover such damages, if any, as he might sustain thereby. We think there can be no doubt of the soundness of this principle.

In each of these cases the judgment of the trial court had originally been reversed, and in each case on rehearing the former judgment of reversal was vacated and the action of the lower court affirmed. The two opinions on rehearing were handed down on the same day. The effect of these decisions was to eliminate much of the advantage of location of the riparian tract under its common-law right, with respect to appropriative rights on the same stream, except where the riparian owner should make actual use of the water before the time of vesting of the appropriative rights.

Several recent decisions have discussed riparian rights in one connection or another.[97] One very recent opinion stated that the common-law rules as to the rights and duties of riparian owners were in force in every part of the State, except as altered or modified by statute, and that one of these principles was that the use of water by riparians must be reasonable with regard to the rights of other riparian owners. This necessarily implied that the common-law right to use water was strictly limited to riparian lands, which meant that in general there was no right to transport waters out of the watershed.[98] The latest decision which discusses riparian rights was in an action for damages arising out of the condemnation of land for a dam and reservoir.[99] The syllabus by the court stated, in part:

In an action for damages arising out of riparian land condemned for a dam and dikes along the Platte river in Keith county, the owner is entitled to recover for the value of the land condemned and for consequential damages to the remainder of his ranch only so far as the consequential damages affect his use of the governmental sections a part of which are included in the land actually taken.

Reference was made to *Crawford Co.* v. *Hathaway*, which had held that the extent of riparian land could not exceed the area acquired by a single entry or purchase from the Government but which had not decided whether this should be 40 acres or 640 at the maximum; and it was concluded that the policy was left to be determined under the circumstances of each particular case. Extending the right to recover for a whole section, if a part is actually deprived of its riparian rights in this condemnation proceeding, was done "more or less arbitrarily, but chiefly because in that territory it has been possible to acquire a section of land from the government."

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[97] *Southern Nebraska Power Co.* v. *Taylor* (109 Nebr. 683, 192 N. W. 317 (1923)); *Slattery* v. *Dout* (121 Nebr. 418, 237 N. W. 301 (1931)); *Fairbury* v. *Fairbury Mill & Elevator Co.* (123 Nebr. 588, 243 N. W. 774 (1932)).

[98] *Osterman* v. *Central Nebraska Public Power & Irr. Dist.* (131 Nebr. 356, 268 N. W. 334 (1936)).

[99] *McGinley* v. *Platte Valley Public Power & Irr. Dist.* (132 Nebr. 292, 271 N. W. 864 (1937)).

*North Dakota.*—This is one of the few States in which the conflict between riparian and appropriative rights has not resulted in substantial limitations upon the riparian doctrine. Comparatively little litigation over the use of water has reached the supreme court.

Riparian rights were recognized by the United States Supreme Court in *Sturr* v. *Beck*,[1] on appeal from the Supreme Court of the Territory of Dakota; although the decision was to the effect that lawful riparian occupancy of public land, with intent to appropriate the land, constituted a prior appropriation as against a subsequent appropriator of the water.

It was held in *Bigelow* v. *Draper*,[2] that the common-law doctrine of riparian rights as applied to nonnavigable streams was in force in the Territory of Dakota at the time of the adoption of the State constitution, and that riparian owners in the Territory had been invested with property rights in the beds of all natural water courses and in the water itself. Such rights were held therefore to be under the protection of the fourteenth amendment to the Federal Constitution, and consequently could not be divested by a provision in the State constitution [3] declaring all flowing streams and water courses to be the property of the State. It was further stated that riparian rights are property, real estate, and can be condemned without also taking the fee of the lands through which the stream flows.

A section of the Civil Code of the Territory of Dakota, approved in 1866,[4] read as follows:

> The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue, nor pollute the same.

This section became a part of the statutes of both the States of North Dakota [5] and South Dakota,[6] and was copied by the Oklahoma Legislature as well.[7] The statute was referred to in *Sturr* v. *Beck*. It was also cited in *McDonough* v. *Russell-Miller Milling Co.*,[8] which held that the right of use of the stream flow is not a mere easement or appurtenance, but a natural right inseparably annexed to the soil itself and which arises immediately with every new division or severance of ownership. The right to have the water flow in natural quantity and purity is necessarily subject to the right of each riparian proprietor to make a reasonable use thereof. It was further stated that the question of reasonableness is to be determined by the circumstances of each particular case—such as character and size of the watercourse, location, uses to which the water may be applied, as well as the general usage of the country in similar cases.

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[1] 133 U. S. 541 (1890).
[2] 6 N. Dak. 152, 69 N. W. 570 (1896).
[3] N. Dak. Const., sec. 210.
[4] Terr. Dak. Civ. Code, sec. 255.
[5] N. Dak. Comp. Laws, 1913, sec. 5341.
[6] S. Dak. Code, 1939, sec. 61.0101.
[7] Okla. Stats. Ann. (1936), title 60, sec. 60.
[8] 38 N. Dak. 465, 165 N. W. 504 (1917). In *Johnson* v. *Armour & Co.* (69 N. Dak. 769, 291 N. W. 113 (1940)) this statute was again referred to and the holding in the *McDonough case* discussed, in reaching the conclusion that a riparian owner could sell his right and grant an easement over his land for the drainage of sewage through his land by an upper riparian proprietor, in which case a subsequent purchaser of the lower land would take the land impressed with such burden.

*Oklahoma.*—Comparatively few cases involving water rights have reached the Oklahoma Supreme Court. Oklahoma has been referred to upon various occasions as a riparian-doctrine State, but the status of that doctrine so far as it affects the rights of appropriators is uncertain; no cases reaching the supreme court have been found which involve clear-cut controversies between riparian proprietors and appropriators.

A statute passed by the First Territorial Legislative Assembly, and still in force,[9] provides that an owner of land may use the water of a definite stream so long as it remains on his land, but that he may not prevent the natural flow of the stream, nor pursue nor pollute it. This statute was copied from a section of the Civil Code of the Territory of Dakota, which was retained in the statutes of the States of North Dakota and South Dakota and has been cited in decisions involving riparian rights in both States, as noted in the discussions of the riparian doctrine as applied in those States. The South Dakota court in one opinion considered that the act was not repealed by a later act concerning the uses of stream water by landowners generally, riparian and otherwise, but stated on rehearing that an expression was not necessary to a decision and therefore refrained from expressing any view as to whether riparian rights were abrogated by the later act.[10] A later South Dakota decision, without referring to this statute, held that riparian rights were divested, by the desert land legislation, from public lands entered after March 3, 1877,[11] but a very recent decision of this court has reversed this ruling,[12] as noted below in the discussion of the riparian doctrine in South Dakota.

An Oklahoma statute, enacted in 1897, declared the unappropriated waters of streams and storm and rain waters, in areas in which irrigation is beneficial, to be the property of the public, subject to appropriation. A portion of the statute, granting the right of condemnation as against private lands, included in the subjects of condemnation "the water belonging to the riparian owner."[13] These several sections were omitted from the Revised Laws of 1910 and thereby repealed.[14] The present appropriation statute provides that beneficial use shall be the basis, the measure, and the limit of the right to use water.[15]

It may be noted, further, that the Conservancy Act[16] provides in section 25, in connection with the water rights of conservancy districts, that where a district is a riparian owner along the streams of the district, it shall have the rights which go with riparian ownership.

*Markwardt* v. *Guthrie* (1907)[17] involved a claim for damages by a lower riparian owner against a city, because of the pollution of a stream by sewage. The riparian owner used the water for irrigation, propagation of fish, and watering of stock. It was held that the city was liable to a lower riparian owner for a nuisance shown to be detrimental to the health and comfort of the latter and to diminish the value of his land.

Various cases involving lands riparian to streams have been before the court subsequently, but on points other than the use of water for

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[9] Okla. Stats. Ann. (1936), title 60, sec. 60.
[10] *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.* (26 S. Dak. 307, 128 N. W. 596 (1910)).
[11] *Cook* v. *Evans* (45 S. Dak. 31, 185 N. W. 262 (1921)).
[12] *Platt* v. *Rapid City* (— S. Dak. —, 291 N. W. 600 (1940)).
[13] Okla. Laws, 1897, p. 192; Okla. Comp. Laws, 1909, sec. 3918.
[14] Okla. Laws, 1910–11, p. 70.
[15] Okla. Stats Ann. (1936), tit. 82, sec. 1.
[16] Okla. Laws, 1923–24, ch. 139; Stats. Ann. (1936), tit. 82, ch. 5, sec. 577.
[17] 18 Okla. 32, 90 Pac. 26 (1907).

irrigation. For example, recovery has been allowed a riparian owner for damage caused by raising the water level above its natural height,[18] for pollution which rendered the water unfit for domestic purposes and the watering of dairy cows,[19] and for the loss of use of water of a stream, by a riparian owner, for domestic purposes, as an injury to the usable or rental value of the real estate bordering on the stream; [20] and recovery has been denied where the pumping of drilling sediments into the stream was not shown to be unreasonable as a matter of fact.[21] In a case decided in 1933, concerning the use of a pond, formed in a former channel of a river, for a fish hatchery and fishing resort, the statute concerning use by a landowner of a definite stream was quoted, and it was stated:[22]

> Under the evidence herein, the stream involved is a definite stream, and both plaintiff and defendant have reciprocal rights. Each is entitled to a reasonable use of the stream.

It thus appears that the riparian doctrine has been recognized as applicable in some measure to the use of water of streams in Oklahoma, but that the cases have dealt principally with the effect of stream pollution upon the use of water by downstream riparians for domestic and other purposes. The doctrine of appropriation has likewise been recognized as applicable to conditions in Oklahoma and the appropriation statute has been construed by the supreme court.[23] So far as could be ascertained, the measure of right of a riparian owner to use water for irrigation, as against the claim of an appropriator under the statute, has not yet been presented to the supreme court and has not been defined even by dictum, so that the status of riparian versus appropriative rights is uncertain.

*Oregon.*—Oregon is essentially an appropriation-doctrine State. Some of the early decisions stated the common-law doctrine [24] and created an impression that the rule of riparian rights was an important part of the State's water law; but from the time controversies began to develop between claimants of riparian rights on the one hand and appropriative rights on the other, the court decisions have consistently upheld the rights of appropriators and have rejected claims of riparians as against appropriators unless based upon actual beneficial use; and the result of the decisions and of legislation has been a virtual abrogation of the riparian doctrine except as to certain vested rights principally for domestic and stock-watering purposes.

The supreme court early adopted the rule that as a riparian right contemplates a tenancy in common and an appropriative right a tenancy in severalty, one cannot claim both as a riparian proprietor and as an appropriator, but must elect to stand upon one right or the other.[25] As a sequence of the application of this rule, it was held that the exercise of one right is in substance a waiver of the other;

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[18] *Zalaback* v. *Kingfisher* (59 Okla. 222, 158 Pac. 926 (1916)).
[19] *Enid* v. *Brooks* (132 Okla. 60, 269 Pac. 241 (1928)).
[20] *Oklahoma City* v. *Tytenicz* (171 Okla. 519, 43 Pac. (2d) 747 (1935)).
[21] *Martin* v. *British American Oil Producing Co.* (187 Okla. 193, 102 Pac. (2d) 124 (1940)).
[22] *Broady* v. *Furray* (163 Okla. 204, 21 Pac. (2d) 770 (1933).
[23] *Gates* v. *Settlers' Mill., Canal & Res. Co.* (19 Okla. 83, 91 Pac. 856 (1907)); *Gay* v. *Hicks* (33 Okla. 675, 124 Pac. 1077 (1912)); *Owens* v. *Snider* (52 Okla. 772, 153 Pac. 833 (1915)).
[24] *Taylor* v. *Welch* (6 Oreg. 198 (1876)); *Coffman* v. *Robbins* (8 Oreg. 278 (1880)); *Shook* v. *Colohan* (12 Oreg. 239 (1885)); *Jones* v. *Conn* (39 Oreg. 30, 64 Pac. 855, 65 Pac. 1068 (1901)).
[25] *North Powder Mill. Co.* v. *Coughanour* (34 Oreg. 9, 54 Pac. 223 (1898)); *Caviness* v. *La Grande Irr. Co.* (60 Oreg. 410, 119 Pac. 731 (1911)); *In re Deschutes River and Tributaries* (134 Oreg. 623, 286 Pac. 563, 294 Pac. 1049 (1930)).

further, that to claim a right to use a fixed quantity of water, from a specified date, to the exclusion of use by others, is to assume the character of an appropriator.[26] In the recent adjudication of the waters of Deschutes River [27] a claim was denominated by the claimant as "a riparian right to use the waters of Deschutes river," but was made for a specific flow of water. The court stated:

> The claimants' rights should be protected. The only way under our statute that its rights can be protected is by giving it superiority over subsequent rights, initiated after the right of the power company. When the law-makers of the state adopted the water code and directed the procedure for adjudicating the waters of stream systems, they provided for the manner of adjudication as followed in this case and in several others. The method pointed out by the statute has been followed without question in regard to all the claimants in this proceeding. As we have heretofore indicated, a definite quantity of water can be adjudicated in favor of claimant only under the statute by following the method mapped out by the state law.

It was further stated, in line with previous decisions, that a riparian owner who makes a claim for a definite quantity of water is making, in substance, the claim of an appropriator.

In the leading case of *Hough* v. *Porter*[28] (1909) the Oregon Supreme Court held that the effect of the congressional desert land legislation of March 3, 1877, was to abrogate the modified common-law doctrine of riparian rights, except for domestic use and the watering of stock essential to the sustenance of riparian owners, so far as public lands entered after that date were concerned. The United States Supreme Court, in *California-Oregon Power Co.* v. *Beaver Portland Cement Co.*,[29] held that that legislation separated the land and the water on the public domain, leaving each State to determine for itself to what extent the appropriation or riparian doctrine should obtain within its borders; and that a homestead patent issued after passage of the act of 1877 did not carry with it as part of the granted estate the common-law right of riparian proprietorship. This subject is discussed further in connection with the growth of the doctrine of prior appropriation in the West, below in this chapter.

The Oregon water code of 1909 contained provisions defining and limiting vested riparian rights to the extent of the actual application of water to beneficial use prior to the passage of the act, or within a reasonable time thereafter by means of works then under construction.[30] The validity of this legislation has been upheld by the Oregon Supreme Court.[31] It was stated:

> The common law having been partially adopted by statute, it is plain that the common-law rule as to the "continuous flow" of a stream, or riparian doctrine, may be changed by statute, except as such change may affect some vested right. * * * It was within the province of the legislature, by the act of 1909, to define a vested right of a riparian owner, or to establish a rule as to when and under what condition and to what extent a vested right should be deemed to be created in a riparian proprietor: * * *

[26] *Caviness* v. *La Grande Irr. Co.* (60 Oreg. 410, 119 Pac. 731 (1911)); *Little Walla Walla Irr. Union* v. *Finis Irr. Co.* (62 Oreg. 348, 124 Pac. 666, 125 Pac. 270 (1912)); *In re Schollmeyer* (69 Oreg. 210, 138 Pac. 211 (1914)); *In re Sucker Creek* (83 Oreg. 228, 163 Pac. 430 (1917)).

[27] *In re Deschutes River and Tributaries* (134 Oreg. 623, 286 Pac. 563, 294 Pac. 1049 (1930)).

[28] 51 Oreg. 318, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 729 (1909).

[29] 295 U. S. 142 (1935).

[30] Oreg. Code Ann. 1930, sec. 47–403.

[31] *In re Hood River* (114 Oreg. 112, 227 Pac. 1065 (1924)).

At an earlier place in this decision it is said:

> The common-law rule, as to riparian rights to water, has been greatly modified in Oregon: * * *

And in a concurring opinion Justice Coshow stated:

> The decisions of this court have to a large degree, if not entirely, abrogated the common-law doctrine of the right of a riparian owner to the continuous flow of a stream. The owner of a bank of a flowing stream has certain well-defined rights in the stream. The beneficial use of the water, however, is the measure of his vested right and not the continuous flow of the stream as defined by the common law.

Later the Federal Circuit Court of Appeals, Ninth Circuit, in the *California-Oregon Power Co. case*,[32] concluded that the riparian owner's right to the natural flow of a stream, substantially undiminished, had been validly abrogated by the water code as construed in the *Hood River case*. Judge Wilbur, dissenting in part, maintained that the water code as thus construed destroyed all riparian rights not beneficially exercised prior thereto, solely because of such nonuse, which he considered a clear violation of the fourteenth amendment. The United States Supreme Court in affirming the judgment,[33] passed over without consideration the question as to whether the water code had validly modified the common-law rule of riparian rights by virtue of this exercise of the State's police power to advance the general welfare; for the Court's conclusion as to the effect of the desert land legislation, noted on the preceding page, made the consideration of this question unnecessary.

Therefore, to summarize, lands in Oregon which passed to private ownership after March 3, 1877, carried no riparian rights except for domestic and farm stock-watering purposes; no right to the use of water in a watercourse is recognized unless based upon actual beneficial use; no new use of the water of streams could be made after the passage of the water code in 1909 except by compliance with the provisions of the code, which means that no owner of riparian land can begin the use of such water unless he makes a statutory appropriation in the same manner as a nonriparian; and no right can be adjudicated under the statute except for the use of a specific quantity of water and with a fixed date of priority—in other words, on an appropriative basis. The result of the statute and decisions has been a virtual abrogation of the substance of the riparian doctrine in Oregon, at least so far as any practical application of its principles as against appropriators is concerned, thus leaving the actual administration of water rights by the State officials to be effected exclusively under the doctrine of prior appropriation. In other words, while the modified riparian doctrine has been recognized by the courts in various cases as among riparian owners themselves, the doctrine now appears to be little more than a legal fiction whenever a riparian claim is involved in the same suit with an appropriative claim, and particularly is this so in the case of a statutory adjudication proceeding.

*South Dakota.*—The United States Supreme Court recognized the existence of riparian rights in the Territory of Dakota, as noted above in connection with the discussion for North Dakota.[34] The

[32] *California-Oregon Power Co.* v. *Beaver Portland Cement Co.* (73 Fed. (2d) 555, C. C. A. 9th (1934)).
[33] 295 U. S. 142 (1935).
[34] *Sturr* v. *Beck* (133 U. S. 541 (1890)).

doctrine has been recognized in a number of decisions of the State supreme court.

The early statutory declaration that an owner of land may use the water of a definite stream so long as it remains on his land, but may not prevent the natural flow nor pursue nor pollute the stream,[35] was stated by the supreme court to have been "a concise statement of the common-law doctrine applicable to the rights of riparian owners," [36] and "should be regarded as merely declaratory of the common law as understood by the commissioners when their report was prepared." [37] In the original opinion in *Lone Tree Ditch Co. v. Cyclone Ditch Co.*[38] it was stated that this enactment was not inconsistent with the act of 1881 concerning the right of owners of agricultural land to use the waters of streams and hence was not repealed thereby; but on rehearing [39] the court stated that it was unnecessary to pass upon the question as to whether riparian rights had been abrogated by the 1881 law and hence refrained from expressing any view upon this point.

Riparian rights attach at the time of settlement upon riparian land.[40] They are incident to and part of the land, and can be lost only by adverse right, grant, actual abandonment, and prior legal appropriation.[41] The dedication of waters to the public in the water code did not affect existing riparian rights, and the provision for statutory forfeiture for nonuse could have no effect upon them.[42] Appropriative rights are subject to every riparian right existing at the time of making the appropriation, whether or not previously exercised by the riparian owner.[43]

As against a subsequent appropriator, the riparian owner has a right to use all water necessary for the proper irrigation of his land, and the appropriator's only right as against the one who entered riparian land before the appropriation was made is to prevent the latter from wasting the water.[44] The only duty the riparian owner owes to such downstream appropriator, in other words, is to use the water with the least possible injury to him, and as against such appropriator the riparian need not divert the water at a point on his own land. Neither a riparian owner nor an appropriator can claim more water than he actually uses, and any use which either makes must be for beneficial purposes and without unnecessarily interfering with the rights of others.[45]

Riparian owners, as against each other, are entitled to make reasonable use of the waters not previously legally appropriated for irrigation purposes.[46] These reasonable riparian needs cannot be

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[35] Terr. Dak. Civ. Code, sec. 255; S. Dak. Code 1939, sec. 61.0101.
[36] *Lone Tree Ditch Co. v. Cyclone Ditch Co.* (15 S. Dak. 519, 91 N. W. 352 (1902)).
[37] *Redwater Land & Canal Co. v. Reed* (26 S. Dak. 466, 128 N. W. 702 (1910)).
[38] 15 S. Dak. 519, 91 N. W. 352 (1902).
[39] 26 S. Dak. 307, 128 N. W. 596 (1910).
[40] *Lone Tree Ditch Co. v. Cyclone Ditch Co.* (15 S. Dak. 519, 91 N. W. 352 (1902)); *Stenger v. Tharp* (17 S. Dak. 13, 94 N. W. 402 (1903)); *Redwater Land & Canal Co. v. Reed* (26 S. Dak. 466, 128 N. W. 702 (1910)); *Redwater Land & Canal Co. v. Jones* (27 S. Dak 194, 130 N. W. 85 (1911)).
[41] *Stenger v. Tharp* (17 S. Dak. 13, 94 N. W. 402 (1903)).
[42] *St. Germain Irr. Ditch Co. v. Hawthorne Ditch Co.* (32 S. Dak. 260, 143 N. W. 124 (1913)).
[43] *Redwater Land & Canal Co. v. Reed* (26 S. Dak. 466, 128 N. W. 702 (1910)).
[44] *Lone Tree Ditch Co. v. Cyclone Ditch Co.* (26 S. Dak. 307, 128 N. W. 596 (1910)).
[45] *Redwater Land & Canal Co. v. Reed* (26 S. Dak. 466, 128 N. W. 702 (1910)).
[46] *Stenger v. Tharp* (17 S. Dak. 13, 94 N. W. 402 (1903)).

anticipated and set out specifically in a decree.[47] As among riparians, no right exists by virtue of prior settlement of land. Uses of water are divided into (1) ordinary or natural, for domestic use and watering of stock, and (2) extraordinary or artificial, for manufacturing, mining, and irrigation purposes. The uses in the first group are superior to those in the second group; a riparian owner may exhaust the stream for the former purposes, but the rights of all riparians to the use of water for the latter purposes are exactly the same.[48]

A limitation (since removed) upon the extent of lands for which riparian rights may be claimed was made in *Cook* v. *Evans* (1921–22).[49] Based upon the Oregon decision of *Hough* v. *Porter*,[50] the court held that Congress by its Desert Land Act of March 3, 1877,[51] severed from all public lands not then lawfully entered, all rights to the use of adjacent waters except the riparian right to use such waters for domestic purposes, and dedicated to the public all remaining public waters and thus rendered them subject to appropriation. Public lands entered after that date were thus held to be divested of all riparian rights except for domestic purposes. In another decision rendered on the same day as the decision on rehearing in *Cook* v. *Evans*, it was held that one claiming as a riparian owner had the burden of establishing such claim by proof of settlement upon the riparian lands prior to March 3, 1877.[52]

The principle established in the foregoing decisions rendered in 1922 was overruled in 1940.[52a] It was held that the decision of the United States Supreme Court in the *California-Oregon Power Co. case* [52b] (see p. 55 above) gave approval to the South Dakota decisions referred to only insofar as they held that Congress by the Desert Land Act intended to sever surplus water from the land on the public domain, but showed that the South Dakota court had erred in holding that Congress intended thereby to set up "appropriation" as the governing rule under which rights in surplus water on the public domain were to be acquired. Inasmuch as the South Dakota decisions rendered prior to 1922 had held that water rights in streams were open to the acquisition of riparian rights through settlement on land and to appropriation under the statute, it was concluded that the rights of a riparian owner must be determined by the law thus established. It was stated that as the interpretation of the Desert Land Act could not be said to have been settled until passed on by the Supreme Court, the rulings of the South Dakota court in *Cook* v. *Evans* and *Haaser* v. *Englebrecht* did not therefore create an established rule of property. This decision apparently restores the riparian doctrine in South Dakota to the superior and substantial position which it occupied prior to 1922.

A recent decision dealt with the right of a city, by virtue of its ownership of a tract of riparian land, to take water out of the water-

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[47] *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.* (26 S. Dak. 307, 128 N. W. 596 (1910)); *Redwater Land & Canal Co.* v. *Reed* (26 S. Dak. 466, 128 N. W. 702 (1910)); *Redwater Land & Canal Co.* v. *Jones* (27 S. Dak. 194, 130 N. W. 85 (1911)).
[48] *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.* (26 S. Dak. 307, 128 N. W. 596 (1910)).
[49] 45 S. Dak. 31, 185 N. W. 262 (1921); 45 S. Dak. 43, 186 N. W. 571 (1922).
[50] 51 Oreg. 318, 98 Pac. 1083 (1909).
[51] 19 Stat. L. 377 (March 3, 1877).
[52] *Haaser* v. *Englebrecht* (45 S. Dak. 143, 186 N. W. 572 (1922)).
[52a] *Platt* v. *Rapid City* (— S. Dak. —, 291 N. W. 600 (1940)).
[52b] *California-Oregon Power Co.* v. *Beaver Portland Cement Co.* (295 U. S. 142 (1935)).

shed for the use of its inhabitants.[53] It was held that the use of water by a riparian owner beyond his riparian land is an infringement of the rights of lower riparian proprietors thereby deprived of the flow; also that land which is not within the watershed of a stream is not riparian thereto, even though it is part of a tract which extends to the stream. Consequently, the city had no right to take any portion of the water away from the natural watershed and onto nonriparian lands and for nonriparian consumers, without compensating the lower riparian owner.

*Texas.*—The riparian doctrine has been recognized as a fundamental part of the water law of Texas from the time of the earliest litigation on the subject, but the applicability of the riparian right has been subjected to various limitations which have not only made possible the existence of the appropriation doctrine, but have accorded it great practical importance.

As early as 1863 the common-law doctrine was stated as giving the riparian owner a right to the use of the natural flow of the stream without diminution or obstruction.[54] For many years there was contention over the question as to whether irrigation was such a "natural" use of water as to entitle the riparian owners to exhaust the entire stream for that purpose, but the controversy was settled in a decision in 1905 [55] which discussed earlier decisions and concluded that there had been no case decided by the supreme court, or in which an application for writ of error from the court of civil appeals had been refused, which was authority for the statement that the rule of reasonable use for irrigation purposes did not apply as among riparians. It was specifically held that domestic uses are natural uses, having preference over demands for irrigation and manufacturing purposes. Subject to this preferred right of natural use by other riparian proprietors, each riparian owner was held to be entitled to make a reasonable use of the stream for irrigation purposes in view of all the circumstances, all proprietors having equal rights; and it was stated that the courts have ample authority to ascertain the relative rights and regulate the manner of use. A subsequent decision cited this case and stated that in a controversy between riparian owners the use of the water for irrigation would be apportioned in accordance with the number of acres of riparian land owned by each.[56] It has been held subsequently that the reasonable needs of riparian owners for domestic and stock-watering purposes have preference over irrigation requirements of other riparians.[57]

With the passage of the early irrigation statutes began the long series of conflicts between claimants for use on riparian lands and claimants for distant use. The vested rights of riparians were held to be unaffected by acts of the legislature,[58] which were valid where they could be applied without detriment to such rights, such

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[53] *Sayles* v. *Mitchell* (60 S. Dak. 592, 245 N. W. 390 (1932)).

[54] *Rhodes* v. *Whitehead* (27 Tex. 304, 84 Am. Dec. 631 (1863)).

[55] *Watkins Land Co.* v. *Clements* (98 Tex. 578, 86 S. W. 733 (1905)); discussing: *Rhodes* v. *Whitehead* (27 Tex. 304, 84 Am. Dec. 631 (1863)), *Tolle* v. *Correth* (31 Tex. 362, 98 Am. Dec. 540 (1868), *Baker* v. *Brown* (55 Tex. 377 (1881)). *Barrett* v. *Metcalfe* (12 Tex. Civ. App. 247, 33 S. W. 758 (1896; writ of error refused, 93 Tex. 679)), and *Mud Creek Irr. Agri. and Mfg. Co.* v. *Vivian* (74 Tex. 170, 11 S. W. 1078 (1889)).

[56] *Matagorda Canal Co.* v. *Markham Irr. Co.* (154 S. W. 1176 (Tex. Civ. App. 1913)).

[57] *Martin* v. *Burr* (111 Tex. 57, 228 S. W. 543 (1921)).

[58] *Mud Creek Irr. Agri. and Mfg. Co.* v. *Vivian* (74 Tex. 170, 11 S. W. 1078 (1889); *Barrett* v. *Metcalfe* (12 Tex. Civ. App. 247, 33 S. W. 758 (1896; writ of error refused, 93 Tex. 679)).

as against riparian lands owned by the State at the time of appropriation and nonriparian lands the owners of which had no interest in the water.[59] A statute passed in 1889 had declared the unappropriated waters of every river or natural stream within the arid portions of the State, in which, by reason of insufficient rainfall, irrigation was necessary for agricultural purposes, to be the property of the public, subject to appropriation for irrigation, domestic, and other beneficial uses, provided that riparian landowners should not be deprived of water for their own domestic uses.[60] The supreme court held that this law was not a special or local law, and was not inoperative because of failure to designate the territory which should be deemed to be the arid portion of the State; that the question as to what lands the act applied to would be a question of fact, to be determined as any other fact.[61] (Later legislation on water appropriation was Statewide in application.)

Riparian and appropriative rights, then, were both recognized in Texas. The riparian's right was stated by the court of civil appeals to be not founded upon "a mere artistic desire to see unappropriated and waste water flow by" his land on its way to the sea, so that he could not restrain a diversion that did not damage him.[62] Waters have been stated to be the property of the public, subject to the easements of riparian owners; as between the riparian owner and the statutory appropriator, the riparian owner must first have water reasonably sufficient for his needs, but as against the excess the statutory appropriation is effective. To hold that riparian owners have the right to have all the water flow past their land as against statutory appropriations would be to destroy the appropriation statute in its entirety.[63]

The subject of riparian rights was extensively reviewed in *Motl* v. *Boyd*[64] in 1926, and while the existence of the doctrine was reiterated, it was held to apply only to certain lands and to certain waters. The supreme court concluded that all grantees of public lands, granted by the Mexican Government and the Republic and State of Texas prior to adoption of the appropriation statute, became invested by virtue of such grants with riparian rights to the waters of streams to which the grants were riparian. Specifically:

On the whole, we think it proper to say that from the Mexican decree of 1823 down to the passage of our appropriation act in 1889, the fixed policy of this State, under all of its several governments—that of Mexico, Coahuila and Texas, Tamaulipas, and the Republic and State of Texas, was to recognize the right of the riparian owner to use water, not only for his domestic and household use, but for irrigation as well.

It was stated that the riparian use must be a reasonable use; also that "unappropriated" waters under the Irrigation Act of 1889 did not include waters granted riparian owners by virtue of their land grants, except such waters as were unnecessary for their use. It was stated further that the water appropriation acts of 1889 and down to and including the act of 1917 were valid and constitutional

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[59] *Santa Rosa Irr. Co.* v. *Pecos River Irr. Co.* (92 S. W. 1014 (Tex. Civ. App. 1906; writ of error denied)).

[60] Tex. Gen. Laws 1889, ch. 88, p. 100.

[61] *McGhee Irr. Ditch Co.* v. *Hudson* (85 Tex. 587, 22 S. W. 398, 967 (1893)).

[62] *Biggs* v. *Leffingwell* (62 Tex. Civ. App. 665, 132 S. W. 902 (1910)).

[63] *Biggs* v. *Lee* (147 S. W. 709 (Tex. Civ. App. 1912; writ of error dismissed, 150 S. W. xix)).

[64] 116 Tex. 82, 286 S. W. 458 (1926).

insofar as they authorized the appropriation of storm and flood waters and other waters without violation of existing riparian rights. (The present appropriation statute of Texas, as noted in the appendix, provides that nothing contained therein shall be construed as recognizing any riparian right in the owner of any lands the title to which passed out of the State after July 1, 1895.) The riparian owner was held not to be precluded from asserting a right in riparian waters because he made application for a permit to appropriate unappropriated waters in the stream.

The foregoing decision placed an important limitation upon the portion of the stream water to which the riparian right applied:

> We are of the opinion that riparian waters are the waters of the ordinary flow and underflow of the stream; and that the waters of the stream, when they rise above the line of highest ordinary flow, are to be regarded as flood waters or waters to which riparian rights do not attach.

In the following year the principle that the riparian water is only the water below the highest line of normal flow of the stream was restated, in a decision holding that storm, flood, or rain waters conveyed through a natural stream from the place of storage to the place of use did not become a part of the riparian waters of the stream.[65]

A section of the appropriation statute provides that appropriators, after 3 years' use of water under their statutory appropriations, shall be deemed to have acquired a title to such appropriations by limitation as against other claimants, including all riparian owners on the same stream or other source.[66] On the authority of *Motl* v. *Boyd*, the court of civil appeals has held that as riparian waters are not unappropriated waters, this limitation is not operative as against the rights of riparian landowners; consequently an appropriator who had made 3 years' use of water under the statute, but who had not shown adverse use as against riparian owners under the general statute of limitations of 10 years, was held not entitled to restrain the riparians from using the water.[67]

The riparian right is a part and parcel of the land,[68] but is not inseparable from riparian land, for the proprietors may consent to the diversion of riparian water and the riparian right may be condemned.[69] The *Watkins case* in 1905 held that riparian rights cannot extend beyond the original survey granted by the Government, and that the right is restricted to land the title to which was acquired by one transaction.[70] It is only the portions of the surveys which lie within the watershed of the stream upon which they abut that are riparian.[71] While ordinarily the riparian owner has no right to divert riparian water to land lying beyond the watershed of the stream, or nonriparian land, this may be allowed where water is abundant and no possible injury can result to lower riparian owners.[72] It has also been stated that while a riparian owner can contract for the diversion of riparian water to nonriparian land, the rights of inferior proprietors

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[65] *Parker* v. *El Paso County W. I. Dist. No. 1* (116 Tex. 631, 297 S. W. 737 (1927)).
[66] Vernon's Tex. Stats. 1936, Rev. Civ. Stats., art. 7592.
[67] *Freeland* v. *Peltier* (44 S. W. (2d) 404 (Tex. Civ. App. 1931)).
[68] *Parker* v. *El Paso County W. I. Dist. No. 1* (116 Tex. 631, 297 S. W. 737 (1927)).
[69] *Matagorda Canal Co.* v. *Markham Irr. Co.* (154 S. W. 1176 (Tex. Civ. App. 1913)).
[70] *Watkins Land Co.* v. *Clements* (98 Tex. 578, 86 S. W. 733 (1905)).
[71] *Matagorda Canal Co.* v. *Markham Irr. Co.* (154 S. W. 1176 (Tex. Civ. App. 1913)).
[72] *Watkins Land Co.* v. *Clements* (98 Tex. 578, 86 S. W. 733 (1905)); *Texas Co.* v. *Burkett* (117 Tex. 16, 296 S. W. 273 (1927)).

will not be affected thereby; and that the riparian owner has the right to contract for the use of his proportionate share of riparian water on other riparian lands.[73]

The riparian right includes the right to store water for future use, so far as this can be done consistently with the rights of other riparian owners.[74] The court of civil appeals has held that a city in its corporate capacity may be a riparian proprietor, entitled to riparian rights in a stream on which it owns land, and that its use of water for domestic purposes is superior to the right of a similar owner for irrigation purposes. This preference, however, does not include the sale of water to railroads or others whose use of the water is not a domestic use, nor to persons outside the city limits.[75]

*Washington.*—The common-law rule of riparian rights to the use of water has been recognized repeatedly in the court decisions, but in the language of the court "has been stripped of some of its rigors." [76] The effect of the decisions, particularly during the past 15 or 20 years, has been to reduce materially the advantage of position of riparian lands with reference to water rights. Irrigation development in Washington has progressed extensively, principally under the appropriation doctrine. As a result the riparian doctrine, while a part of the water law, is unquestionably of minor importance in the irrigation economy of the State.

It was stated by the supreme court in 1897, in *Benton* v. *Johncox*,[77] that the riparian doctrine had been recognized in several preceding decisions, as well as by the legislature; that it was not incompatible with the condition of society in the State; and that it applied to the arid as well as the humid areas. The existence of the appropriation doctrine was likewise reaffirmed, subject to the limitation that the rights of lands in private ownership at the time the appropriation statutes were passed were in no wise affected. It was further held that the riparian rights of a patentee of the Government attached, by relation, at the very inception of his title and would be protected as against subsequent appropriations. The principle of this decision as to the existence of the common-law doctrine was reasserted in a case 10 years later, as being not inconsistent with reasonable use of the water for irrigation; and it was further stated that assertion of rights by appropriation is not antagonistic to, and in effect a waiver of, rights arising out of riparian ownership.[78]

A number of important principles governing the operation of the riparian doctrine were announced or reaffirmed in a series of court decisions beginning in the early twenties. Prior appropriation and use of the waters of nonnavigable streams on the public domain was held to confer rights superior to those of all subsequent entrymen claiming as riparian owners.[79] The decision in *Brown* v. *Chase* [80] stated that while the Washington courts had adhered to the principle of riparian rights as a primary doctrine, that principle had been greatly modified by various decisions by engrafting upon

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[73] *Texas Co.* v. *Burkett* (117 Tex. 16, 296 S. W. 273 (1927)).
[74] *Stacy* v. *Delery* (57 Tex. Civ. App. 242, 122 S. W. 300 (1909)); *Chicago, Rock Island & Gulf Ry.* v. *Tarrant County W. C. & I. Dist. No. 1* (123 Tex. 432, 73 S. W. (2d) 55 (1934)).
[75] *Grogan* v. *Brownwood* (214 S. W. 532 (Tex. Civ. App. 1919)).
[76] *In re Alpowa Creek* (129 Wash. 9, 224 Pac. 29 (1924)).
[77] 17 Wash. 277, 49 Pac. 495 (1897).
[78] *Nesalhous* v. *Walker* (45 Wash. 621, 88 Pac. 1032 (1907)).
[79] *Leiser* v. *Brown* (121 Wash. 125, 208 Pac. 257 (1922)).
[80] 125 Wash. 542, 217 Pac. 23 (1923).

it the necessity of beneficial use by the riparian owner, refusing relief where the riparian owner was not substantially damaged, and granting relief where he was either presently or prospectively damaged. Further, the waters of nonnavigable streams to which riparian rights are applicable, are those which can be beneficially used either directly or prospectively within a reasonable time on or in connection with riparian lands, the excess being subject to appropriation. Where the supply of water is limited, the burden of proof is upon the appropriator to show that no riparian right will be injured; but where the supply is more than ample for all possible riparian uses, the burden is upon the riparian to prove substantial injury.

It was subsequently stated that riparian rights date from the first step taken to secure a title from the Government, and cannot be defeated by subsequent appropriation, but that a bona fide appropriation of water for a beneficial use is superior to subsequently acquired riparian rights.[81] In other words, an appropriation of water antedates the riparian rights of lands entered after the date of the appropriation.[82] Furthermore, the riparian owner's right of protection is based upon a showing that either at present, or in the near future, he will make beneficial use of the water.[83]

The "existing vested rights" preserved by statute to the riparian owner have no reference to the surplus waters of a stream nor to the surplus waters of a lake.[84] All surplus waters not attaching as a right to riparian lands, may be taken by appropriation for use on nonriparian land.[85] The riparian right, once vested, however, is a property right which cannot be taken for public purposes without just compensation,[86] nor can it be seriously impaired by a subsequent appropriator.[87]

As against a subsequent appropriator, the riparian claimant is limited to a specific proportion of the water of the stream, as the flow increases or diminishes, namely, the ratio which the area of his riparian land capable of being irrigated from the stream bears to the total area of riparian land capable of such irrigation. As against each other, riparian owners have coequal rights to make a reasonable use of water for irrigation, regardless of the several dates of their settlement upon the land.[85] A tract of land detached from a riparian tract and no longer touching the stream loses its riparian character by such transaction; and a tract, not riparian to a stream when title is acquired, cannot be made riparian by thereafter acquiring title to the land lying between such tract and the stream.[88]

Riparian rights in navigable waters are not recognized.[89] Nor may a riparian owner store water in reservoirs for future use, and thus deprive other riparian owners of their use of the stream in its natural condition, except under a valid prior appropriation therefor.[90]

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[81] *In re Alpowa Creek* (129 Wash. 9, 224 Pac. 29 (1924)).

[82] *Hunter Land Co.* v. *Laugenour* (140 Wash. 558, 250 Pac. 41 (1926)); *In re Sinlahekin Creek* (162 Wash. 635, 299 Pac. 649 (1931)).

[83] *State* v. *American Fruit Growers* (135 Wash. 156, 237 Pac. 498 (1925)).

[84] *Proctor* v. *Sim* (134 Wash. 606, 236 Pac. 114 (1925)).

[85] *Hunter Land Co.* v. *Laugenour* (140 Wash. 558, 250 Pac. 41 (1926)).

[86] *Litka* v. *Anacortes* (167 Wash. 259, 9 Pac. (2d) 88 (1932)).

[87] *Church* v. *Barnes* (175 Wash. 327, 27 Pac. (2d) 690 (1933); see also *In re Martha Lake Water Co. No. 1* (152 Wash. 53, 277 Pac. 382 (1929)), concerning protection of riparian owner from property damage resulting from lowering of natural level of lake.

[88] *Yearsley* v. *Cater* (149 Wash. 285, 270 Pac. 804 (1928)).

[89] *State ex rel. Ham, Yearsley and Ryrie* v. *Superior Court* (70 Wash. 442, 126 Pac. 945 (1912)).

[90] *Still* v. *Palouse Irr. & Power Co.* (64 Wash. 606, 117 Pac. 466 (1911)); see also *Tacoma Eastern R. R.* v. *Smithgall* (58 Wash. 445, 108 Pac. 1091 (1910)).

The Washington court held in 1911 [91] and again in 1914 [92] that the congressional Desert Land Act [93] applied only to desert lands and did not affect rights to waters on public lands not entered under that act. This general subject, with the recently expressed views of the United States Supreme Court, is discussed below in connection with the development of the appropriation doctrine in the West. With reference to State school lands, a decision in 1923 [94] held that such lands were not segregated from the public domain until statehood in 1889, and stated concerning the Desert Land Act of 1877:

> After the passage of that act, it might have been questioned whether or not the state took the lands granted by the United States government subject to any riparian rights at all. However, we have adhered to the doctrine of riparian rights, and the Federal courts have uniformly recognized whichever doctrine applies in the state as to title to lands and water after its admission.

Accordingly it was held that whatever rights the State had in the water did not pass to any grantee until the sale of the lands, and that riparian rights attached at the time of such sale. In a subsequent decision it was stated that the State by its constitution and water legislation had granted rights which the State had in the State school lands for the purpose of irrigation to the public, with the result that riparian rights in such lands had been waived so long as the title remained in the State; but that such rights attached to the lands by the transfer to private ownership.[95]

In a decision in 1925 it was held that riparian owners were entitled to recover substantial damages for being deprived of the natural flow of a stream in which they had rights by virtue of the riparian character of their land, the deprivation resulting from diversion, storage, and development of the water upstream for power purposes under permits from the State hydraulic engineer.[96] The only measure of damages discussed by either party at the trial was the value of potential water power which might have been developed on the downstream riparian lands if the water had not be diverted.

## The Doctrine of Prior Appropriation

### Irrigation Is Essential to Agriculture in Much of the West

It is undeniable that in the arid portions of the Western States, irrigation is essential to agriculture.

The quantity of water available is far short of the quantity that would be required for the farming of all agricultural lands. The degree of the necessity for irrigating varies widely, the primary consideration in a given area being the deficiency of precipitation during the growing season with regard to the quantity of water required for crop growth. In some portions of the West, then, irrigation is seldom required; in other areas it contributes to a wider range of crop production and to greater production than would be possible with the use solely of precipitation on the cropped land: and in still others it is necessary to practically every form of de-

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[91] *Still* v. *Palouse Irr. & Power Co.* (64 Wash. 606, 117 Pac. 466 (1911)).
[92] *Bernot* v. *Morrison* (81 Wash. 538, 143 Pac. 104 (1914)).
[93] 19 Stat. L. 377 (March 3, 1877).
[94] *In re Doan Creek* (125 Wash. 14, 215 Pac. 343 (1923)).
[95] *In re Crab Creek and Moses Lake* (134 Wash. 7, 235 Pac. 37 (1925)).
[96] *Eckenbary* v. *Calispel Light & Power Co.* (132 Wash. 255, 231 Pac. 946 (1925)).

pendable agricultural development. For example, in California, where the range of climatic conditions is wide, the census of 1930 showed that five-eighths of all farms were irrigated farms; and in the more generally arid State of Utah, that seven-eighths of all farms were irrigated.[97] Of economic significance is the further showing that in each of these States, the value of crops produced under irrigation in 1929 was nearly as great as the value reported as invested in irrigation enterprises.[98]

The sources of water are snow and rain on the mountain ranges and other higher lands, which in seeking lower levels flow over and under the surface in streams and in diffused flows. As water is much less abundant than good land in the West, the problem is to distribute these water supplies where they can be most beneficially and economically utilized. The physical, economic, and legal problems involved go far beyond those concerned with the simple operation of diverting a little water from a stream for domestic use and incidental irrigation in an area in which the rainfall in most seasons is adequate for farming purposes.

### The Riparian Doctrine Proved Unsuitable for the Irrigation of Arid Lands, and a New Rule Was Developed

The common-law riparian doctrine was found to be unsuited to water development in the more arid areas. Had the riparian doctrine remained the only accepted rule, the lands contiguous to surface streams would have had the prior claim to the flowing waters, solely by reason of location, and diversions for use on nonriparian lands would have been made at the sufferance of the riparian owners. This would have been the case, regardless of the relative productive capacities of riparian and nonriparian lands. It was natural that some other rule, laying greater emphasis upon beneficial use, and affording protection to enterprises based upon feasibility of diversion of water and application to lands whether or not contiguous to watercourses, should have developed from the necessities of the environment. The so-called doctrine of prior appropriation appeared adequate for this purpose. While by no means a perfect system, it has proved more generally satisfactory for conditions in most of the West than has the common-law doctrine.

### General Statement of the Appropriation Doctrine

An excellent summary of the fundamental principles of the doctrine appears in *Union Mill & Mining Co.* v. *Dangberg*,[99] a Federal district court decision rendered in Nevada in 1897:

> Under the principles of prior appropriation, the law is well settled that the right to water flowing in the public streams may be acquired by an actual appropriation of the water for a beneficial use; that, if it is used for irrigation, the appropriator is only entitled to the amount of water that is necessary to irrigate his land, by making a reasonable use of the water; that the object had in view at the time of the appropriation and diversion of the water is to be

[97] U. S. Department of Commerce, Bureau of the Census, Fifteenth Census of the United States, 1930. Irrigation of Agricultural Lands, pp. 86 and 326.

[98] U. S. Department of Commerce, Bureau of the Census, Fifteenth Census of the United States, 1930, Irrigation of Agricultural Lands, pp. 29 and 327.

[99] 81 Fed. 73 (C. C. D. Nev. 1897).

considered in connection with the extent and right of appropriation; that, if the capacity of the flume, ditch, canal, or other aqueduct, by means of which the water is conducted, is of greater capacity than is necessary to irrigate the lands of the appropriator, he will be restricted to the quantity of water needed for the purposes of irrigation, for watering his stock, and for domestic use; that the same rule applies to an appropriation made for any other beneficial use or purpose; that no person can, by virtue of his appropriation, acquire a right to any more water than is necessary for the purpose of his appropriation; that, if the water is used for the purpose of irrigating lands owned by the appropriator, the right is not confined to the amount of water used at the time the appropriation is made; that the appropriator is entitled, not only to his needs and necessities at that time, but to such other and further amount of water, within the capacity of his ditch, as would be required for the future improvement and extended cultivation of his lands, if the right is otherwise kept up; that the intention of the appropriator, his object and purpose in making the appropriation, his acts and conduct in regard thereto, the quantity and character of land owned by him, his necessities, ability, and surroundings, must be considered by the courts, in connection with the extent of his actual appropriation and use, in determining and defining his rights; that the mere act of commencing the construction of a ditch with the avowed intention of appropriating a given quantity of water from a stream gives no right to the water unless this purpose and intention are carried out by the reasonable, diligent, and effectual prosecution of the work to the final completion of the ditch, and diversion of the water to some beneficial use; that the rights acquired by the appropriator must be exercised with reference to the general condition of the country and the necessities of the community, and measured in its extent by the actual needs of the particular purpose for which the appropriation is made, and not for the purpose of obtaining a monopoly of the water, so as to prevent its use for a beneficial purpose by other persons; that the diversion of the water ripens into a valid appropriation only where it is utilized by the appropriator for a beneficial use; that the surplus or waste water of a stream may be appropriated, subject to the rights of prior appropriators, and such an appropriator is entitled to use all such waters; that, in controversies between prior and subsequent appropriators of water, the question generally is whether the use and enjoyment of the water for the purposes to which the water is applied by the prior appropriator have been in any manner impaired by the acts of the subsequent appropriator.

Since the above decision was rendered, the State water codes have generally provided administrative procedure under which the extent of one's appropriation is measured and determined, subject to judicial review. Otherwise the principles so stated are equally applicable at the present time. Important features of the development and application of the appropriation doctrine, including the effect of the "doctrine of relation" upon date of priority of an appropriation, are discussed in chapter 6.

### Appropriations of Water Were Permitted Under Mexican Sovereignty, but the Doctrine of Prior Appropriation in Its Present Widely Accepted Form Grew From the Customs of California Miners

Irrigation in the West did not originate with the Anglo-Saxons. It was practiced in the Southwest by the Spanish settlers, and by the Indians long before the Spaniards came.[1] Nor did the doctrine of prior appropriation, in the form in which it is now widely recognized, grow strictly from irrigation necessities, although it appears that some form of "appropriation" of water for agricultural purposes in connection with nonriparian land was being practiced in the Southwest before the cession of that area to the United States. The fact that appropriations of water could be made under the Mexican

[1] U. S. Department of Agriculture, Year Book of Agriculture 1938, Soils and Men, p. 693.

regime has been stressed in court decisions upholding the exclusive appropriation doctrine in Arizona and New Mexico. The Supreme Court of Arizona has stated that appropriation under Mexican sovereignty was permitted to some extent by local custom as well as by express grant from the Government.[2] Likewise, the New Mexico Supreme Court has stated that the law of appropriation was a part of Mexican law and was recognized and adopted by Territorial legislation.[3] In declaring that riparian ownership of water was not a part of the law of New Mexico, and that under Mexican law the use of water was not confined to riparian lands, but extended to other lands under public regulation, the court stated, in another case:[4]

> And the Mexican law, as well as the law of Indian tillers of the soil, who preceded the Spaniards here, as it may be gathered from the ruins of their irrigation systems, did but recognize the law of things as they are, declaring that such must, of necessity, be the use of the waters of streams in this arid region.

Nevertheless, the appropriative principle in the form in which it is now recognized throughout the West—embodying the essential element of priority—is not traceable to Mexican laws and customs, but sprang from the requirements of a mining region for protection in the use of water supplies needed to work the mining claims. The basis of the present doctrine of "prior" appropriation is the maxim "First in time, first in right"—the recognition and protection of a right acquired by an individual to an exclusive use of water, based strictly upon priority of appropriation and application of the water to beneficial use, and without limitation of the place of use to riparian land. This principle was developed from customs originating with the gold miners of California, who in formulating a workable set of rules could have been no more influenced by Spanish-Mexican law than they were by the common law of England. A rule was adopted as to the possessory right to mining claims, giving the first locator of a claim the superior right to the same as against all later comers, and the same rule was applied to appropriations of water for the purpose of working mining claims, this element of superior right to the one who was prior in time having been theretofore unknown in the civil or common law governing waters or in the civil law as modified by Spanish-Mexican law.[5] The mining area was a part of the Mexican public domain and upon the cession became a part of the public domain of the United States; and as the mining region was largely uninhabited prior to the discovery of gold, and contained no riparian proprietors, there "had been, in fact, no law in force to interfere with the California miners helping themselves to the waters they needed."[6] The miners' customs became law, adaptable to diversions of water for irrigation as well as for mining purposes; and it is the specific principles there developed under the exigencies of that environment, rather than the less widely known principles of Mexican appropriation law and custom, that

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[2] *Maricopa County M. W. C. Dist. v. Southwest Cotton Co.* (39 Ariz. 65, 4 Pac. (2d) 369 (1931)).

[3] *United States v. Rio Grande Dam & Irr. Co.* (9 N. Mex. 292, 51 Pac. 674 (1898)).

[4] *Hageman Irr. Co. v. McMurry* (16 N. Mex. 172, 113 Pac. 823 (1911)).

[5] Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, sec. 776, pp. 1345–1346.

[6] Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 68, p. 68.

have been adopted by legislation and court decisions and are now a part of the water codes throughout the West. Even the present water codes of Arizona and New Mexico follow the general western pattern, although early Territorial legislation continued in force the laws and customs of Sonora, of which these States once formed a part, and thus impressed upon their water laws certain features not found elsewhere in the West.[7]

Harding says, concerning the early mining conditions:[8]

> Lands available for settlement in the eastern states did not require the diversion and use of water for irrigation, so that when settlement began in the western states there was no established policy for the acquirement of rights to the use of such waters. The early mining settlements needed provisions for acquiring and enforcing titles to lands and waters. No statutory provisions were available. The only governmental agencies in the area were scattered military commands whose main activities related to the suppression of Indian warfare and protection of settlers from violence. There was little civil government or provisions for handling civil controversies between settlers. As a natural result of these conditions the miners developed their own rules and enforced them by community action. This was done more or less independently by the different mining settlements with the natural result that differences in the customs of different camps arose, although the same general basis was followed.
>
> Early mining in California consisted of the working of surface gravels by hydraulic or placer methods. Water was required for such mining. The miners developed their own rules regarding the acquirement of mining lands, as such land was then public and the federal government exercised no control over its use. These mining customs included limitations on the area which a miner could hold, advantages in obtaining claims based on priority of discovery, and requirements regarding the amount of work necessary to hold a claim. The same principles were applied to acquirement of water for use in mining. The amount of water to which title could be obtained was limited to the amount needed for the purposes of use just as the extent of the mining claim was limited to the area the miner could work out in a reasonable time. The one first using water had the prior right up to the needs of his use just as the prior discoverer had the prior right to secure the mining ground. Diligence in construction of the diversion system and continued use were required to hold title to water just as similar standards in working the mine were required to hold title to it. These are the essential elements of the appropriation system of titles to water which has been generally adopted in the western states.

### The Customs Were Sanctioned by Court Decisions

This development began with the active mining operations which followed the discovery of gold in 1848. Inevitably the departure from common-law principles caused dissension, but a decision of the California Supreme Court in 1855 upheld the appropriative principle as between a canal owner who had diverted water from public land and a miner who had later located on public lands bordering the stream from which water had been diverted.[9] In deciding that the common-law rule should not prevail, the court pointed out that the lands were not owned by individual proprietors but were the property of the United States, and that the diversion objected to by the

[7] For example, the "community acequia" irrigation system was once highly important in Arizona water law and still is in that of New Mexico. Likewise the Arizona Supreme Court has held that the holding of land was the basis for any valid appropriation of water from a public stream in Sonora, and that on any such matters the court decisions in States having water laws of different origin from that of Arizona and New Mexico are not controlling or even authoritative in Arizona. *Tattersfield* v. *Putnam* (45 Ariz. 156, 41 Pac. (2d) 228 (1935)).

[8] Harding, S. T., Water Rights for Irrigation—Principles and Procedure for Engineers, pp. 3–4.

[9] *Irwin* v. *Phillips* (5 Calif. 140, 63 Am. Dec. 113 (1855)).

appellants was made prior to the time they located upon the creek. It was then stated:

> Courts are bound to take notice of the political and social condition of the country, which they judicially rule. * * * a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily encouraged by the expressed legislative policy of the other. If there are, as must be admitted, many things connected with this system, which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of *res judicata*. Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, * * *

Reference was then made to the fact that the policy of the State of California, as indicated by certain acts of the legislature, was to recognize on an equal footing the privilege of working mines and of diverting streams from their natural channels. The court then stated that as these rights are considered to be equal the first in time was the first in right and held in favor of the defendant.

The rule of appropriation was thus recognized by the Supreme Court of California, based upon the statement of facts presented, prior to the period of serious conflict over the doctrine of riparian rights.

### The Doctrine Was Extended to Use of Water for Irrigation and Other Purposes as Well as for Mining Purposes

The question arose soon after the recognition of the doctrine of prior appropriation as to whether an appropriation could be made for purposes other than mining. In the areas where mining interests were strongly intrenched, it was argued that a prior appropriation could be made solely for the purpose of mining and a valid appropriation for other purposes could not be made.

In the early case of *Tartar* v. *Spring Creek Water & Min. Co.*,[10] a water right was claimed by the operator of a sawmill upon a stream, the water of which was used for propelling the machinery of the mill. Certain miners, subsequent to the time of the erection of the mill, located on the stream above the sawmill and proceeded to divert water for mining purposes, which prevented the operation of the mill for 5 months of the year inasmuch as the water during that period was not sufficient for both parties. The mill owner sought an injunction which was granted. In affirming the holding of the lower court, the Supreme Court of California made the following statement:

> It results, from the consideration we have given the case, that the right to mine for the precious metals, can only be exercised upon public lands; that although it carries with it the incidents to the right, such as the use of wood and water, those incidents must also be of the public domain in like manner as the lands; that a prior appropriation of either to steady individual purpose, establishes a *quasi* private proprietorship, which entitles the holder to be protected in its quiet enjoyment against all the world but the true owner, * * *

[10] 5 Calif. 395 (1855)

In the case of *Rupley* v. *Welch*,[11] the plaintiff had constructed a reservoir for impounding the waters of a ravine, which water was to be used for purposes of irrigation on public lands. The defendants threatened to divert the water from the reservoir for mining purposes without regard to the rights of the plaintiff, who was the prior appropriator. The court decided that regardless of the rights of defendants to enter public lands for mining purposes, the threatened diversion of water from plaintiff's reservoir was a clear violation of a vested right of property, acquired by virtue of a prior appropriation, of which he could not be divested for any private purposes or for the benefit of a few private individuals.

The United States Supreme Court rendered two decisions in 1874 which supported the principles developed in the foregoing cases. In *Atchison* v. *Peterson*,[12] which involved the respective water rights of miners on the public domain, the Court stated that the doctrines of the common law declaratory of the rights of riparian owners had been found inapplicable or applicable only in a very limited extent to the necessities of miners and inadequate for their protection, and that as the Government was the sole proprietor of the public lands there was no occasion to apply such doctrine in the mining regions. Hence the doctrine of appropriation had grown up, at first with the silent acquiescence of the Government, and then with congressional recognition; and in the meantime had been recognized by legislation and enforced by the courts in the Pacific States and Territories. Under this doctrine priority gives the better right. In *Basey* v. *Gallagher*[13] water on the public lands had been appropriated for irrigation purposes, neither party having any title from the United States. Referring to *Atchison* v. *Peterson*, then recently decided, the Court stated:

> The views there expressed and the rulings made are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in those States and Territories by the custom of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one.

Uses of water for domestic and various other beneficial purposes have also come to be specifically recognized as purposes for which appropriative rights may be acquired, as noted below in chapter 6.

#### Congress Recognized the Appropriation of Water on Public Lands of the United States

The United States was the owner of the lands upon which the appropriation customs originated. These customs had been in effect for years before Congress passed any legislation on the subject; and the first act of July 26, 1866,[14] resulted from insistence on the part of western Members of Congress that the rights of miners and appropriators, theretofore tacitly recognized, be expressly confirmed.[15]

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[11] 23 Calif. 452 (1863).
[12] 87 U. S. 507 (1874).
[13] 87 U. S. 670 (1874).
[14] 14 Stat. L. 253, sec. 9; U. S. Rev. Stats., sec. 2339 (July 26, 1866).
[15] Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 93, p. 104 et seq.

This first act was primarily a mining law, but contained the following section (sec. 9):

* * * whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed: *Provided, however*, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

This was essentially a codification of the customs and usages which had grown up on the public domain. By its silent acquiescence the Federal Government had allowed these customs and usages to become established on its public lands; and these rights, according to the Supreme Court, "the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866."[16] Consequently, according to this decision, "this act was an unequivocal grant of the right of way, if it was no more," for a canal that ran at that date through the land of the United States; but as to lands which had been granted prior to the passage of the statute, under an act containing a reservation in favor of preexisting rights, an appropriator who had constructed a canal across such lands before they were granted need not rely on the statute of 1866, for the court considered it "rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one." Hence the act of 1866, according to Wiel,[17] "gave the formal sanction of the United States to the prevailing theory of a grant to the holders of existing rights upon public land, which indeed was its primary object;"—that is, the protection of existing rights on public land against the United States itself. This legislation effectively negatived any further assumption that appropriators of water on the public domain were trespassers; for their appropriations constituted a grant from the United States originally implied from its silent acquiescence and now resting upon the act itself.[18]

A second statute, amending the act of 1866, enacted on July 9, 1870,[19] provides that:

* * * all patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory.

The Desert Land Act of March 3, 1877,[20] contained the following:

*Provided however* that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose

[16] *Broder* v. *Water Co.* (101 U. S. 274 (1879)).
[17] Wiel, op. cit., vol. I, sec. 99. p. 116.
[18] Wiel, op. cit., vol. I, sec. 155, p. 177 et seq.
[19] 16 Stat. L. 218; U. S. Rev. Stats., sec. 2340 (July 9, 1870).
[20] 19 Stat. L. 377 (March 3, 1877).

of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

This act applied specifically to Arizona, California, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. An amendment on March 3, 1891,[21] extended the provisions to Colorado.

### The United States Supreme Court Has Held Recently That Congress by the Desert Land Legislation Separated the Land and the Water on the Public Domain, Leaving to Each State the Determination of What System Should Govern Rights to the Use of Such Waters, and That a Patent Issued Thereafter in a Desert Land State or Territory, Under any Federal Land Laws, Carried of Its Own Force No Common-Law Riparian Right

The rights of appropriators of water on the public domain, thus recognized by the several congressional acts, have been repeatedly upheld by the Supreme Court. Similarly, the Court repeatedly has upheld the right of each State to adopt its own system of water law, as stated heretofore. (See p. 34.) The recent decision of the Supreme Court in *California-Oregon Power Co.* v. *Beaver Portland Cement Co.*[22] reviews the congressional legislation and some of the earlier decisions concerning it.

The question as to whether the desert land legislation was limited to desert lands was not decided by the Supreme Court until 1935, in the *California-Oregon Power Co. case*, and in the meantime the highest courts of four States had been equally divided on the matter. The Supreme Court of Oregon, in the noted case of *Hough* v. *Porter*,[23] expressed the opinion in 1909 that all public lands settled upon after the enactment of that legislation were accepted with the implied understanding that, excepting water for domestic use, the first appropriator should have the superior right. The Washington court, in a decision in 1911,[24] refused to follow the lead of Oregon, and held that the Desert Land Act related only to the reclamation of desert lands and that no right attached by virtue of such act to public lands other than desert lands; and reaffirmed this principle in 1914.[25] The South Dakota court in 1921[26] expressly adopted the principle as stated in *Hough* v. *Porter;* but the California court in the following year[27] declined to adopt it, holding that the act was not intended to apply to all public lands of the United States and that it did not affect other than desert lands.

The United States Supreme Court, however, settled the question in the *California-Oregon Power Co. case* by holding that the Desert Land Act applied to all the public domain in the States and Territories named, and that it severed the water from the land and left the unappropriated waters of nonnavigable sources open to appro-

[21] 26 Stat. L. 1096, 1097 (March 3, 1891).
[22] 295 U. S. 142 (1935).
[23] 51 Oreg. 318, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909).
[24] *Still* v. *Palouse Irr. & Power Co.* (64 Wash. 606, 117 Pac. 466 (1911)).
[25] *Bernot* v. *Morrison* (81 Wash. 538, 143 Pac. 104 (1914)).
[26] *Cook* v. *Evans* (45 S. Dak. 31, 185 N. W. 262 (1921)).
[27] *San Joaquin & Kings River, C. & Irr. Co.* v. *Worswick* (187 Calif. 674, 203 Pac. 999 (1922)).

priation by the public under the laws of the several States and Territories. This case arose in Oregon; it concerned the right of an owner of riparian lands which had been acquired by patent under the Homestead Act of 1862, and who had never diverted water for beneficial use or had made an appropriation, to enjoin an appropriator from so interfering with the stream in question as to lessen the flow over and along the riparian land. The Supreme Court referred to the decisions in the four States on the question as to whether the water appropriation provisions in the Desert Land Act applied to all public lands in the States and Territories concerned, and said that the opinion of the Oregon court in *Hough* v. *Porter* was "well reasoned, and we think reaches the right conclusion." As to the contrary opinions of the Washington and California courts, the Supreme Court stated that to accept that view "would, in large measure, be to subvert the policy which Congress had in mind—namely, to further the disposition and settlement of the public domain." It was further stated that Congress must have known that in innumerable instances lands thereafter patented under the Desert Land Act and other lands patented under the preemption and homestead laws would be in the same locality and would require water from the same natural sources of supply; hence it is inconceivable that Congress intended to abrogate the common-law right of the riparian patentee for the benefit of the desert land owner and keep it alive against the homestead or preemption claimant. It was held that the Government, as owner of the public domain, possessed the power to dispose of land and water together or separately; and that the intention of Congress, by the act of 1877, was to establish the rule that for the future the land should be patented separately, and that all nonnavigable waters on the public domain should be reserved for the use of the public under the laws of the States and Territories named. From that it was held to follow that:

> * * * a patent issued thereafter for lands in a desert-land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed.

The Supreme Court stated, further, that inasmuch as Congress had no power to enforce upon any State either the riparian doctrine or the appropriation doctrine, the full choice of a system of water law must remain with the State. In the language of the Court:

> What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since "Congress cannot enforce either rule upon any state," *Kansas* v. *Colorado*, 206 U. S. 46, 94, the full power of choice must remain with the state. The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation. See *Wyoming* v. *Colorado*, 259 U. S. 419, 465.

The State's control over unappropriated waters, then, had the formal recognition of the Federal Government. The unsettled question of the *ownership* of unappropriated waters on the public domain is discussed in ch. 6, p. 420 et seq.

## Application of the Appropriation Doctrine in the Several States

### The State Procedures Apply to Appropriations, Whether Made on Private Lands or on the Public Domain

The foregoing discussion has shown that the relation of the United States Government to the appropriation doctrine has involved essentially a recognition of State customs and laws upon the subject, as applied to nonnavigable waters on the public domain. Congress, while it has authorized the use of water on forest reservations under State laws or under the laws of the United States and rules and regulations established thereunder,[28] and the construction of reservoirs on unoccupied and unreserved public lands for livestock purposes,[29] and has passed several statutes authorizing the acquisition of rights-of-way across public lands,[30] nevertheless has neither set up nor authorized a general procedure under which an individual must initiate and perfect a right to appropriate nonnavigable water on the public domain. The State procedures apply to such rights, whether initiated on the public domain or elsewhere.

### The Early Statutes Were Comparatively Brief and Gave the Sanction of Law to Customs Then in Effect

All of the 17 Western States, as noted heretofore, have statutes providing for the appropriation of water. The earliest enactments were generally short, and usually provided for the posting of a notice at the point of diversion and for filing a copy of the notice in the county records. They usually specified, also, a certain time within which construction must be commenced.

In various States the earliest statutes were enacted long after irrigation development had begun. This was the case in California, in which the appropriation doctrine in its generally accepted form originated; the first legislative authorization to appropriate water having been in 1872.[31] Irrigation in Nevada began about 1849; yet there was no general legislation on the subject until 1866.[32] It was stated in *Ormsby County* v. *Kearney*,[33] in 1914, that the greater portion of the water rights in Nevada had been acquired before the passage of any statute prescribing a method of appropriation, and that such rights had been recognized by the courts as being vested under the common law. Irrigation in Utah began when the Mormon pioneers entered Great Salt Lake Basin in 1847. The earliest legislation made grants of water privileges and authorized public officials to make grants; [34] and a statute passed in 1880 [35] recognized accrued rights to water acquired by appropriation or adverse use, but did not contain a specific authorization to appropriate. It was not until 1897 that Utah, a State in which agriculture is so important and so largely dependent upon irrigation, provided by statute for the future appropriation of

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[28] 30 U. S. Stats. 35 (June 4, 1897).
[29] 29 U. S. Stats. 484 (Jan. 13, 1897).
[30] Cited and discussed by Harding, S. T., Water Rights for Irrigation, pp. 127–137.
[31] Calif. Civ. Code. secs. 1410–1422 (March 21, 1872).
[32] Nev. Laws 1866, ch. C.
[33] 37 Nev. 314, 142 Pac. 803 (1914).
[34] Laws and Ordinances of the State of Deseret (Utah), Compilation 1851, Shepard Book Co., Salt Lake City, Utah, 1919.
[35] Utah Laws 1880, ch. XX.

water by individuals.[36] In the meantime the Utah courts had recognized the appropriative right,[37] and had repudiated the riparian doctrine.[38] Irrigation was being practiced in various portions of the Southwest, notably New Mexico, at the time of its accession to the United States, and the beginnings of the practice in some of those areas are lost in antiquity.

What statutes in various States did was to give legislative sanction to methods of appropriation already developed by custom. In the States in which there had been little development prior to legislation on irrigation, the legislatures generally adopted the statutes then in effect in other States, so that the initiation of an appropriative right by posting and filing a notice became the general method throughout the West. The right became vested by reason of application of the water to beneficial use; and if the appropriator was diligent, his priority related back to the time of taking the first statutory step.

#### Administrative Procedure Has Become Highly Developed in Most States

Administrative procedure governing the acquisition, determination, and administration of rights, in contrast with its early stages, has become highly developed throughout the West. The present procedures are based largely upon those which originated in Colorado and Wyoming. The State's supervision and control are usually exercised through the State engineer or other corresponding official, and the courts. In some States a board or department of the State government exercises control.

In Wyoming, all these functions are vested primarily in State administrative officers, and any party aggrieved by a decision may appeal to the courts for redress. The exclusive procedure for initiating the acquirement of a water right is to apply to the State engineer for a permit to make the appropriation; adjudications or determinations of existing rights are made by the board of control, composed of the State engineer and the four water division superintendents, from which appeals lie to the courts; and the distribution of water according to priorities of right is under the control of the organization of division superintendents and district commissioners, headed by the State engineer.

The Colorado system places responsibility for the distribution of water, according to priorities as established by judicial decrees, upon the division engineers and district commissioners, under the general supervision of the State engineer. However, permits to appropriate water are not required; the intending appropriator begins his work and then files a claim with the State engineer. Furthermore, jurisdiction to hear and adjudicate questions concerning priority of appropriation is vested exclusively in the courts, upon petition of any water-right claimant.

The same results are accomplished under both of these State systems. Permits in Wyoming are "mere licenses to appropriate, if the requisite amount of water be there."[39] The Wyoming system places the initiative for making determinations upon the State organi-

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[36] Utah Laws 1897, p. 219 et seq.
[37] *Crane* v. *Winsor* (2 Utah 248 (1870)).
[38] *Stowell* v. *Johnson* (7 Utah 215, 26 Pac. 290 (1891)).
[39] *Wyoming* v. *Colorado* (259 U. S. 419 (1922)).

zation; whereas in Colorado, individual initiative has been effective in bringing about adjudications of priorities generally, although an early legislative requirement that water-right claims be filed in court gave considerable impetus to the movement to adjudicate rights.

Most of the other Western States have adopted procedures based upon features of these two plans. Montana is the only Western State in which control over the appropriation of water is not centered by statute in a State administrative organization; although it is true that in Kansas the centralized procedure is not generally followed. It may be noted, in this connection, that the Montana legislature in 1939 [40] authorized the State engineer at the direction of the State water conservation board to bring action to adjudicate the waters of any stream or stream system, to apply to the court for the appointment of a referee or referees, and to make complete hydrographic surveys which may be introduced as evidence in adjudication proceedings.

In the majority of the States the statutory procedure is held or conceded to be the exclusive method of acquiring an appropriative right. Idaho is a definite exception. There the statutory procedure, while not exclusive, is advantageous to an appropriator in that the date of application for a permit from the State establishes the date of priority, provided the right is perfected by taking all the subsequent steps; whereas the priority of one not proceeding under the statute dates from the time of application of water to beneficial use. In Montana, likewise, the statutory procedure is exclusive as to appropriations of water from adjudicated streams made after the date of the amended statute. (See discussions for Idaho and Montana, below.)

Whatever the method of determining water rights—a form of property—jurisdiction in the last analysis is necessarily vested in the courts. The Wyoming system, which has been copied in Nebraska, makes the powers of the State board quasi-judicial in that its determinations are final unless appeal is taken to the courts. The Oregon system, which has been followed in several other States, is a modification, in that the administrative determination is filed in court as the basis for a suit in equity. In still other States the attorney general brings suit to determine water rights, or the statutes may authorize or require the courts to refer preliminary determinations to the State engineer as a means of securing competent technical evidence, it being made the duty of the State engineer to make findings of fact. In no event are individuals precluded from recourse to the courts for protection of their water rights,[41] the purpose of the procedure being to determine all rights on a stream system in one proceeding in which all interested parties, including the State, are participants.

The separate procedure for acquiring and exercising appropriative water rights in each of the Western States, and hence the extent to which each has adopted all or portions of the centralized system of control, is briefly outlined in the ensuing discussion of the application of the appropriation doctrine by States and is given in somewhat greater detail in the appendix.

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[40] Mont. Laws 1939, ch. 185.

[41] See, e. g., *Mays* v. *District Court* (34 Idaho 200, 200 Pac. 115 (1921)); *State ex rel. Roseburg* v. *Mohar* (169 Wash. 368, 13 Pac. (2d) 454 (1932)); *Simmons* v. *Ramsbottom* (51 Wyo. 419, 68 Pac. (2d) 153 (1937)).

**The Centralized System of Public Control Over Water Rights Has Not Been Completely Applied in All States and Has Been More Successful in Some Places Than in Others. However, It Is a Workable System Generally, and Its Foundation Is the State's Vital Interest in the Orderly Utilization of Its Water Resources**

The advantage to the public of a centralized system for the acquisition, determination, and administration of water rights, consistently applied, lies in the higher degree of order and definiteness of rights which it affords. Priorities to water of a long stream system become a matter of record in one office, instead of being based upon filings in a number of counties and upon acts of applying water that may not become matters of record. Determinations of rights are made in comprehensive proceedings, based upon public records and surveys, in which the State engineer participates, rather than in a multiplicity of suits between individuals. And distribution of water according to priorities on the stream system is coordinated under one public authority.

Chandler stated in 1918, with regard to the desideratum in legislation regarding the public waters:[42]

> It must be emphasized that the new legislation controlling appropriations is based upon no new legal principles. It simply offers an improvement in the details of administration—just as a modern auditing system makes it possible for a business house to more easily control its operations. Under the new system the appropriator is under state control from the initiation to the completion of his project. It is a control, however, which protects, rather than prohibits, bona fide projects. Under the old method of posting notices, the records were useless as evidences of work actually done, and one was never certain of the status of his right during construction.
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> In those states having no special legislation for the determination or adjudication of existing rights to the stream flow, the status of the various rights is settled only by ordinary court action. It is, therefore, possible to have dozens of law suits over water rights on a stream without all of the water users being brought into any one of them. The new system provides a method for the determination of all rights in a single proceeding. * * *
>
> Although one may be successful in the ordinary lawsuits regarding water rights in those states in which the new legislation has not been adopted, he is without protection, other than further court action, if the wrongful diversions continue. Here again the abler courts have taken the matter into their own hands and have appointed officers to divide the waters in accordance with the decree and at the expense of the parties interested. The new legislation cares for the distribution by dividing the state into districts with water commissioners to apportion the waters therein in accordance with the determination of rights. * * *

Inevitably the development of public control over matters of such vital importance as water rights in the Western States—in which the background and growth of institutions affecting the use of water have not been uniform—has proceeded in greater or less degree by trial and error. The centralized system has not, even yet, become completely effective in all States in which introduced and has not always operated without confusion. The portion of the system involving procedure for acquiring rights upon application to the State has been most extensively used and appears to have operated with marked success. The statutory determination and

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[42] Chandler, A. E., Elements of Western Water Law, p. 156–157.

administration of water rights have been equally successful in producing results in several of the States, having on most or all of the important stream systems in those States yielded decrees which govern the distribution of water by the State organization. In some other States, on the other hand, these portions of the centralized system have been only partially effective or have not been put into effect at all, owing to one cause or another. Features of the statutory adjudication of rights have been held unconstitutional in several jurisdictions, as will be noted in the ensuing discussion by States; and in several cases the enabling statutes are little used, either because the existing rights have not been deemed sufficient to justify general adjudications and the appointment of State commissioners or water-masters, or, where water-right claims are numerous, because it is locally preferred to maintain the status quo on the basis of existing individual decrees and agreements. On some streams water is being distributed by commissioners appointed by Federal or State courts, as the result of decrees and continuing court jurisdiction. Conflicts over the distribution of water, even when supervised by public authority, have occurred, particularly in times of great scarcity of water, but in the nature of things this sometimes appears unavoidable.

However, while the system as a whole has not been applied as completely in some jurisdictions as in others, and has not met with uniform success in all places, it is undeniable that a long period of time has shown that centralized control over water-right functions is workable. The system is generally conceded in the West to have been of marked public benefit. None of the States which have imposed public control have receded from the principle, excepting in those instances in which specific functions have been rendered inoperative as the result of unfavorable court decisions. The general principle is now well established in most of the Western States, for it is widely realized that the foundation of the system is the vital interest of the State in its water resources.

### Many of the States Have Specifically Dedicated Unappropriated Waters to the Public

Dedication of waters to the public, for the purpose of laying the legal foundation for their appropriation and use under State regulation, is made by constitutional provision in some States but by statute in most of the States in the West. Some of the provisions refer to all waters in the State, and some speak of certain classes only. Such dedication of water is subject to vested private rights, as well as to the rights of the Federal Government.[43]

The waters covered by the dedication measures are summarized, by States, as follows:

*Arizona.*—Water of all sources, flowing in streams, canyons, ravines, or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste, or surplus water, and of lakes, ponds, and springs on the surface, belongs to the public. (Rev. Code 1928, sec. 3280.)

[43] Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights. 2d ed., vol. I, p 637 et seq.

*California.*—All water within the State is the property of the people of the State. (Civil Code, sec. 1410.) All waters flowing in any river, stream, canyon, ravine, or other natural channel, except waters reasonably needed under riparian rights, or otherwise appropriated, are public waters. (Stats. 1913, ch. 586, sec. 11, amended by Stats 1923, ch. 62; Deering's Gen. Laws 1937, Act 9091, sec. 11.)

*Colorado.*—Unappropriated water of every natural stream is property of the public, dedicated to the use of the people of the State. (Const. art. XVI, sec. 5.)

*Idaho.*—All waters when flowing in their natural channels, including waters of all natural springs and lakes, are property of the State. (Code Ann. 1932, sec. 41–101.)

*Kansas.*—Neither the constitution nor the statutes declare that waters belong to the public. Under the statutes, certain waters may be appropriated.

*Montana.*—Use of all water appropriated for beneficial use shall be held to be a public use. (Const. art. III, sec. 15.)

*Nebraska.*—Use of water of every natural stream is dedicated to the people of the State for beneficial purposes, subject to appropriation. (Const. art. XV, secs. 5 and 6.) Unappropriated water of every natural stream is property of the public, dedicated to the use of the people of the State. (Comp. Stats. 1929, sec. 46–502.)

*Nevada.*—Water of all sources of water supply, whether above or beneath the surface of the ground, belongs to the public. (Comp. Laws 1929, sec. 7890.) All ground waters belong to the public. (Sess. Laws 1939, ch. 178, sec. 1.)

*New Mexico.*—Unappropriated water of every natural stream, perennial or torrential, belongs to the public. (Const. art. XVI, sec. 2.) Waters of underground streams, channels, artesian basins, reservoirs or lakes, having reasonably ascertainable boundaries, are public waters and belong to the public. (Laws 1931, ch. 131, sec. 1; 1938 Supp. to Stats. Ann., sec. 151–201.)

*North Dakota.*—All flowing streams and natural watercourses shall forever remain the property of the State for mining, irrigating, and manufacturing purposes. (Const. sec. 210.) All waters from all sources of water supply belong to the public. (Comp. Laws 1913, sec. 8235, amended Laws 1939, ch. 255.)

*Oklahoma.*—A statute passed in 1897 declared the unappropriated waters of the ordinary flow or underflow of every running stream or flowing river, and storm or rain waters of every river or natural stream, canyon, ravine, depression, or watershed in those portions of the State in which by reason of insufficiency or irregularity of rainfall irrigation was beneficial for agriculture, the property of the public, subject to appropriation. (Comp. Laws 1909, secs. 3915, 3916.) This statute was omitted from the Revised Laws of Oklahoma, 1910, and thereby repealed; for the act adopting the Revised Laws of 1910 provided that all general or public laws not contained in the revision were thereby repealed. (Okla. Laws 1910–11, p. 70.)

*Oregon.*—All water from all sources of water supply belongs to the public. (Code Ann. 1930, sec. 47–401.) Waters in counties east of the summit of the Cascades, in underground streams, channels, artesian basins, reservoirs or lakes, the boundaries of which may reason-

ably be ascertained, belong to the public. (Code Ann. Supp. 1935, sec. 47–1302.)

*South Dakota.*—All waters, from whatever source of supply, belong to the public, subject to vested private rights, and except that the owner of land owns water standing thereon or flowing over or under the surface but not forming a definite stream. (Code 1939, sec. 61.0101.)

*Texas.*—Waters of the ordinary flow and underflow and tides of every flowing river or natural stream, of all lakes, bays, or arms of the Gulf of Mexico, and storm, flood, or rain waters of every river or natural stream, canyon, ravine, depression, or watershed, are property of the State. (Vernon's Tex. Stats. 1936, Rev. Civil Stats., art. 7467.)

*Utah.*—All waters, whether above or under the ground, are the property of the public, subject to existing rights to their use. (Rev. Stats. 1933, sec. 100-1-1, amended by Laws 1935, ch. 105.)

*Washington.*—Use of waters for irrigation, mining, and manufacturing purposes shall be deemed a public use. (Const. art. XXI, sec. 1.) All waters belong to the public, subject to existing rights. (Rem. Rev. Stats. Ann. 1931, sec. 7351.)

*Wyoming.*—Water of all natural streams, springs, lakes, or other collections of still water is the property of the State. (Const. art. VIII, sec. 1.)

### Application of the Appropriation Doctrine in Each State

A more detailed statement of the application of the appropriation doctrine in each State follows. This doctrine has been so generally upheld by the courts that it is not deemed necessary to cite decisions in each State to that effect. Judicial interpretations of some important features, however, are indicated. The administrative procedure in each case is briefly stated. More complete summaries of State procedures for acquiring, determining, and administering water rights, with statutory references, are given in the appendix.

*Arizona.*—The doctrine of riparian rights has been repudiated in this State. The constitution provides:[44]

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

The Bill of Rights, adopted at the first Territorial legislative session in 1864 as a part of the Howell Code, declared that all streams, lakes, and ponds capable of being used for navigation or irrigation, were public property, and denied the right to appropriate them except under legislative regulation.[45] The Howell Code, furthermore, declared all rivers, creeks, and streams of running water to be public and available for irrigation and mining, and stated that all inhabitants of the Territory who owned or possessed arable and irrigable land, should have the right to construct public or private acequias (ditches) and to obtain the necessary water from any of the foregoing sources.[46] In 1887, the legislature abolished the doctrine of riparian rights,[47] and the constitutional provision above quoted is simply a restatement of that principle.

[44] Ariz. Const., art. XVII, sec. 1.
[45] Terr. Ariz. Bill of Rights, art. 22 (October 4, 1864).
[46] Terr. Ariz. Howell Code, ch. LV, secs. 1 and 3 (October 4, 1864).
[47] Ariz. Rev. Stats. 1887, sec. 3198 (March 10, 1887).

The courts have specifically held that the riparian doctrine has been repudiated.[48] The declarations of the legislature in 1864 have been held to constitute a statutory repudiation of the riparian doctrine and an establishment of the appropriation doctrine, so far as the waters named in the Bill of Rights are concerned, subject only to such vested rights to the use of specific waters as had been acquired, either formally from the Mexican Government or impliedly as a result of local custom, and to the right of use of percolating waters underlying private lands.[49]

The present statute provides:[50]

> The water of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belongs to the public, and is subject to appropriation and beneficial use, as herein provided. * * *

It has been stated by the court that drainage waters resulting from irrigation are not subject to appropriation under the statute.[51]

As noted more fully in the discussion of the appropriation doctrine in chapter 6, a valid appropriation in Arizona may be made only by the owner or possessor of irrigable land, and to be a "possessor" one must have a present intent and apparent future ability to acquire ownership of the land. This is an exception to the general western rule. (See p. 311.)

The water code contains complete machinery for the appropriation of water, determination of existing rights, and the administration of water rights. A water commissioner, appointed by the Governor, has general control and supervision over water. Applications to appropriate water are made to the commissioner. He is required to approve all applications made in proper form; but if the proposed use conflicts with vested rights, is a menace to the safety, or is against the interests and welfare of the public, the application is to be rejected. Since the enactment of the water code of 1919, it has been necessary in acquiring a right to appropriate water from the specified sources, to comply with the requirements of the code;[52] otherwise no right may be legally acquired. The commissioner may, on his own initiative, determine water rights on streams, and is required to do so when petitioned by water users if the conditions justify it. Any State court in which an action is brought to determine such rights may transfer the action to the commissioner. The order and record of determination by the commissioner are filed in court as the basis of a suit in equity. The power to distribute water according to respective priorities, aside from that reserved to commissioners appointed by courts under earlier decrees, is vested in the commissioner and superintendents of water districts.

*California*.—California recognizes both the riparian doctrine and the doctrine of appropriation, as stated above, and the conflict of riparian and appropriative rights has been the subject of much

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[48] *Clough* v. *Wing* (2 Ariz. 371, 17 Pac. 453 (1888)); *Pima Farms Co.* v. *Proctor* (30 Ariz. 96, 245 Pac. 369 (1926)).

[49] *Maricopa County M. W. C. Dist.* v. *Southwest Cotton Co.* (39 Ariz. 65, 4 Pac. (2d) 369 (1931)).

[50] Ariz. Rev. Code 1928, sec. 3280.

[51] *Brewster* v. *Salt River Valley Water Users' Assn.* (27 Ariz. 23, 229 Pac. 929 (1924)).

[52] *Tattersfield* v. *Putnam* (45 Ariz. 156, 41 Pac. (2d) 228 (1935)).

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litigation. It was not until 1928 that the State constitution contained any reference to riparian rights, and the purpose of the amendment in that year was to hold the exercise of such rights to reasonable use and reasonable methods of diversion, although the restriction applies to all uses of the water of watercourses. The amendment approved by the voters November 6, 1928, follows:[53]

It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and 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. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; *provided, however*, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

The Civil Code provides that all waters within the State are the property of the people of the State, and that running water flowing in a river or stream or down a canyon or ravine, is subject to appropriation.[54] This provision was originally enacted in 1872, the declaration of public ownership being added in 1911.[55]

The present "water commission act" of California was enacted in 1913 [56] and as amended from time to time is in force today. It provides, in section 11:[57]

* * * And all waters flowing in any river, stream, canyon, ravine or other natural channel, excepting so far as such waters have been or are being applied to useful and beneficial purposes upon, or in so far as such waters are or may be reasonably needed for useful, and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is and are hereby declared to be public waters of the state of California and subject to appropriation in accordance with the provisions of this act.

Section 17 provides for the securing of permits "for any unappropriated water or for water which having been appropriated or used flows back into a stream, lake or other body of water within this state." It also provided in section 42 that the terms "stream, stream system, lake or other body of water or water," occurring in sections relating to the procedure for appropriating water and determining rights, shall be interpreted to refer only to "surface water, and to subterranean streams flowing through known and definite channels."

The position of the owner of land riparian to a stream with reference to an appropriator from the stream has been outlined in the

[53] Calif. Const., art. XIV, sec. 3.
[54] Calif. Civ. Code, sec. 1410.
[55] Calif. Stats. 1911, ch. 407, p. 821.
[56] Calif. Stats. 1913, ch. 586.
[57] Calif. Stats. 1913, ch. 586, sec. 11, as amended by Stats. 1923, ch. 62, p. 124; Deering's Gen. Laws of Calif., 1937, vol. 2, act 9091, p. 4229.

discussion of the riparian doctrine in California, above in this chapter. Briefly, the riparian right is paramount, but since the passage of the constitutional amendment the right extends only to a reasonable beneficial use of the water under a reasonable method of diversion, as do water rights of every character; excess waters of all streams, above the quantities required for all existing riparian and appropriative rights, are public waters of the State, subject to appropriation and use under State control; and when the right of a riparian owner as limited by the constitution has been determined and protected by the court, he cannot enjoin an appropriation of any part of the excess waters. The dedication of excess waters to the public made in section 11 of the water commission act, has been stated to be implicit in the new State policy promulgated by the constitutional amendment.[58]

Administration of the 1913 water commission act was vested in the State water commission, whose functions are now performed by the division of water resources of the department of public works, the State engineer being chief of such division. A right to appropriate water is initiated by application to the chief of the division for a permit to appropriate. The statute provides that this is the exclusive procedure; furthermore, in a recent decision the supreme court has stated that since the effective date of this act, an intending appropriator has been required to file his application with the State administrative body; and to sustain his claim of appropriation otherwise than under the statute, the appropriation must have been actually complete prior to passage of the statute, and kept in force subsequently by beneficial use.[59]

The custom of appropriating water in California originated on the public domain, and the riparian doctrine was developed after large areas of land had passed to private ownership, primarily as the result of early Spanish and Mexican grants. Hence the question arose as to whether the appropriation of water should be confined to public lands. No legislation has limited the doctrine to public lands, and the court decisions have not done so. It is stated in *Duckworth* v. *Watsonville Water & Light Co.*:[60]

> The right to appropriate water under the provisions of the Civil Code is not confined to streams running over public lands of the United States. It exists wherever the appropriator can find water of a stream which has not been appropriated and in which no other person has or claims superior rights and interests.

The court stated in *San Bernardino* v. *Riverside* [61] that appropriation under the Civil Code is but another form of prescription.

The water commission act provides also for the determination of rights acquired under the act and for the distribution of water. The division of water resources may make determinations on petition of one or more claimants to the use of water of any stream system, including both appropriative and riparian rights, the order and record of determinations to be filed in court as the basis of an adjudication. The courts also, in their discretion, may refer to the division, as referee, suits brought for the adjudication of water rights, subject to review; and the division may act as master or referee when requested by a Federal court. The California Supreme Court in at least five recent

[58] *Meridian* v. *San Francisco* (13 Calif. (2d) 424, 90 Pac. (2d) 537 (1939)).
[59] *Crane* v. *Stevinson* (5 Calif. (2d) 387, 54 Pac. (2d) 1100 (1936)).
[60] 150 Calif. 520, 89 Pac. 338 (1907).
[61] 186 Calif. 7, 198 Pac. 784 (1921).

cases [62] has reminded the trial courts of their power to call upon the State organization for competent expert assistance in water-right cases, so often involving complicated technical problems. In one of these cases the court pointed out specific circumstances affecting the physical facts involved, which would make the use of the State organization advantageous. In another the court said: [63]

> The facilities of the commission can, in this manner, be made available to the trial court and that court can thus secure independent and impartial expert advice not colored by personal interest. Incidentally, the procedure outlined in this section will secure representation of the state in such actions, thus insuring the protection of the rights of the public.

The most recent pronouncement on the matter of referring water-adjudication suits to the division of water resources was made in a decision which emphasized the fact that excess waters above the requirements of holders of established rights had been dedicated to the public for use under State control.[64] The court pointed out that the instant controversy was between a city and but one user of water on the river and that the judgment was necessarily confined to the issues so presented. Further:

> This method of resolving controversies involving the rights of the users of water on the river is necessarily piecemeal, unduly expensive and obviously unsatisfactory. This court pointed out * * * a method by which under section 24 of the Water Commission Act, the rights of all users of water on the river may be appraised and determined in one proceeding. This method would seem to be especially desirable where the state's interest in the excess waters of the stream may be made to appear and the claim of public agencies as users on the stream render it burdensome for private users severally to assert their rights.

The division may create water districts and appoint water masters and deputies to effect proper supervision of the distribution of water.

*Colorado.*—The doctrine of appropriation governs the acquirement of water rights in Colorado to the exclusion of the riparian doctrine. This was foreshadowed in very early cases [65] and was definitely settled in *Coffin* v. *Left Hand Ditch Co.*[66] in 1882. The court stated, after holding that the appropriation doctrine had existed from the date of the earliest appropriations of water within the State:

> We conclude, then, that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith.

This case laid the basis for the exclusive doctrine of appropriation of rights to the use of water of watercourses, which has been consistently adhered to by the Colorado courts [67] and which forms the basic law also in the seven other more arid western States.

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[62] *Peabody* v. *Vallejo* (2 Calif. (2d) 351, 40 Pac. (2d) 486 (1935)); *Tulare Irr. Dist.* v. *Lindsay Strathmore Irr. Dist.* (3 Calif. (2d) 489, 45 Pac. (2d) 972 (1935)); *Lodi* v. *East Bay Municipal Utility Dist.* (7 Calif. (2d) 316, 60 Pac. (2d) 439 (1936)); *Rancho Santa Margarita* v. *Vail* (11 Calif. (2d) 501, 81 Pac. (2d) 533 (1938)); *Meridian* v. *San Francisco* (13 Calif. (2d) 424, 90 Pac. (2d) 537 (1939)).

[63] *Tulare Irr. Dist.* v. *Lindsay Strathmore Irr. Dist.* (3 Calif. (2d) 489, 45 Pac. (2d) 972 (1935)).

[64] *Meridian* v. *San Francisco* (13 Calif. (2d) 424, 90 Pac. (2d) 537 (1939)).

[65] *Yunker* v. *Nichols* (1 Colo. 551 (1872)); *Schilling* v. *Rominger* (4 Colo. 100 (1878)).

[66] 6 Colo. 443 (1882).

[67] *Sternberger* v. *Seaton Mountain &c. Co.* (45 Colo. 401, 102 Pac. 168 (1909)); *Snyder* v. *Colorado Gold Dredging Co.* (181 Fed. 62 (C. C. A. 8th, 1910)); *Wyoming* v. *Colorado* (259 U. S. 419 (1922)).

The constitution of Colorado provides:

The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.[68]

The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.[69]

It will be noted that these provisions refer to "natural" streams, and that they place no limitation otherwise upon the character or location of the streams—that is, whether surface or subterranean—and make no reference to other waters. It does not necessarily follow that this constitutional enumeration is exclusive; and as shown in the discussion of ground-water law in Colorado, in chapter 4 below, the courts have applied the appropriative principle to ground waters physically tributary to natural streams.

Concerning the matter of preferences in the second constitutional provision above quoted, it was stated in a fairly early case that the preferred domestic use protected by the constitution is such use as the riparian owner has at common law to take water for himself, his family, and his stock;[70] and in a decision rendered in the following year, it was further stated that this right is not subject to conveyance apart from the land.[71] Those decisions did not go so far as to hold that an owner of riparian land may take water without making an appropriation therefor; rather, they represent an interpretation of the constitutional provision relating to the scope of the preference given to domestic appropriation rights over other rights, and so far as they may be considered as recognizing the existence of riparian water rights, were doubtless dicta. It is not believed that either the observations in those decisions or the constitutional provision create any real exception to the rule that riparian rights do not obtain in Colorado. As shown in the discussion of preferential uses of water in chapter 6, this constitutional provision has been interpreted as not authorizing the taking of water for domestic purposes, without compensation, from those who have previously appropriated it for some other purpose. The Colorado courts in all cases involving rights to watercourses have consistently applied the appropriation doctrine, and where riparian claims have been definitely in issue, have repeatedly and emphatically denied the existence of the riparian doctrine; hence the conclusion seems justified that the riparian doctrine in that State has never been recognized. The United States Supreme Court said in 1922, concerning Colorado and Wyoming:[72]

The common-law rule respecting riparian rights in flowing water never obtained in either State.

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[68] Colo. Const., art. XVI, sec. 5.
[69] Colo. Const., art. XVI, sec. 6.
[70] *Montrose Canal Co.* v. *Loutsenhizer Ditch Co.* (23 Colo. 233, 48 Pac. 532 (1896)).
[71] *Broadmoor Dairy & Live Stock Co.* v. *Brookside Water & Impr. Co.* (24 Colo. 541, 52 Pac. 792 (1897)).
[72] *Wyoming* v. *Colorado* (259 U. S. 419 (1922)).

One Colorado statute provides that the waters of natural flowing springs may be appropriated, as in case of natural streams.[73] Another refers to the utilization of waste, seepage, or spring waters,[74] and another refers to such waters in irrigation districts.[75] Still another statute concerns water raised from mines.[76] The extent to which rights to such waters concern rights to the use of water of watercourses, is discussed in chapters 3 and 4, dealing with diffused surface waters and ground waters.

Appropriations of water in Colorado are made by diversion and application of the water to beneficial use. The appropriator commences his surveys or construction work, and then files his statement of claim with the State engineer. He is not required to apply to the State for a permit to divert water, and the statutes do not empower the State engineer to reject a filing on the ground that there may be unappropriated water in the stream. A separate filing is required for the appropriation of water for storage.

Adjudications of water rights are made exclusively by the district courts. In order to effectuate adjudications generally, a statute passed in 1881 [77] required all claimants to file statements with the courts in that year, and provided that thereafter any claimant might petition the court for an adjudication of his appropriation after the water appropriated had been put to beneficial use. It was subsequently provided that all claimants whose claims had not been adjudicated or which were in process of adjudication should file supplemental statements of their claims with the State engineer by January 1, 1922, under penalty of cancelation of such claims, and that the courts in any general adjudication should require the State engineer to certify all filings in good standing.[78]

The administration of all decreed appropriations is under the jurisdiction of the State engineer. The State is divided into 70 statutory water districts, generally comprising separate stream systems, which are administered by water commissioners; and all water districts are grouped into seven irrigation divisions, under irrigation division engineers. The State engineer has general supervision of the work of these division and district officials.

*Idaho.*—The doctrine of riparian rights is not recognized in Idaho. In one of its earliest water-right decisions the supreme court held that the prior appropriator had the better title to the use of water as against a riparian claimant who entered land after the appropriation had been made.[79] In two decisions rendered in 1909 it was held that a riparian owner who desired to appropriate public water for a beneficial use must comply with the provisions of the law to the same extent as those who are not riparian owners; [80] and that in Idaho there was no such thing as a riparian right to the use of waters as against an appropriator who had pursued the constitutional and statutory method in acquiring his water right, and that a riparian owner's right to use water for domestic and stock-watering

[73] Colo. Stats. Ann., 1935, ch. 90, sec. 21.
[74] Colo. Stats. Ann., 1935, ch. 90, sec. 20.
[75] Colo. Stats. Ann., 1935, ch. 90, sec. 499.
[76] Colo. Stats. Ann., 1935, ch. 110, sec. 212.
[77] Colo. Laws, 1881, p. 142.
[78] Colo. Comp. Laws, 1921, secs. 1792–95; Colo. Stats. Ann., 1935, ch. 90, secs. 190–193.
[79] *Drake* v. *Earhart* (2 Idaho 750, 23 Pac. 541 (1890)).
[80] *Idaho Power & Transp. Co.* v. *Stephenson* (16 Idaho 418, 101 Pac. 821 (1909)).

purposes was inferior to a right acquired by appropriation but superior to any right of a stranger, intermeddler, or interloper.[81] The United States Supreme Court in a decision rendered several years later, reviewed the status of the riparian doctrine in Idaho and concluded that the doctrine had been abrogated in that State so far as it conflicted with the rights of appropriators for beneficial use.[82] As recently as 1939 the Idaho Supreme Court stated:[83]

The right of riparian ownership has been abrogated in Idaho.

The State constitution refers only to waters of natural streams, as follows:[84]

The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. * * *

The controlling statutory provisions are:

* * * All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed; * * *.[85]

The right to the use of the waters of rivers, streams, lakes, springs, and of subterranean waters, may be acquired by appropriation.[86]

A further statute[87] relates to seepage, waste, and spring waters. The water code contains procedure for appropriating water by applying to the department of reclamation for a permit and perfecting the right by taking all prescribed steps, for the distribution of water under supervision of State officials, and for the adjudication of water rights by the courts.

The courts have held in numerous cases that in acquiring appropriative rights, the statutory procedure is not exclusive; such rights may be perfected by diversion and application of the water to beneficial use, without pursuing the statutory method of appropriation, which is now initiated by applying to the State for a permit to appropriate water.[88] If the statute is not followed, application of water to beneficial use completes the appropriation; the right is limited to the amount so applied, and the date of priority is determined by the time of applying the water to beneficial use and thus completing the appropriation, and not upon the time of commencement of construction of works.[89] The advantage of following the statutory procedure, and complying with all conditions imposed, is that the priority in such case dates from the time of applying to the State for a permit, thus safeguarding the priority pending com-

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[81] *Hutchinson* v. *Watson Slough Ditch Co.* (16 Idaho 484, 101 Pac. 1059 (1909)).
[82] *Schodde* v. *Twin Falls Land & Water Co.* (224 U. S. 107 (1912)).
[83] *Jones* v. *McIntire* (60 Idaho 338, 91 Pac. (2d) 373 (1939)).
[84] Idaho Const., art. XV, sec. 3.
[85] Idaho Code Ann. 1932, sec. 41–101.
[86] Idaho Code Ann. 1932, sec. 41–103.
[87] Idaho Code Ann. 1932, sec. 41–107.
[88] For example: *Sand Point Water & Light Co.* v. *Panhandle Dev. Co.* (11 Idaho 405, 83 Pac. 347 (1905)); *Youngs* v. *Regan* (20 Idaho 275, 118 Pac. 499 (1911)); *Bachman* v. *Reynolds Irr. Dist.* (56 Idaho 507, 55 Pac. (2d) 1314 (1936)).
An appropriation completed by applying the water to beneficial use is prior in right to a later application for a permit made by another to the State, and in such case cannot be defeated by a permit from the State: *Nielson* v. *Parker* (19 Idaho 727, 115 Pac. 488 (1911)); *Washington State Sugar Co.* v. *Goodrich* (27 Idaho 26, 147 Pac. 1073 (1915)).
[89] *Crane Falls Power & Irr. Co.* v. *Snake River Irr. Co.* (24 Idaho 63, 133 Pac. 655 (1913)); *Reno* v. *Richards* (32 Idaho 1, 178 Pac. 81 (1918)); *Rabido* v. *Furey* (33 Idaho 56, 190 Pac. 73 (1920)).

pletion of the appropriation;[90] for the statutory method is the exclusive method by which the right can relate back to the commencement of proceedings.[91] The completion of the statutory proceedings also makes it much easier to prove an actual application of the water to a beneficial use.

Sections in the water code, as passed in 1903, which provided for the bringing by State water commissioners of suits to adjudicate the rights of claimants to the use of water of streams, were declared unconstitutional in 1904,[92] and have been omitted from subsequent revisions of the statute. The court based its decision on the absence of authority in the legislature to compel a county to pay court costs in an action to settle the rights to the use of water as between private parties, when the county was not properly a party to the action; and the absence of authority to authorize a public official to bring a suit to settle private water rights and priorities.

However, the section which provides that when suit is filed in the district court for adjudicating priorities from any stream, the judge shall request the State department to make an examination of the stream,[93] has been upheld as being directory, the question being left to the sound discretion of the judge as to whether or not such request shall be made.[94] The statute provides for paying the costs of the examination out of the general fund, such sums to constitute a part of the costs of the adjudication and to be repaid eventually by the parties and replaced in the general fund. The supreme court has held that the legislature by this act did not appropriate the entire general fund for the purpose specified, or any definite portion of that fund, and that no appropriation of money from the general treasury was made by this section; hence a demurrer was upheld in a case arising on petition for a writ of mandate to compel the State auditor to certify a claim for services of a special deputy appointed by the commissioner of reclamation to make an examination at the request of a district judge.[95]

The water code contains a section providing for a summary supplemental adjudication of water rights in cases in which priority rights on a stream have been determined by a decree, and thereafter it appears that some person having a right to use the water was not included in the decree as a party thereto, or that some person has subsequently acquired a right to the use of the water. Such person may bring this action against the watermaster, or if there is no watermaster, against the department of reclamation, and must accept, as binding upon him, the former decree.[96] The supreme court has held that this remedy is not exclusive, but is merely cumulative, and that it does not preclude the right of a claimant to bring an action to quiet title.[97]

It follows that in Idaho water rights may be adjudicated only in proceedings initiated by claimants to the use of the water.

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[90] *Washington State Sugar Co.* v. *Goodrich* (27 Idaho 26, 147 Pac. 1073 (1915)).

[91] *Crane Falls Power & Irr. Co.* v. *Snake River Irr. Co.* (24 Idaho 63, 133 Pac. 655 (1913)); *Reno* v. *Richards* (32 Idaho 1, 178 Pac. 81 (1918)); *Bachman* v. *Reynolds Irr. Dist.* (56 Idaho 507, 55 Pac. (2d) 1314 (1936)).

[92] *Bear Lake County* v. *Budge* (9 Idaho 703, 75 Pac. 614 (1904)).

[93] Idaho Code Ann. 1932, sec. 41–1301.

[94] *Boise City Irr. & Land Co.* v. *Stewart* (10 Idaho 38, 77 Pac. 25, 321 (1904)).

[95] *Blaine County Inv. Co.* v. *Gallet* (35 Idaho 102, 204 Pac. 1066 (1922)).

[96] Idaho Code Ann. 1932, sec. 41–1305.

[97] *Mays* v. *District Court* (34 Idaho 200, 200 Pac. 115 (1921)).

The State is divided by the water code into three water divisions; according to a letter to the author from the commissioner of reclamation of Idaho, this feature of the law is inoperative. It is the duty of the department of reclamation to direct and control the distribution of water according to priorities, and to create water districts consisting of areas supplied by stream systems or independent sources of supply. Watermasters are elected by holders of adjudicated rights.

*Kansas.*—The riparian and appropriation doctrines are both part of the water law of Kansas; but as noted heretofore in the discussion of the riparian doctrine, the riparian rule is of paramount importance in the decisions thus far rendered by the supreme court.

Neither the constitution nor the statutes declare that waters belong to the public. One statute provides: [98]

> The right to the use of running water flowing in a river or stream in this state, for the purposes of irrigation, may be acquired by appropriation. As between appropriators, the first in time is the first in right.

Another statute [99] authorizes the diversion from natural beds, basins, or channels, of natural waters west of the ninety-ninth meridian, first for irrigation, subject to domestic uses, and second, for other industrial purposes. This is limited by a subsequent provision [1] to the effect that south of township 18 and west of the ninety-ninth meridian, waters in subterranean channels or lakes are appurtenant to the overlying lands. Water may be appropriated by means of artesian wells.[2]

The appropriation statute, originally enacted in 1886, provides for the posting and filing of notices of appropriation.[3] A law passed in 1917 [4] provided for a water commission, one of its duties being to prescribe rules and regulations for the appropriation of water; and it provided also that surface or underground waters may be appropriated by first making application to the commission therefor. The statutory duties of the commission have been transferred to the division of water resources of the State board of agriculture.

The 1886 law is the one which is generally followed. Conflicting water rights are adjudicated and defined only in suits between claimants. However, it is provided that copies of all adjudication decrees shall be forwarded to the chief engineer of the division of water resources, who is to aid in the performance of the decrees by distributing the water according to the rights thus adjudicated.

The appropriation statute of 1886 has recently been held ineffective as conferring any right of priority upon a riparian owner as against other owners of riparian land whose titles antedated passage of the appropriation statute.[5] The court took judicial notice of the fact that in 1886 much land in western Kansas was still part of the public domain, but stated that whether the 1886 act was valid as applied to lands afterward patented was not in issue in the instant case and therefore was not decided. However, reference was

[98] Kans. Gen. Stats. Ann. 1935, sec. 42-101.
[99] Kans. Gen. Stats. Ann. 1835, sec. 42-301.
[1] Kans. Gen. Stats. Ann. 1935, sec. 42-305.
[2] Kans. Gen. Stats. Ann. 1935, sec. 42-307.
[3] Kans. Gen. Stats. Ann. 1935, sec. 42-103.
[4] Kans. Laws 1917, ch. 172; Gen. Stats. Ann. 1935, secs. 24-901 to 24-905.
[5] *Frizell* v. *Bindley* (144 Kans. 84, 58 Pac. (2d) 95 (1936)).

made to a previous decision [6] in which that possibility was recognized. This recent decision, therefore, while positively restating the paramount riparian rights of lands granted prior to the 1886 statute, was not directly concerned with the rights of lands granted thereafter and apparently leaves the way open for further decisions clarifying the subject of appropriative rights as against lands granted after enactment of the statute.

*Montana.*—For a number of years there was doubt as to whether or not the riparian doctrine prevailed in Montana, and the language of various decisions lent some support to the view that such doctrine was in effect. However, in 1921, the State supreme court stated that while observations upon some phase or other of the riparian doctrine had been made in numerous cases in that court, the question of riparian rights had really not been involved in any of them and that the comments had been purely obiter dicta; hence the court felt entirely at liberty to treat the matter as one of first impression.[7] After reviewing the Territorial and State legislation concerning water rights it was concluded that the policy thereby established was irreconcilable with any form of riparian rights; and that the established doctrine of appropriation, born of necessity, was intended to be permanent in character, exclusive in operation, and to fix the status of water rights in Montana. Finally:

> Our conclusion is that the common-law doctrine of riparian rights has never prevailed in Montana since the enactment of the Bannack Statutes in 1865; that it is unsuited to the conditions here; * * *.

Several years later a claim was made that riparian owners might use water for so-called natural purposes—domestic use and watering livestock. This was denied, by reference to the previously cited case, it being held that the prevailing doctrine of appropriation sanctions the right of an appropriator to use all the waters of a stream, to the exclusion of riparian proprietors, if he has appropriated the entire flow, subject only to his own needs and facilities.[8]

The State constitution provides: [9]

> The use of all water now appropriated, or that may hereinafter be appropriated for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use. * * *

A statute of the State provides: [10]

> The right to the use of the unappropriated water of any river, stream, ravine, coulee, spring, lake, or other natural source of supply may be acquired by appropriation, and an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same.

Montana is the only Western State which has not provided by statute for a centralized State control over the appropriation and administration of water. The appropriative right in Montana is initiated, under the statute, by posting a notice at the point of diversion and filing a copy in the county records. If the appropriation is to be made upon a stream or other source of supply the rights in which

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[6] *Clark* v. *Allaman* (71 Kans. 206, 80 Pac. 571 (1905)).
[7] *Mettler* v. *Ames Realty Co.* (61 Mont. 152, 201 Pac. 702 (1921)).
[8] *Wallace* v. *Goldberg* (72 Mont. 234, 231 Pac. 56 (1925)).
[9] Mont. Const., art. III, sec. 15.
[10] Mont. Rev. Codes, 1935, sec. 7093.

have been adjudicated, a petition is filed in the county court in which the water is appropriated; other claimants are made defendants, and whatever right the appropriator is entitled to is awarded by a separate decree, subject to all prior adjudicated rights.

It was held in a fairly early case [11] that a valid water right may be acquired by appropriation where water is actually diverted from a stream and applied to beneficial use, even where there has been no compliance with the statute; and that one who fails to comply with the statute, but who nevertheless actually diverts water, cannot be deprived of the right by another who complies with the statute but who initiates his appropriation at a time subsequent to the time of actual completion of the nonstatutory appropriation. This principle has since been restated and apparently still applies to appropriations upon streams the rights of use of which have not been adjudicated.[12] In such cases compliance with the statute is important in securing the benefit of the doctrine of relation; that is, that as to appropriations made after the passage of the appropriation statute, one who seeks to have his priority relate back to the date of the initial step can do so only by complying with the statutory provisions. [13]

The Montana Legislature provided in 1907 [14] a method by which appropriations of water could be made from adjudicated streams, and amended the act in 1921.[15] The supreme court held in 1926 [16] that the legislature of 1921 unquestionably intended that no appropriation of the waters of an adjudicated stream should be made thereafter without a substantial compliance with the requirements of the statute then enacted, and that the method prescribed must be held to be exclusive; but expressly reserved a finding on the question as to whether the 1907 act provided an exclusive procedure. However, later in the same year it was held [17] that the 1907 legislature did not intend to declare that one who failed to comply with the terms of the statute, but who, in the absence of any conflicting adverse right, had nevertheless actually impounded, diverted, and put the water to a beneficial use, should acquire no title thereby; but the court held further that on the authority of the *Anaconda case*, rights to the use of waters of adjudicated streams initiated subsequently to the enactment of the 1921 act, and without compliance with its provisions, were invalid. It has been held since that an appropriator from an adjudicated stream under the statutory procedure simply becomes a junior appropriator and is governed by all the provisions of the original decree.[18] These principles are significant in their application to the effect of legislation in force at the time appropriations are made.

Determinations of rights are made exclusively by the courts. Water commissioners may be appointed by the courts, in their discretion, on application of the owners of at least 15 percent of the water rights affected, for the purpose of administering the rights

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[11] *Murray* v. *Tingley* (20 Mont. 260, 50 Pac. 723 (1897)).
[12] *Bailey* v. *Tintinger* (45 Mont. 154, 122 Pac. 575 (1912)); *Vidal* v. *Kensler* (100 Mont. 592, 51 Pac. (2d) 235 (1935)).
[13] *Murray* v. *Tingley* (20 Mont. 260, 50 Pac. 723 (1897)); *Vidal* v. *Kensler* (100 Mont. 592, 51 Pac. (2d) 235 (1935)).
[14] Mont. Laws 1907, ch. 185.
[15] Mont. Laws 1921, ch. 228; Rev. Codes 1935, sec. 7119 et seq.
[16] *Anaconda National Bank* v. *Johnson* (75 Mont. 401, 244 Pac. 141 (1926)).
[17] *Donich* v. *Johnson* (77 Mont. 229, 250 Pac. 963 (1926)).
[18] *Quigley* v. *McIntosh* (88 Mont. 103, 290 Pac. 266 (1930)).

determined by the decrees of adjudication. An amendment in 1939 [19] provides that the State water conservation board, any contractor therewith, or any other owner of stored waters may petition the court to have such stored waters distributed by the water commissioners; and if the court makes such order, the commissioners must measure and distribute "the stored and supplemental waters stored and as released by" the board into and through artificial or natural channels or other sources of supply in the same manner and under the same rules and regulations as those applying to decreed water rights. Compensation is to be fixed by the court, the owners and users of decreed, stored, and supplemental waters to pay their proportionate share.

Participation by the State in adjudication proceedings is authorized by a statute passed in 1939.[20] This declares it to be the policy of the State that the waters of the State and especially those of interstate streams arising outside of Montana be investigated and adjudicated as soon as possible in order to protect the rights of water users in Montana, that interstate compacts relating thereto be negotiated, and that the State water conservation board and the State engineer make necessary invesigations and initiate and carry on actions therefor. At the direction of the board, the State engineer is authorized to bring action to adjudicate the waters of any stream or any stream and its tributaries; and in such action the State engineer on the direction of the board, or any party in any pending adjudication, may apply to the court for the appointment of a referee or referees and the court may so appoint and may submit thereto any or all issues of fact. Furthermore, either before or after the bringing of action, the State engineer upon direction of the board or the court shall make hydrographic surveys and perform all services required in the securing of all necessary information and making it available to the board, the courts, and interested parties. The resulting surveys, reports, maps, and plats may be furnished to the judge or referee and introduced as evidence in the proceedings. The costs and expenses of this service are to be paid by the board. The report of the referee shall contain findings of fact upon issues submitted, but not conclusions of law; objections or exceptions may be filed; the court may adopt those findings to which no exceptions are filed, and may adopt, reject, or modify those findings objected to. In the proceedings it is provided that all vested and decreed water rights shall be recognized.

*Nebraska.*—The riparian doctrine is in effect in Nebraska concurrently with the appropriation doctrine, as noted heretofore. The appropriation statute, however, has been held to have abrogated the doctrine of riparian rights except as to rights which had already accrued;[21] and the riparian owner's claim to a superior right over that of an appropriator from the same source appears to depend in substance upon his having put the waters to actual use before the right of the appropriator accrued.[22]

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[19] Mont. Laws 1939, ch. 187, amending Rev. Codes 1935, sec. 7136.
[20] Mont. Laws 1939, ch. 185.
[21] *Crawford Co.* v. *Hathaway* (67 Nebr. 325, 93 N. W. 781 (1903)).
[22] *McCook Irr. & Water Power Co.* v. *Crews* (70 Nebr. 109, 115, 96 N. W. 996 (1903), 102 N. W. 249 (1905)); *Cline* v. *Stock* (71 Nebr. 70, 79, 98 N. W. 454 (1904), 102 N. W. 265 (1905)).

The State constitution provides:

> The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want.[23]
>
> The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section.[24]
>
> The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. * * *[25]

The statutes contain the foregoing principle in substantially the same language. A statute further provides:[26]

> The right to the use of running water flowing in any river or stream or down any canyon or ravine may be acquired by appropriation by any person.

The Supreme Court of Nebraska has stated that running water is publici juris; that the use of such water belongs to the public and is controlled by the State in its sovereign capacity.[27] It is also stated in the cited decision that a riparian proprietor cannot appropriate water without the permission of the State.

The statutes provide complete procedure for appropriating water by first making application to the department of roads and irrigation for a permit to make the appropriation and taking all prescribed subsequent steps to perfect the right; for the adjudication of water rights; and for the distribution of water. The Nebraska system is based very largely upon that of Wyoming, and the constitutionality of the basic principles has been upheld.[28] The supreme court has held that after the taking effect of the irrigation act of 1895, the exclusive procedure for acquiring an appropriative right has been that contained in the statutory provisions.[29]

The department of roads and irrigation has a large discretion in granting a right to make an appropriation, according to the supreme court; it is an administrative body having quasijudicial functions, and as such is invested with reasonable discretion in the exercise of its supervisory powers.[30] If the public welfare demands, the department may grant a qualified and limited right, with such a qualification as that "power generated under and by virtue of this permit must not be transmitted or used beyond the confines of the state of Nebraska";[31] or may, if required by the public interest, dismiss an application.[32]

The department may cancel an appropriation if it appears upon a hearing that the water has not been put to beneficial use, or has

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[23] Nebr. Const. art. XV, sec. 4.

[24] Nebr. Const. art. XV, sec. 5.

[25] Nebr. Const. art. XV, sec. 6.

[26] Nebr. Comp. Stats. 1929, sec. 46–613.

[27] *Kirk* v. *State Board of Irr.* (90 Nebr. 627, 134 N. W. 167 (1912)).

[28] *Crawford Co.* v. *Hathaway* (67 Nebr. 325, 93 N. W. 781 (1903)); *Enterprise Irr. Dist.* v. *Tri-State Land Co.* (92 Nebr. 121, 138 N. W. 171 (1912)). Writ of error to review this latter decision was dismissed in *Enterprise Irr. Dist.* v. *Farmers Mutual Canal Co.* (243 U. S. 157 (1917)); dismissal was on a point of jurisdiction, where the judgment of the State court was placed upon two grounds, one involving a Federal question and the other not, it being held that the judgment was not open to review by the Supreme Court.

[29] *Enterprise Irr. Dist.* v. *Tri-State Land Co.* (92 Nebr. 121, 138 N. W. 171 (1912)).

[30] *Kersenbrock* v. *Boyes* (95 Nebr. 407, 145 N. W. 837 (1914)); *In re Babson* (105 Nebr. 317, 180 N. W. 562 (1920)); *State* v. *Oliver Bros.* (119 Nebr. 302, 228 N. W. 864 (1930)).

[31] *Kirk* v. *State Board of Irr.* (90 Nebr. 627, 134 N. W. 167 (1912)).

[32] *Commonwealth Power Co.* v. *State Board of Irr., Highways & Drainage* (94 Nebr. 613, 143 N. W. 937 (1913)).

ceased to be so used for more than 3 years; the decision being subject to appeal. The constitutionality of this provision has been upheld.[33]

Adjudications of water rights are made by the department, from which appeals may be taken to the courts. If not appealed from, these adjudications are final, and cannot be collaterally attacked.[34]

The distribution of water is under the direction of the department.[34a] The State is divided by statute into two water divisions, headed by superintendents, and the department is authorized to create water districts, conforming to watersheds, and to appoint commissioners therefor.

*Nevada.*—The riparian doctrine has not been recognized in Nevada since 1885. Prior to that year, several decisions had referred to riparian rights, and in 1872 the doctrine was applied to lands patented by the United States prior to the congressional act of July 26, 1866.[35] However, in *Jones* v. *Adams* (1885),[36] the Nevada Supreme Court specifically overruled this decision, and on various subsequent occasions has emphasized its rejection of the riparian doctrine. As recently as 1926 it was stated that "the doctrine of riparian rights has been held not applicable to conditions in this state, * * *."[37]

The Nevada constitution contains no provisions on water rights. The statutes provide:

> The water of all sources of water supply within the boundaries of the state, whether above or beneath the surface of the ground, belongs to the public.[38]
>
> Subject to existing rights, all such water may be appropriated for beneficial use as provided in this act and not otherwise.[39]

The statutes also provide for the appropriation of ground waters,[40] and for acquiring rights for the watering of range livestock.[41]

The water code provides an exclusive procedure for initiating an appropriation of water, by making application to the State engineer for a permit to appropriate, and for completing the appropriation.

The water code also provides for the determination of relative rights to the use of water of any stream, by the State engineer, either upon his own initiative or upon petition of the water users. The order of determination is filed in the district court and has the legal effect of a complaint in a civil action. Furthermore, in any suit in any district court for the determination of water rights,

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[33] *Dawson County Irr. Co.* v. *McMullen* (120 Nebr. 245. 231 N. W. 840 (1930)). See also, concerning cancellations: *Kersenbrock* v. *Boyes* (95 Nebr. 407, 145 N. W. 837 (1914)); *State* v. *Oliver Bros.* (119 Nebr. 302, 228 N. W. 864 (1930)).

[34] *Farmers' Irr. Dist.* v. *Frank* (72 Nebr. 136. 100 N. W. 286 (1904)); *Enterprise Irr. Dist.* v. *Tri-State Land Co.* (92 Nebr. 121, 138 N. W. 171 (1912); writ of error dismissed. 243 U. S. 157 (1917)).

[34a] In a very recent case, *State ex rel. Cary* v. *Cochran* (138 Nebr. 163. 292 N. W. 239 (1940)), the Supreme Court distinguished the ministerial duties of the department in distributing water according to priorities, from its quasijudicial functions relating to the granting and cancellation of prior appropriative rights. The findings of fact necessary to performance of the ministerial functions are final. unless unreasonable or arbitrary. Thus the department must make findings as to whether, in time of water shortage, a quantity of water passing a given point could, if not interrupted. reach downstream prior appropriators in usable quantities; if it could be delivered to them in usable quantities. the prior appropriators must be allowed to have it. regardless of heavy losses in transit in the stream bed; if it could not, it may be given to junior appropriators upstream.

[35] *Vansickle* v. *Haines* (7 Nev. 249 (1872)).

[36] 19 Nev. 78. 6 Pac. 442 (1885).

[37] *In re Humboldt River* (49 Nev. 357, 246 Pac. 692 (1926)).

[38] Nev. Comp. Laws 1929, sec. 7890.

[39] Nev. Comp. Laws 1929, sec. 7891.

[40] Nev. Stats. 1939, ch. 178.

[41] Nev. Comp. Laws 1929, secs. 7979–7985.

all claimants on that stream system are to be made parties, and the court is required by statute to direct the State engineer to furnish a complete hydrographic survey. Any such suit at any time may be transferred by the court, in its discretion, to the State engineer for his report and order of determination, which, as above stated, becomes in effect a complaint against all of the appropriators of waters of the stream system. Concerning this procedure for statutory adjudications, the supreme court has said:[42]

The law meets every demand for a full, fair, and just determination of the rights of every water user.

The duty of the State engineer and his assistants is to divide the waters of streams and other sources of supply according to priorities. This applies only to streams on which there has been a final adjudication of water rights under the water code.[43] However, pending the final court decree, the distribution of water is made in accordance with the State engineer's determination.[44] While the State engineer has no authority to regulate the water of unadjudicated streams, he has been called upon frequently by the water users to act as arbiter in effecting the settlement of controversies on such streams.[45]

*New Mexico.*—The doctrine of riparian rights is not recognized in New Mexico. This has been consistently stated in the decisions. The following statement is typical:[46]

The common law doctrine of riparian right was not suited to an arid region, and was never recognized by the people of this jurisdiction.

The State constitution provides:

All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed.[47]

The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.[48]

Beneficial use shall be the basis, the measure and the limit of the right to the use of water.[49]

The statutes provide:

All natural waters flowing in streams and water courses, whether such be perennial, or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use.[50]

The appropriation statute "shall not be construed to apply to stockmen, or stock owners who may build or construct water tanks or wells for watering stock."[51] This provision has been upheld by the State supreme court.[52] A separate statute[53] governs the appropriation of ground waters having reasonably ascertainable bound-

[42] *In re Humboldt River* (49 Nev. 357, 246 Pac. 692 (1926)).
[43] *Pacific Live Stock Co.* v. *Malone* (53 Nev. 118, 294 Pac. 538 (1931)).
[44] *State ex rel. Hinckley* v. *Sixth Judicial District Court* (53 Nev. 343, 1 Pac. (2d) 105 (1931)).
[45] State of Nevada, Biennial Report of the State Engineer for the Period January 1, 1931, to June 30, 1932, Inclusive, p. 23.
[46] *Snow* v. *Abalos* (18 N. Mex. 681, 140 Pac. 1044 (1914)).
[47] N. Mex. Const., art. XVI, sec. 1.
[48] N. Mex. Const. art. XVI, sec. 2.
[49] N. Mex. Const., art. XVI, sec. 3.
[50] N. Mex. Stats. Ann. Comp. 1929, sec. 151–101.
[51] N. Mex. Stats. Ann. Comp. 1929, sec. 151–179.
[52] *First State Bank of Alamogordo* v. *McNew* (33 N. Mex. 414, 269 Pac. 56 (1928)).
[53] N. Mex. 1938 Supp. Stats. Ann., secs. 151–201 to 151–212.

aries. Another statute[54] governs the appropriation of seepage from constructed works.

The statutes provide that in order to appropriate water an application shall be made to the State engineer for a permit to make the appropriation. It was held in *Farmers' Development Co.* v. *Rayado Land & Irrigation Co.*[55] that compliance with the provisions of the statutes in force prior to enactment of the water code of 1907 was not necessary in order to validate an appropriative right, which might be made under the general law of appropriation as recognized in the arid States of the West; but that the act of May 19, 1907 (the present water code) "seems to provide an exclusive method for the appropriation of water after that act became effective."

Adjudications of water rights are made exclusively in the courts. Upon the completion of the hydographic survey of any stream system by the State engineer, the attorney general is authorized to initiate a suit on behalf of the State to determine all water rights concerned, unless such suit has been brought by private parties. In any suit to determine water rights all claimants are to be made parties, and the court is required to direct the State engineer to make or furnish a complete hydrographic survey.

The State engineer has supervision over the apportionment of waters, and may create districts and appoint water masters upon application of a majority of the water users concerned. This applies only to water rights acquired under licenses and to adjudicated water rights.[56]

New Mexico has many ditch systems known as community acequias, the rights of which were acquired under Spanish and Mexican laws and customs and preserved under early territorial statutes. These old community acequias or ditches are exempted from certain provisions of the water code.[57]

*North Dakota*.—The riparian and appropriation doctrines are both recognized in North Dakota.

The constitution provides:[58]

> All flowing streams and natural water courses shall forever remain the property of the state for mining, irrigating and manufacturing purposes.

A statute provides:[59]

> All waters within the limits of the State from all sources of water supply belong to the public and are subject to appropriation for beneficial use.

Prior to amendment in 1939, this section had excepted navigable waters from appropriation. Another statute reads:[60]

> The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream formed by nature over or under the surface may be used by him as long as it remains there; but he may not prevent the natural flow of the stream or of the natural spring from which it commences its definite course, nor pursue nor pollute the same.

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[54] N. Mex. Stats. Ann. Comp. 1929, sec. 151–165.
[55] 28 N. Mex. 357, 213 Pac. 202 (1923).
[56] *Vanderwork* v. *Hewes* (15 N. Mex. 439 110 Pac. 567 (1910)); *Pueblo of Isleta* v. *Tondre* (18 N. Mex. 388, 137 Pac. 86 (1913)).
[57] N. Mex. Stats. Ann. Comp. 1929, secs. 151–130 and 151–168; see also *Pueblo of Isleta* v. *Tondre* (18 N. Mex. 388, 137 Pac. 86 (1913)).
[58] N. Dak. Const., sec. 210.
[59] N. Dak. Comp. Laws 1913, sec. 8235, as amended by Laws 1939, ch. 255.
[60] N. Dak. Comp. Laws 1913, sec. 5341.

A further statute [61] authorizes the holders of agricultural land to impound or divert "the flood waters of any draw, coulee, stream or water course, having a flow of not to exceed one-third of one cubic foot of water per second during the greater part of the year," by filing a location certificate with the State engineer and securing a permit therefor. Another statute [62] relates to the appropriation of seepage waters from constructed works.

The water code provides an exclusive method for the acquirement of appropriative water rights, by first making application to the State engineer and following this with the prescribed necessary steps to complete the appropriation. Under the 1939 water conservation commission law, the granting of water rights to any person, association, firm, corporation, or municipality by the State engineer is subject to the approval of the commission.[63] The water code also contains machinery for complete adjudication of water rights by means of surveys by the State engineer and actions brought by the attorney general, who is to intervene on behalf of the State in suits brought by private parties, if the State engineer so advises. In suits initiated privately, all claimants are to be made parties, and the court is to direct the State engineer to provide a hydrographic survey. The distribution of water by an organization under the supervision of the State engineer is also provided in the statute.

The State water conservation commission may initiate water rights for its projects by filing with the State engineer a declaration of intention to appropriate.[64]

*Oklahoma.*—The riparian doctrine is apparently recognized to some extent in Oklahoma; but so far as a search of the cases has disclosed, the extent of application of the doctrine, in its effect upon the rights of prior appropriators, has not been decided by the State supreme court. The appropriation statute, however, has been before the court, as noted below.

A statute declaring the unappropriated water of the ordinary flow or underflow of streams and storm or rain water in those portions of the State in which irrigation was beneficial for agriculture, to be the property of the public and subject to appropriation [65] was omitted from the Revised Laws of Oklahoma of 1910 and thereby repealed, for the act adopting the Revised Laws of 1910 provided that all general or public laws not contained in the revision were thereby repealed.[66] The present statute, however, provides a complete and exclusive procedure by means of which "water" may be appropriated, but does not specify the waters that are subject to appropriation. An early statute, copied from a very early enactment of the Territory of Dakota, provides that the owner of land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream.[67] The effect of these enactments apparently is to make the unappropriated waters of watercourses open to appropriation,

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[61] N. Dak. Comp. Laws 1913, secs. 8271 to 8274.
[62] N. Dak. Comp. Laws 1913, sec. 8297.
[63] N. Dak. Laws 1939, ch. 256.
[64] N. Dak. Laws 1939, ch. 256.
[65] Okla. Comp. Laws 1909, secs. 3915 and 3916.
[66] Okla. Laws 1910–11, p. 70.
[67] Okla. Stats. Ann. (1936), title 60, sec. 60.

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subject to whatever private rights the courts may hold to have vested owing to one reason or another; and subject also to the reasonable use by the landowner of diffused surface waters on his land, if tributary to watercourses, if the courts should apply this restriction to the use of such waters, as noted in chapter 3. There is also a statute concerning the appropriation of seepage water from constructed works.[68]

In a case decided in 1907 both parties claimed by virtue of prior appropriation.[69] The court applied the appropriative principles as developed in the western State decisions; and held further that where there are conflicting claims in a suit for irrigation, the court has the power to make equitable distribution of the water supply according to the proven priorities of right.

The present statute requires applicants for the appropriation of water to make filings with the State planning and resources board, which has succeeded to the functions originally performed by the State engineer. It is also provided that the board shall make hydrographic surveys of stream systems, and that upon completion of any survey the attorney general shall bring suit for the determination of water rights, unless such suit has been begun by private parties, and that in the latter event the attorney general shall intervene if notified by the board that in its opinion the public interest requires such action. In any suit for the determination of water rights, all parties who claim rights to use the waters in question must be made parties, and the court is required by the statute to direct the board to provide a complete hydrographic survey.

The Oklahoma Supreme Court has placed a construction upon the procedure for acquiring water rights that differs radically from that in the other States; namely, that a hydrographic survey and court adjudication are conditions precedent to the granting by the State administrative officer of a valid permit to appropriate water. In a case decided in 1912,[70] plaintiff had devoted to beneficial use the waters of a stream prior to the time defendant applied to the State engineer for a permit to appropriate the water, and brought action to enjoin defendant and the State engineer from conducting proceedings on the permit until the rights of plaintiff had been determined. It was held that the authority of the State engineer is administrative, not judicial, and that his granting a permit would not be conclusive but would be subject to collateral attack, for until there had been a final determination of all existing rights a subsequent applicant could get no enforceable interest in the stream. The conclusion was that in order that there be an orderly procedure for the determination of the rights involved, it is necessary that a survey and adjudication precede action by the State engineer further than accepting the application to fix priority. This principle was subsequently affirmed in a case [71] in which plaintiff claimed to be the first applicant, having been granted a permit to appropriate water from a stream, and in which action was brought to enjoin upstream landowners from taking water from the stream. The necessity for

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[68] Okla. Stats. Ann. (1936), title 82, sec. 102.
[69] *Gates* v. *Settlers' Mill. Canal & Res. Co.* (19 Okla. 83, 91 Pac. 856 (1907)).
[70] *Gay* v. *Hicks* (33 Okla. 675, 124 Pac. 1077 (1912)).
[71] *Owens* v. *Snider* (52 Okla. 772, 153 Pac. 833 (1915)).

a hydrographic survey and court adjudication was reiterated, even if the plaintiff were shown to be the only appropriator, otherwise other claimants might appear at any time and attack collaterally the action of the State engineer in granting the permit. It was stated that to prevent a conflict of claims, the statute had provided for a hydrographic survey. Consequently there was held to be no error in the judgment refusing the injunction where plaintiff's right was based on a permit which was not preceded by a hydrographic survey and judicial determination.

The statute gives the board supervision over the apportionment of water according to issued licenses and decreed rights, with power to create water districts and appoint water masters.

*Oregon.*—The common-law doctrine of riparian rights has been virtually abrogated in Oregon and for practical purposes appears to be no longer more than a legal fiction. As noted in the foregoing discussion of riparian rights (p. 54), a water right in Oregon may be called by its claimant riparian, but must yield to a direct appropriation unless the riparian claimant has made some use of the water, in which event his right would necessarily be adjudicated on an appropriative basis in order to give him an enforceable priority. Furthermore, after the enactment of the water code in 1909, any right to the use of water of watercourses could be acquired only by making a statutory appropriation.

The constitution contains no provisions concerning water other than the control and development of water power (art. XI–D). The statutes provide in general:

> All water within the state from all sources of water supply belongs to the public.[72]
>
> Subject to existing rights, all waters within the state may be appropriated for beneficial use, as herein provided, and not otherwise; but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, corporation, or association to any water; * * *[73]

Certain designated streams and a section of the Columbia River are exempted from appropriation in order to preserve the natural flow for scenic and other purposes. Special provisions relate to the appropriation of ground waters of certain character in the portions of the State lying east of the summit of the Cascade Mountains.[74] Another statute concerns the utilization of waste, spring, or seepage waters.[75]

The system of appropriative water rights in Oregon contemplates applications to the State engineer, permits to appropriate water, and certificates of appropriation; determination of rights by the State engineer, followed by court adjudication; and the distribution of water under the supervision of the State engineer. This is a modification of the Wyoming system; for in Oregon the determination of rights is first made by the State engineer upon petition of one or more water users, and the findings of fact and definitions of rights are filed with the court, which proceeds to hear the matter under proceedings as nearly as possible like those of a suit in equity, and upon final hearing enters an order affirming or modifying the order of the State engineer. The admin-

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[72] Oreg. Code Ann. 1930, sec. 47–401.
[73] Oreg. Code Ann. 1930, sec. 47–402.
[74] Oreg. Code Ann., Supp. 1935, sec. 47–1302.
[75] Oreg. Code Ann. 1930, sec. 47–1401.

istrative determination is in effect in the meantime, unless stayed by a stay bond. The Oregon procedure for administrative and judicial determination of water rights, with the provision for distribution of water in conformity with the administrative order pending court adjudication, has been upheld by the United States Supreme Court as not violative of the due process clause of the fourteenth amendment.[76]

The statutory method of appropriation is the exclusive procedure for acquiring an appropriative right, according to the statute.[77] The permit from the State engineer authorizes the applicant to proceed with construction of the necessary works and to take all steps necessary to apply the water to a beneficial use and to perfect the proposed appropriation; and the right then dates from the initial filing in the State engineer's office.

The State engineer is given control over the distribution of water. He is authorized to divide the State into districts when the need therefor arises, and to appoint a water master for each district.

*South Dakota.*—The riparian doctrine has been recognized in South Dakota in many court decisions, together with the appropriation doctrine. As noted heretofore in this chapter (p. 58), it was held in 1922 that public lands entered after the passage by Congress of the Desert Land Act of March 3, 1877, werer divested by that act of all riparian rights except for domestic purposes; whereas in 1940 the court concluded that in view of the United States Supreme Court decision in the *California-Oregon Power Co. case* it had been in error in making this 1922 ruling. This apparently restores the riparian doctrine to the paramount position which it occupied in South Dakota prior to 1922.[78]

The State constitution contains no provisions concerning water rights, other than to declare that the irrigation of arid lands is a public purpose and to authorize legislation for the organization of irrigation districts.[79] The water statutes as amended by the 1939 code provide as follows:[80]

> Subject to vested private rights, and except as hereinafter in this section specifically provided, all the waters within the limits of this state, from whatever source of supply, belong to the public and, except navigable waters, are subject to appropriation for beneficial use. Subject to the provisions of this Code relating to artesian wells and water, the owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature, over or under the surface, may be used by such landowner as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, or of a natural spring arising on his land which flows into and constitutes a part of the water supply of a natural stream, nor pursue nor pollute the same, except that any person owning land through which any nonnavigable stream passes, may construct and maintain a dam across such nonnavigable stream if the course of the water is not changed, vested rights are not interfered with, and no land flooded other than that belonging to the owner of such dam or upon which an easement for such purpose has been secured. Nothing in this section shall be construed to prevent the

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[76] *Pacific Live Stock Co.* v. *Lewis* (241 U. S. 440 (1916)).
[77] Oreg. Code Ann. 1930, secs. 47–402 and 47–501.
[78] *Cook* v. *Evans* (45 S. Dak. 31, 185 N. W. 262 (1921); 45 S. Dak. 43, 186 N. W. 571 (1922)). In *Platt* v. *Rapid City* (— S. Dak. —, 291 N. W. 600 (1940)), the court based its reversal of the 1922 ruling on its interpretation of the Supreme Court decision in *California-Oregon Power Co.* v. *Beaver Portland Cement Co.* (295 U. S. 142 (1935)).
[79] S. Dak. Const., art. XXI, sec. 7.
[80] S. Dak. Code 1939, sec. 61.0101.

owner of land on which a natural spring arises, and which constitutes the source or part of the water supply of a definite stream, from acquiring a right to appropriate the flow from such spring in the manner provided by law for the appropriation of waters.

There is also a statute[81] authorizing the appropriation and use, by the holders of agricultural lands, for irrigation or livestock purposes, of flood waters in any "dry draw" or watercourse, not having a flow of at least 20 miner's inches during the greater part of the year, by filing a location certificate in the county records, posting a copy, and sending a copy to the State engineer. These rights are not subject to the rules and regulations and under the jurisdiction of the State engineer, but a certificate covering such appropriation may be secured from him upon petition. Another statute[82] relates to the appropriation of seepage water from constructed works.

The water code provides for the acquirement and determination of water rights and for the appointment of commissioners to supervise the distribution of water. The exclusive method of initiating an appropriative right, excepting as to appropriations under the "dry draw" law above indicated, is through application to the State engineer for a permit to appropriate water.

The 1939 code revised the procedure for determination of rights in order to make it workable, for the State's participation in water adjudications had been rendered largely inoperative by reason of the decision in *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.*[83] in 1913. The statute had then provided that in any action for the determination of water rights on any stream system all claimants should be made parties, and that when any such action had been begun the court should direct the State engineer to provide a complete hydrographic survey of the stream, the costs of the action, including the costs on behalf of the State and of the hydrographic survey, to be charged against all private parties to the action. The *St. Germain case* arose on demurrer to a complaint asking that the State engineer be directed to make a statutory adjudication of the water of a creek claimed under appropriative and riparian rights. The court held that as the cost of a hydrographic survey may be considerable, a riparian proprietor or appropriator who makes lawful use of the stream water cannot be required, without his consent, to bear any portion of such expense; to require this would deprive him of property without due process of law. This provision, therefore, was held void. Furthermore, the section requiring a permit to appropriate water was held unconstitutional so far as it related to vested property rights in and to the use of water. It was after the rendering of this decision that the legislature inserted the phrase "Subject to vested private rights" at the beginning of the section above quoted making waters subject to appropriation.

Under the 1939 amendments,[84] it is provided that when any such action for the determination of rights has been begun, the court shall request the State engineer to provide a complete hydrographic survey, it being the duty of the State engineer to proceed with the survey whenever funds are made available from legislative appropriations

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[81] S. Dak. Code 1939, sec. 61.0133.
[82] S. Dak. Code 1939, sec. 61.0146.
[83] 32 S. Dak. 260, 143 N. W. 124 (1913).
[84] S. Dak. Code 1939, sec. 61.0119.

or other sources; and it is further provided that the costs of the court action shall be charged against the private parties in proportion to their water rights, but that no part of the costs on behalf of the State or of the hydrographic survey shall be charged against private parties without their consent expressly stipulated. The attorney general may bring suit for the adjudication of rights within a stream system.

A new section added in the 1939 code revision authorizes the appointment of water commissioners for the distribution of water whenever in the judgment of the State engineer or the court having jurisdiction such appointment is necessary.[85] Appointments are to be made annually by the State engineer, after consultation with the water users, who are to bear the costs pro rata. The commissioners are under the direction of the State engineer and have authority to regulate diversions of water according to adjudication decrees or schedules agreed upon by the water users.

A statute passed in 1935 [86] vests the full control of all waters of definite streams, so far as they relate to "irrigation or other riparian rights," in the State engineer, whose duty it is to apportion the waters on request of five or more landowners having riparian rights.

The exception of navigable waters from waters subject to appropriation is made by South Dakota and by no other Western State (a similar provision in the North Dakota law was eliminated by amendment in 1939, as noted above on p. 96). An important question then arises as to just what waters are navigable and therefore exempt from appropriation. Although this feature of the water appropriation statute has not yet been passed upon by the Supreme Court of South Dakota, that court has defined navigable waters for certain other purposes as those more reasonably adapted to public than to private uses, public uses including such purposes as fishing, fowling, and boating, as well as commercial navigation.[87] (See discussion of rights in navigable waters, above, p. 35 and following.) In commenting upon this matter, the State engineer of South Dakota has stated in a letter to the author (quoted with his permission):

> The question would arise as to artificial lakes created for public use and the damming of a non-navigable stream subject to appropriation, thus making a public or "navigable" body of water which is not subject to appropriation. What is the position of potential appropriators on the stream or of existing rights? Also many of our major streams and lakes are used for public purposes and are therefore public or navigable waters.

It would follow that if the definition of navigable waters as applied by the supreme court in controversies in which the appropriation of water or the construction of the appropriation statute was not in any way involved, should be held to control the question of appropriable waters as well, important sources of water supply in South Dakota may be held to be unavailable for irrigation or other consumptive uses under the statutory exemption.

*Texas.*—Riparian rights are recognized in Texas as applicable to the ordinary flow and underflow of streams on grants of land made

[85] S. Dak. Code 1939, sec. 61.0121.
[86] S. Dak. Code 1939, secs. 61.0104 and 61.0105.
[87] *Flisrand* v. *Madson* (35 S. Dak. 457, 152 N. W. 796 (1915)); *Anderson* v. *Ray* (37 S. Dak. 17, 156 N. W. 591 (1916)); *Hillebrand* v. *Knapp* (65 S. Dak. 414, 274 N. W. 821 (1937)).

prior to the enactment of the general appropriation statute of 1889; the appropriation act of 1889 and the subsequent water legislation down to and including the act of 1917 being held valid and constitutional insofar as they authorize the appropriation of storm and flood waters and other waters without violation of the paramount preexisting riparian rights.[88] The supreme court has also held that the appropriation statute has no application to diffused surface waters on lands granted prior to its enactment.[89]

The State constitution contains the following section:[90]

> The conservation and development of all of the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its over-flowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.

The appropriation statute provides:[91]

> The waters of the ordinary flow and underflow and tides of every flowing river or natural stream, of all lakes, bays or arms of the Gulf of Mexico, and the storm, flood or rain waters of every river or natural stream, canyon, ravine, depression or watershed, within the State of Texas, are hereby declared to be the property of the State, and the right to the use thereof may be acquired by appropriation in the manner and for the uses and purposes hereinafter provided, and may be taken or diverted from its natural channel for any of the purposes expressed in this chapter. * * *

The present legislation extends the right of appropriation to the entire State, whereas the 1889 and 1895 acts referred only to the arid portions of the State to which irrigation was necessary.[92]

Appropriations of water in Texas are made by application to the State board of water engineers for permits to appropriate, followed by the steps required to perfect the right. The statute provides only one method for acquiring such right.[93] Prior to enactment of the present water code, the opinion in *Biggs* v. *Miller*[94] stated that under Texas law "nonriparian lands acquire rights to water by statutory appropriation," and that "statutory appropriations, when filed in compliance with law," gave appropriators the right to take water for use on nonriparian lands. Apparently the statutory procedure is exclusive in making an appropriation.

The water code of 1917[95] authorized the board, on petition of any water user, to make a determination of the relative rights on the stream or other source of supply, and provided that a suit brought in any court to determine such rights might be transferred to the board for determination. It was further provided that appeals might be taken to the courts from the board's order, and that pending the determination of the appeal, the order was to be in full force and effect. The board was further authorized to create water dis-

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[88] *Motl* v. *Boyd* (116 Tex. 82, 286 S. W. 458 (1926)).
[89] *Turner* v. *Big Lake Oil Co.* (128 Tex. 155, 96 S. W. (2d) 221 (1936)).
[90] Tex. Const., art. XVI, sec. 59a.
[91] Vernon's Tex. Stats. 1936, Rev. Civ. Stats., art. 7467.
[92] Tex. Gen. Laws 1889, ch. 88, p. 100, sec. 2; Gen. Laws 1895, ch. 21, p. 21.
[93] Vernon's Tex. Stats. 1936, Rev. Civ. Stats., art. 7492.
[94] 147 S. W. 632 (Tex. Civ. App. 1912).
[95] Tex. Laws 1917, ch. 88.

tricts and appoint water commissioners to distribute water among users according to the board's determination. The portions of the statute relating to determination of rights by the board of water engineers were held invalid in *Board of Water Engineers* v. *McKnight*,[96] as attempting to vest judicial powers in a branch of the executive department of the State without the express permission of the constitution; and these provisions relating to determination of rights and distribution of water were omitted from the revised civil statutes of 1925, and were thereby repealed.[97] However, it is required by statute that a copy of any judgment, order, or decree of court concerning water rights be transmitted to the board.

*Utah.*—Riparian rights have never been recognized in Utah. In the first case in which the Territorial Supreme Court had occasion to pass upon this matter, in 1891, it was stated: [98]

> Riparian rights have never been recognized in this Territory, or in any State or Territory where irrigation is necessary; for the appropriation of water for the purpose of irrigation is entirely and unavoidably in conflict with the common-law doctrine of riparian proprietorship. If that had been recognized and applied in this Territory, it would still be a desert; * * * The legislature of this Territory has always ignored this claim of riparian proprietors, and the practice and usages of the inhabitants have never considered it applicable, and have never regarded it.

The United States Supreme Court, in a case which went up from the Utah Supreme Court concerning condemnation of a right-of-way, recognized the alteration of the common-law doctrine by many of the Western States and agreed that it was necessary to their mining and agricultural industries.[99] In 1936 the Utah Supreme Court stated that its uniform holding had been not to recognize the doctrine of riparian rights.[1]

The State constitution provides: [2]

> All existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed.

The statutes provide: [3]

> All waters in this state, whether above or under the ground, are hereby declared to be the property of the public, subject to all existing rights to the use thereof.

The Utah water code provides complete procedure for the appropriation and distribution of water under the supervision of the State engineer, and for adjudications by the courts in which the State engineer makes proposed determinations.

Whether or not the statutory permit method is the exclusive method of acquiring an appropriative water right in Utah, has been open to some question in recent years but appears now to be settled. The court had held in 1925 that the 1903 statute was intended to provide an exclusive procedure, and that a right based upon actual diversion of water and application to beneficial use, without fol-

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[96] 111 Tex. 82, 229 S. W. 301 (1921).

[97] Vernon's Tex. Stats. 1936, Rev. Civ. Stats., Final Title, sec. 2, p. 1569.

[98] *Stowell* v. *Johnson* (7 Utah 215, 26 Pac. 290 (1891)).

[99] *Clark* v. *Nash* (198 U. S. 361 (1906)).

[1] *Whitmore* v. *Salt Lake City* (89 Utah 387, 57 Pac. (2d) 726 (1936)). In the very recent case of *Spanish Fork Westfield Irr. Co.* v. *District Court* (99 Utah 527, 104 Pac. (2d) 353 (1940), the supreme court stated: "The doctrine of riparian rights was entirely unsuited to the conditions found in the arid portions of the country. It tended to retard the development of vast regions in the western states."

[2] Utah Const., art. XVII, sec. 1.

[3] Utah Rev. Stats. 1933, sec. 100–1–1, as amended by Laws 1935, ch. 105.

lowing the statutory procedure set out in the act of 1903, was inferior, and gave such appropriator no right as against a subsequent claimant who complied with the statute and filed his application in the State engineer's office after the first party had completed an actual physical appropriation and use of the water.[4] This decision was considered in the prevailing opinion in a decision rendered in 1935,[5] and on this point was stated to be erroneous and overruled; but such statement was probably dictum, inasmuch as the waters then under consideration were appropriated prior to the enactment of the 1903 statute. In any event, shortly thereafter the legislature amended the section of the water code to read, in part:

> Rights to the use of the unappropriated public waters in this state may be acquired only as provided in this title. No appropriation of water may be made and no rights to the use thereof initiated and no notice of intent to appropriate shall be recognized except application for such appropriation first be made to the state engineer in the manner hereinafter provided, and not otherwise. * * *[6]

The legislative intent to make the procedure under the State engineer the exclusive method of appropriation, at least so far as rights initiated after the amendment are concerned, appears now to be very clear. The court has apparently accepted this declaration, for a recent decision has stated that the appropriative right must be exercised by a statutory appropriation since the enactment of the statute governing such matters, or by a diversion prior to the statute; further, that if an appropriator attempts to bring new and additional waters to his point of diversion, "no right thereto can attach or be asserted until after an application has been filed in the office of the state engineer."[7]

The State engineer may initiate suits to determine water rights, on petition of five or more or a majority of the water users upon any stream; and may bring such action on his own initiative in case of an interstate stream, in cooperation with the State engineer of an adjoining State. He may also join in suits in the Federal courts and courts of other States, under certain circumstances. The water code, as amended in 1939,[8] provides that upon the filing of any suit for the determination of water rights, the clerk of the court shall notify the State engineer of the fact, and the State engineer is required to make such field investigations and surveys as are necessary to supplement records in his office with respect to all existing claims upon water in that particular source of supply. A report of the findings and a proposed determination are filed with the court and constitute the basis upon which the court proceeds to hear contests and to adjudicate the water rights. It is provided that "the court shall proceed to determine the water rights involved in the manner provided by this chapter and not otherwise."[9] Pending final disposal of the case, the water rights are to be administered according to the administrative determination, subject to modification by court order, unless there has been a prior adjudication; in the latter event, the former

[4] *Deseret Live Stock Co.* v. *Hooppiania* (66 Utah 25, 239 Pac. 479 (1925)).
[5] *Wrathall* v. *Johnson* (86 Utah 50, 40 Pac. (2d) 755 (1935)).
[6] Utah Laws 1935, ch. 105, amending Rev. Stats. 1933, sec. 100–3–1.
[7] *Adams* v. *Portage Irr., Res. & Power Co.* (95 Utah 1, 72 Pac. (2d) 648 (1937)).
[8] Utah Rev. Stats. 1933, secs. 100–4–1 to 100–4–20, as amended by Laws 1935, ch. 105, Laws 1937, ch. 130, and Laws 1939, ch. 112.
[9] Utah Rev. Stats. 1933, sec. 100–4–3, as amended by Laws 1939, ch. 112.

adjudication is to prevail until modified or set aside. The validity of this legislation, as amended in 1939, has been upheld by the Utah Supreme Court.[9a]

The State engineer has charge of the distribution of water, and may appoint water commissioners after consultation with the water users concerned and upon recommendation of the majority if the majority can agree. He also has authority to create water districts, and to define ground-water administrative areas.

*Washington.*—Although the riparian and appropriation doctrines are both recognized in Washington, the superiority of the common-law riparian right has been reduced substantially as a result of the court decisions. The exercise of vested riparian rights, on a basis of beneficial use, is protected by the courts; but generally speaking, the doctrine of appropriation is much the more important in the exercise and administration of water rights in the State.

The State constitution provides:[10]

> The use of the waters of this state for irrigation, mining, and manufacturing purposes shall be deemed a public use.

The statutes provide:[11]

> The power of the state to regulate and control the waters within the state shall be exercised as hereinafter in this act provided. Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations, the first in time shall be the first in right. Nothing contained in this act shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise. * * *

The water code provides for the acquisition of rights by first making application for a permit to the State hydraulic engineer and taking the prescribed steps necessary to complete the appropriation, and for the determination of water rights and the distribution of water. The duties of the State hydraulic engineer now devolve upon the director of conservation and development, who exercises, through and by means of an assistant director known as the State supervisor of hydraulics, the duties formerly imposed upon the State hydraulic engineer. The statute makes the designated procedure the exclusive method of acquiring an appropriative right.[12]

The supervisor of hydraulics is authorized to initiate proceedings for the determination of water rights, upon petition of one or more claimants, or when in his judgment the interest of the public will be served by such determination. A statement is filed with the court, and after completion of the service of summons the court is required to refer the proceedings to the supervisor for the taking of testimony as referee. Upon filing of the transcript and report, the court hears the matter and renders its decree. Pending final disposition of the case, the stream is regulated according to the administrative findings, unless an interested party files a bond and obtains a court order staying such regulation. The supreme court has held that as between private parties, the enforcement of water rights existing at the time of adoption of the water code may be

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[9a] *Spanish Fork Westfield Irr. Co.* v. *District Court* (99 Utah 527, 104 Pac. (2d) 353 (1940)).
[10] Wash. Const., art. XXI, sec. 1.
[11] Wash. Rem. Rev. Stats. 1931, sec. 7351.
[12] Wash. Rem. Rev. Stats., 1931, sec. 7351.

sought by a direct action in court; that the water code did not withdraw from the jurisdiction of the superior court all matters affecting the adjudication of water rights, nor could it do so under the constitution.[13] The issuance of a permit by the State is not an adjudication of private rights.[14] In a recent case proceedings had been instituted by the State supervisor of hydraulics to determine water rights.[15] Although it was made to appear that all owners entitled to the entire flow had by means of a contract providing for rotation of water settled all their respective rights, the supreme court held that the proceedings should not be dismissed, inasmuch as the State should not be deprived of its right to make a survey and examination and have established by judicial decree facts which the State contended should be established; and that the decree should confirm the rotation contract.

The supervisor of hydraulics has supervision over the distribution of water according to rights and priorities, and may designate districts and appoint watermasters upon petition by interested parties. He is also required to appoint stream patrolmen for designated streams the water rights of which have been adjudicated, upon application of interested parties and approval of the district watermaster if one has been appointed for each area, for whatever periods of time local conditions justify.

The supreme court has held that the water code authorizes the State administrative officer to control all waters of the State for irrigation purposes, including those theretofore lawfully appropriated or acquired; that he has jurisdiction over adjudicated rights of a stream only partially adjudicated; and that he may enforce "rights" established by decree of a Federal court.[16] In the course of an adjudication suit it was contended that the irrigation code had never been intended to regulate the use and occupation of vested and established water rights in a stream where admittedly there is no surplus water, and in fact insufficient to supply the needs of those having vested rights therein. The supreme court stated:[17]

> The water code saves all existing rights in land and water. Our decisions have consistently preserved them. That, however, does not militate against the right of the state, in the exercise of a supervisory control, of administering the use of water for the public welfare, according to the various and definite rights of all parties in the water.

*Wyoming.*—Riparian rights have never been recognized in Wyoming. The unsuitability of that doctrine to Wyoming conditions and the fact that it never existed in that State were thus phrased by the State supreme court:[18]

> The common law doctrine relating to the rights of a riparian proprietor in the water of a natural stream, and the use thereof, is unsuited to our requirements and necessities, and never obtained in Wyoming. So much only of the common law as may be applicable has been adopted in this jurisdiction. The doctrine involved is inapplicable. A different principle better adapted to the material conditions of this region has been recognized. That principle, briefly stated, is that the right to the use of water for beneficial purposes depends upon a prior appropriation. Our statutes have repeatedly recognized this right, and the constitution

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[13] *State ex rel. Roseburg* v. *Mohar* (169 Wash. 368, 13 Pac. (2d) 454 (1932)).
[14] *Madison* v. *McNeal* (171 Wash. 669, 19 Pac. (2d) 97 (1933)).
[15] *In re Crab Creek* (194 Wash. 634, 79 Pac. (2d) 323 (1938)).
[16] *West Side Irr. Co.* v. *Chase* (115 Wash. 146, 196 Pac. 666 (1921)).
[17] *In re Doan Creek* (125 Wash. 14, 215 Pac. 343 (1923)).
[18] *Moyer* v. *Preston* (6 Wyo. 308, 44 Pac. 845 (1896)).

of the State declares it. We incline strongly to the view expressed by the Supreme Court of Colorado, to the effect that such right and the obligation to protect it existed anterior to any legislation upon the subject. (Coffin v. Left Hand Ditch Co., 6 Col., 443.)

The State constitution provides:

Water being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channels, its control must be in the state, which, in providing for its use, shall equally guard all the various interests involved.[19]

The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.[20]

Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.[21]

The constitution also provides for the offices of State engineer and board of control.[22] The board of control consists of the State engineer and superintendents of the four water divisions, the State engineer being president.

The statutes contain no statement as to what waters are appropriable. "Water right" is defined thus:

A water right is a right to use the water of the state, when such use has been acquired by the beneficial application of water under the laws of the state relating thereto, and in conformity with the rules and regulations dependent thereon. Beneficial use shall be the basis, the measure and limit of the right to use water at all times, not exceeding in any case, the statutory limit of volume. * * *[23]

The Wyoming water code provides for the acquirement of water rights by first making application to the State engineer for a permit and by taking the subsequent steps required to perfect the appropriation; for adjudications of water rights by the board of control; and for the distribution of water by the organization headed by the State engineer. The constitutionality of the law was considered at length and upheld in *Farm Investment Co.* v. *Carpenter*.[24]

Compliance with the State statutes governing the acquisition of water rights is a condition precedent to making a valid appropriation.[25] The court in that case declined to sanction a priority claimed to have been initiated since 1890, the year of enactment of the code, without conforming to the provisions requiring an application to the State engineer for a permit. Appeal from the State engineer's action upon an application may be taken to the board of control and thence to the court.

All statutory adjudications of water rights are initiated and made by the board of control, and are final unless appeals are taken to the courts. However, the board of control is not vested with exclusive jurisdiction of actions to determine priority of water rights, and such actions may be brought by claimants in the courts in proper proceedings.[26] It had been stated in the earlier case of *Farm Investment Co.* v. *Carpenter*, above referred to, that in the absence of a previous determination by the board, or in the courts, an inter-

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[19] Wyo. Const., art. I, sec. 31.
[20] Wyo. Const., art. VIII, sec. 1.
[21] Wyo. Const., art. VIII, sec. 3.
[22] Wyo. Const., art. VIII, secs. 2 and 5.
[23] Wyo. Rev. Stats. 1931. sec. 122–401.
[24] 9 Wyo. 110, 61 Pac. 258 (1900).
[25] *Wyoming Hereford Ranch* v. *Hammond Packing Co.* (33 Wyo. 14, 236 Pac. 764 (1925)); *Campbell* v. *Wyoming Dev. Co.* (55 Wyo. 347, 100 Pac. (2d) 124 (1940)).
[26] *Simmons* v. *Ramsbottom* (51 Wyo. 419, 68 Pac. (2d) 153 (1937)).

ested party may resort to the courts to obtain relief to which he can show himself entitled, and that the jurisdiction of the courts to grant relief remains as ample and complete after as well as before an adjudication by the board; but that a party may not relitigate a question which has passed into final adjudication. The board of control was held to act in an administrative capacity in guarding the interests involved in the use of water, but to possess quasi-judicial authority in adjudicating water rights.

With few exceptions, the statutory adjudications of claims which were based upon appropriations antedating the passage of the water code were completed by the board of control many years ago, the streams being taken up, one at a time, and separately adjudicated. In various cases rights on tributaries were determined in proceedings in which the rights on the main stream systems were not represented, the parties to one proceeding not being parties to the other; but provision has been made for reconciling these determinations.[27] Rights acquired under permits from the State engineer are also adjudicated by the board of control.

The State engineer has general supervision over the distribution of water. Pursuant to constitutional mandate,[28] the legislature has divided the State into four water divisions; and the board of control has further subdivided the State into water districts. The organization of division superintendents and district commissioners, headed by the State engineer, is charged with the administration of water priorities; and their control extends to all water rights, whether adjudicated or not. Any party injured by an act of the water commissioner may appeal to the division superintendent, thence to the State engineer, and thence to the court.

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[27] Wyo. Rev. Stats. 1931, sec. 122–137.
[28] Wyo. Const., art. VIII, sec. 4.

## Chapter 3

# DIFFUSED SURFACE WATERS

### Importance of the Problem

Waters which in their natural state are flowing vagrantly over the surface of the ground, or standing in bogs or marshes, from whatever source they may have originated, are diffused surface waters. Such waters necessarily are not concentrated in watercourses. The physical characteristics of diffused surface waters and the distinctions between such waters and watercourses have been discussed in chapter 1.

Until recent years questions concerning waters of this character arose chiefly between neighboring landowners, one of whom desired to prevent the water from flowing across his property from higher lands and claimed the right to cast it back upon his neighbor's land, and arose likewise in connection with the protection of land from overflow from streams. A minor percentage of the controversies dealt with the right of the landowner to make beneficial use of the water, and such controversies were primarily between individuals. Hence, until recently, the problem of riddance of diffused surface waters has been of more importance from a legal standpoint than has the right to make use of them.

The soil conservation and other programs upon which the Department of Agriculture is now engaged have raised important questions concerning the right of control and use of diffused surface waters. It has become necessary to ascertain the landowner's rights and liabilities with respect to such waters while on his land, not only as against his neighbor under common-law and civil-law principles, but as against the claims of appropriators on watercourses of which the diffused surface waters constitute part of the source of supply. More specifically, is the landowner's right to withhold such naturally flowing diffused waters an absolute right; or is it qualified by the rights of others; or is it subordinate to the rights of appropriators on the stream to which the waters would flow if not interfered with, and whose appropriative rights may be adversely affected by the landowner's operations? The present importance of the problem arises from the fact that large-scale operations for controlling diffused surface waters throughout the upper portions of a watershed may result in material alterations of the flow in the streams which drain the watershed.

### Ownership of Diffused Surface Waters as Between Owners of Lands Across Which They Flow

The purport of existing court decisions appears to be that as between two landowners who claim the right of use of diffused surface water, each landowner either "owns" the waters while on his land

or has a right to their use, and may subject them to use by capturing and retaining them on such lands, thereby reducing them to private possession. The method of capture and use, and of disposing of the unused residue, must be such as not to injure the lands of others.

The law of ownership of diffused surface waters is derived principally from judicial decisions. The only statutory declarations are those of North Dakota, Oklahoma, and South Dakota noted below, to the effect that the owner of land "owns" the water standing thereon, or flowing over or under the surface, but not forming a definite stream. The South Dakota statute has been construed by the courts.[1]

Various statutes specify waters subject to appropriation, as noted below. A few statutes have defined "watercourse," mostly in connection with specific legislation and without stating the ownership of waters not constituting watercourses; this has been discussed in chapter 1.

#### The Law of Diffused Surface Waters for the Most Part Is Distinct From the Law of Watercourses

It is fundamental that the law of watercourses as developed to the present time does not apply to diffused surface waters, except in those cases in which statutes are held to make such waters appropriable. No decision has been found to the contrary. A large body of law has grown around the physical distinctions between watercourses and diffused surface waters, as a basis for applying or not applying the law of watercourses to the facts of a given case.

Riparian rights attach only to definite watercourses, or to lakes or other bodies of water, and not to diffused surface waters.[2] The existence of watercourses was held to have been established, as against contrary contentions, and riparian rights held to attach to such watercourses, in *Lindblom* v. *Round Valley Water Co.*,[3] and in *Humphreys-Mexia Co.* v. *Arsenaux*.[4] See also *Lux* v. *Haggin*,[5] in which the existence of a watercourse to which riparian rights attached was questioned by one of the parties; also *Schaefer* v. *Marthaler*,[6] in which the laws governing watercourses were held to apply after diffused surface waters had entered a pond. Corpus Juris states that as riparian rights do not attach to diffused waters, the lower proprietor cannot require their flow to his land; [7] an Alabama case [8] cited in support of the above statement involved damages for flooding property, but the court stated that while riparian rights on streams constitute a part of the land, such rights do not attach to diffused surface water. The South Dakota decision noted below in connection with appropriative rights was also cited.

Appropriative rights likewise have been held to attach only to watercourses and not to diffused surface waters, in the absence of some statute authorizing the appropriation of waters of this char-

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[1] *Benson* v. *Cook* (47 S. Dak. 611, 201 N. W. 526 (1924)); *Terry* v. *Heppner* (59 S. Dak. 317, 239 N. W. 759 (1931)).

[2] See Gould, A Treatise on the Law of Waters, 3d ed., p. 535; Kinney, A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. I, p. 518; and Wiel, Water Rights in the Western States, 3d ed., vol. I, p. 380.

[3] 178 Calif. 450, 173 Pac. 994 (1918).

[4] 116 Tex. 603, 297 S. W. 225 (1927).

[5] 69 Calif. 255, 10 Pac. 674, 764 (1886).

[6] 34 Minn. 487, 26 N. W. 726 (1886).

[7] 67 C. J. 864, Waters, sec. 287.

[8] *Southern Ry.* v. *Lewis* (165 Ala. 555, 51 So. 746 (1910)).

acter.[9] Several text writers have stated the general principle that diffused surface waters are not subject to appropriation.[10] The Supreme Court of South Dakota has held both that riparian rights do not attach to diffused surface waters and that the appropriation doctrine does not apply.[11] In the language of the court:

> There is no right on the part of a lower proprietor to have surface water flow to his land from upper property. A landowner is entitled to use surface water as he pleases so long (and so long only) as it continues in fact to come upon his premises. He may drain or divert the same or he may capture, impound, and use it in such fashion as he will, provided only that he does not thereby create a nuisance or unlawfully dam back or cast the waters upon the land of another.

In this case, both litigants were attempting to secure possession of waters which the court classified as diffused surface waters. The Wyoming and Idaho Supreme Courts have spoken with equal directness.[12] It should be noted that the riparian doctrine is recognized in South Dakota, and the exclusive appropriation doctrine in Wyoming and Idaho, so that the basic distinction between those doctrines was not determinative of the question. The New Mexico Supreme Court has held likewise regarding waters which clearly fell within the classification of diffused surface waters, although the opinion of the court in the case in point did not state what the waters were.[13]

In still other cases the courts have distinguished the waters in controversy from diffused surface waters, or have defined a watercourse to which rights could be maintained, and upheld the existence of watercourses to which appropriative rights attached, thus indicating that different rules applied to the two classes of waters.[14] See also *Jacob* v. *Lorenz*,[15] in which it was held that diffused surface water draining into a ditch, though not the subject of appropriation, added to the value of the ditch.

On the contrary, as noted in Corpus Juris, special statutes relating to priorities in the use of waste, seepage, and spring waters have been construed in certain cases as applicable to diffused surface waters which were differentiated in those cases from running streams.[16] This matter is discussed in more detail in the latter portion of this chapter in connection with the question of the appropriability of diffused surface waters. (See p. 129 and following.)

### Where the Right of a Landowner to Utilize Diffused Surface Waters on His Land Has Been Directly in Issue, the Decisions of the Western Courts Have Been to the Effect That He May Appropriate Them to His Own Use, Although the Question Has Been Squarely Decided in Comparatively Few Jurisdictions

The decisions of the western courts, although not numerous on this point, have held that the owner of the land on which such waters

[9] 67 C. J. 967, Waters, sec. 412.

[10] See Farnham, The Law of Waters and Water Rights, vol. III, p. 2572; Kinney, id., pp. 518–519; and Wiel, id.

[11] *Terry* v. *Heppner* (59 S. Dak. 317, 239 N. W. 759 (1931)). See also *Benson* v. *Cook* (47 S. Dak. 611, 201 N. W. 526 (1924)).

[12] *Wyoming* v. *Hiber* (48 Wyo. 172, 44 Pac. (2d) 1005 (1935)); *Riggs Oil Co.* v. *Gray* (46 Wyo. 504, 30 Pac. (2d) 145 (1934); *King* v. *Chamberlin* (20 Ida. 504, 118 Pac. 1099 (1911)); *Washington County Irr. Dist.* v. *Talboy* (55 Ida. 382, 43 Pac. (2d) 943 (1935)); see also *Binning* v. *Miller* (55 Wyo. 451, 102 Pac. (2d) 54 (1940)).

[13] *Vanderwork* v. *Hewes* (15 N. Mex. 439, 110 Pac. 567 (1910)).

[14] *Geddis* v. *Parrish* (1 Wash. 587, 21 Pac. 314 (1889)); *Hutchinson* v. *Watson Slough Ditch Co.* (16 Ida. 484, 101 Pac. 1059 (1909)); *Hoefs* v. *Short* (114 Tex. 501, 273 S. W. 785 (1925)); *Barnes* v. *Sabron* (10 Nev. 217 (1875)).

[15] 98 Calif. 332, 33 Pac. 119 (1893).

[16] 67 C. J. 967, Waters, sec. 412; *Denver, Texas & Fort Worth R. R.* v. *Dotson* (20 Colo. 304, 38 Pac. 322 (1894); *Borman* v. *Blackmon* (60 Oreg. 304, 118 Pac. 848 (1911)).

occur, "owns" such waters and may appropriate them to his own use even though by so doing he may deprive a lower landowner of the opportunity of receiving and using them, where his right to do this has been squarely presented and passed upon. The decisions cited as exceptions in the discussion immediately above, and which were based upon special statutes, nevertheless involved rights of way for ditches; and while the statute in each case gave the owner of land on which such waters arose the prior right to their use, this statutory preference was not involved and the right of the landowner to use the water as against an attempted appropriator was not passed upon. There appears to be little if any dissent from this, as a general principle, in the jurisdictions in which the question has been directly raised. It should be noted at this point, as brought out later in detail, that the controversies thus decided have been between owners of land across which the waters flowed, or between landowners and others who claimed to have appropriated the waters directly, and have not involved the claims of appropriators or riparians on undisputed watercourses that the diffused surface waters were tributary thereto and were necessary to the enjoyment of their rights on the watercourses.[16a]

The Texas Supreme Court has held that this general principle applies to diffused surface waters on lands granted prior to enactment of the appropriation statute, but expressed no opinion as to whether it applied to diffused surface waters on lands granted subsequently, as that question was not involved.[17] The use of diffused surface waters was not involved in the controversy, but the question of whether they were public waters under the appropriation statute, and therefore governed by the antipollution statute, was in issue.

### The Lower Landowner Therefore Cannot Require Continuance of the Flow From Higher Lands

As a corollary, the lower landowner has no right to require an upper landowner to allow such waters to flow off the upper and upon the lower land for the exclusive benefit of the latter.[18] Nor can he acquire a prescriptive right to such water, nor any right (except by grant) to have the upper owner continue the flow. In *Garns* v. *Rollins* [19] the water was waste from irrigation, but the court considered it in the same category as diffused surface water, so far as the right of a lower proprietor to have it flow to his land is concerned. The court stated:

> The law is well settled, in fact the authorities all agree, that one landowner receiving waste water which flows, seeps, or percolates from the land of another cannot acquire a prescriptive right to such water, nor any right (except by grant) to have the owner of the land from which he obtains the water continue the flow.

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[16a] In the English case of *Broadbent* v. *Ramsbotham* (11 Ex. 602, 156 Eng. Reprint 971 (1856)), the controversy was between the claimant of right of use of a stream and the occupant of land on which the tributary waters arose.

[17] *Turner* v. *Big Lake Oil Co.* (128 Tex. 155, 96 S. W. (2d) 221 (1936)).

[18] *Terry* v. *Heppner* (59 S. Dak. 317, 239 N. W. 759 (1931)); *Benson* v. *Cook* (47 S. Dak. 611, 201 N. W. 526 (1924)); *Wyoming* v. *Hiber* (48 Wyo. 172, 44 Pac. (2d) 1005 (1935)); *Binning* v. *Miller* (55 Wyo. 451, 102 Pac. (2d) 54 (1940)).

[19] 41 Utah 260, 125 Pac. 867, Ann. Cas. 1915 C, 1159 (1912). The note in Ann. Cas. 1915 C 1165 states it to be an established rule that a landowner cannot acquire a prescriptive right to the continued flow of waste water from the land of another. See, generally, as to the matter of acquiring prescriptive rights to the flow of water from or past higher lands, pages 41, 296, and 399, herein.

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It was held in *Green* v. *Carotta*[20] that a lower landowner, who through the revocable license of an upper landowner had been using the waste from waters collected on the upper land from a spring, could not enjoin disturbance of the flow from the upper to the lower land.

The fact that the lower owner had no right to require continuance of the flow was held to be the case in the absence of a specific conveyance in *Buffum* v. *Harris*.[21] In *Curtiss* v. *Ayrault*,[22] it was held that this was the general rule, but that an artificial condition under which the waters were made to flow to lower lands, existing at the time of conveyance, could be required by the grantee of the lower lands to be continued.

### The General Rule That Diffused Surface Waters Belong to the Landowner Is Stated in Numerous Dicta and in Textbooks

Numerous dicta are found to support the general rule, in cases involving the avoidance or riddance of diffused surface waters, where the right to utilize the waters was not in issue.[23]

In *Frazier* v. *Brown*[24] it was stated that this seems to be the established doctrine, unless some right derived from actual contract or positive legislation intervenes.

In *Swett* v. *Cutts*[25] the general rule was modified by giving each landowner, "while in the reasonable use and improvement of his land, the right to make reasonable modifications of the flow of such water in and upon his land," the action being for damages caused by forcing diffused surface waters back upon the lands of plaintiff.

Chandler, Harding, Kinney, and Wiel in their texts on water law have stated this to be the general rule.[26] Other authors have stated that this is the rule under the common law, but that under the civil law the lower proprietor had certain rights to the flow of such waters.[27]

It is stated in Ruling Case Law[28] that the owner of the soil is generally held to have the absolute right to the surface water thereon, but that the rule in some jurisdictions has apparently been qualified to limit the upper proprietor's right of appropriating the waters to the quantity needed for reasonable use of his land. *Swett* v. *Cutts*, supra, cited in support of this qualification, was an action for damages caused by forcing waters back upon other lands.

The general principle that diffused surface waters belong to the owner of the land on which they occur is the law in England.[29]

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[20] 72 Calif. 267, 13 Pac. 685 (1887); see also Farnham, id., p. 2572.

[21] 5 R. I. 243 (1858).

[22] 47 N. Y. 73 (1871).

[23] *Miller* v. *Letzerich* (121 Tex. 248, 49 S. W. (2d) 404 (1932)); *Republic Production Co.* v. *Collins* (41 S. W. (2d) 100 (Tex. Civ. App. 1931)); *Gibbs* v. *Williams* (25 Kans. 214, 37 Am. Rep. 241 (1881)); *Town* v. *Missouri Pac. Ry.* (50 Nebr. 768, 70 N. W. 402 (1897)); *Barkley* v. *Wilcox* (86 N. Y. 140, 40 Am. Rep. 519 (1881)); *Noyes* v. *Cosselman*, 29 Wash. 635, 70 Pac. 61 (1902)); *Schaefer* v. *Marthaler* (34 Minn. 487, 26 N. W. 726 (1886)).

[24] 12 Ohio St. 294 (1861).

[25] 50 N. H. 439, 9 Am. Rep. 276 (1870).

[26] Chandler, Elements of Western Water Law, p. 38; Harding, Water Rights for Irrigation, p. 9; Kinney, id., p. 519; Wiel, id., p. 379.

[27] Gould, id., pp. 538-539; Farnham, id., p. 2572. Domat, J., The Civil Law in Its Natural Order, Cushing ed. (1853), vol. I, par. 1583, p. 616, states that if rainwater or other waters "have their course regulated" from one tract to another, the upper proprietor cannot change the course of the water to the prejudice of the lower proprietor.

[28] 27 R. C. L. 1138, 1139.

[29] See Coulson and Forbes, The Law Relating to Waters, 4th ed., pp. 105, 201. This was held to be the case in *Rawstron* v. *Taylor* (11 Ex. 369, 156 Eng. Reprint 873 (1855)) and *Broadbent* v. *Ramsbotham* (11 Ex. 602, 156 Eng. Reprint 971 (1856)). See *Bradford Corporation* v. *Ferrand* (2 Ch. (1902)).

Although some authors have stated that under the civil law the lower owner had at least some rights to the flow of diffused surface waters from the upper land, none of the western decisions read have held that to be the case where the right to utilize the water was in controversy. On the contrary, the Texas court has stated that under the rule of the Mexican civil law, rainwater falling on one's property belongs to the owner, to do with as he pleases, so long as it remains there, in the absence of some prescriptive or contractual right; and that in general the rule of the common law with respect to diffused surface water is the same as that of the civil law, aside from the much-disputed "common-enemy doctrine," to the effect that diffused surface waters are a common enemy and may be fought off in any way the landowner can best get rid of them, even though their diversion may injure the adjoining landowner.[30]

Farnham draws a distinction between such waters spread over the surface of the ground and those collected in rather definite drainage lines (although not watercourses). He states [31] that under the rule of the civil law, as stated by Domat, the waters, in order to prevent interference by the lower owner, must have had "their course regulated," implying "something more than a mere general diffusion of water over the surface of the ground, merely finding its way without definite course from higher to lower property." [32]

The greater number of decisions dealing with waters of this class refer to efforts to ward off or get rid of the waters, rather than to capture and utilize them; and Farnham's comprehensive discussion deals almost entirely with drainage and is approached from that standpoint. It would serve no useful purpose, in this discussion, to review these essentially drainage principles and the disputes over the common-enemy doctrine, for they appear to have little bearing upon the right of a landowner to capture and utilize diffused surface waters which a lower owner likewise wishes to capture and utilize—aside from the dicta contained in the opinions. It is sufficient to note, at this point, that no distinction has been found in the western decisions between the common-law (or common-enemy) rule and the civil-law rule with respect to the ownership of diffused surface water found on one's land.[32a]

## Methods by Which Diffused Surface Waters May Be Subjected to Possession and Use

### Diffused Surface Waters May Be Subjected to Possession and Use by Any Process of Capturing and Retaining Them on One's Own Lands That Does Not Injure the Lands of Others

So long as diffused surface waters remain on one's land, the holdings of the courts have been that they are the property of the landowner, or subject to his disposition, as indicated above. They may be reduced

[30] *Miller v. Letzerich* (121 Tex. 248, 49 S. W. (2d) 404 (1932)).
[31] Farnham, id., p. 2586; see also footnote 27, *supra*.
[32] See also id., p. 2605.
[32a] In a recent article Kinson, S. V., and McClure, R. C., Interferences with Surface Waters, 24 Minn. Law Rev., No. 7, pp. 891–939 (June 1940), point out that the rule that the possessor of higher land has an unqualified privilege of appropriating surface water thereon, and that the possessor of lower land has no right to the continued flow to his land, has been followed in "common-enemy" jurisdictions, in jurisdictions committed to the civil-law rule, and in some jurisdictions in which the courts have not yet clearly accepted any one of the three major views of the law of such waters, i. e., common enemy, civil law, or reasonable use.

to physical possession by any means that does not create a nuisance or damage the lands of others.[33] There appear to be no court decisions to the contrary.

It necessarily follows that when diffused surface waters have flowed from the lands of one proprietor to those of a lower proprietor, they pass from the "ownership" of the former and become subject to the "ownership" of the latter. Therefore, to be made available for use by a landowner, these waters must be captured by him before they leave his lands.

Once reduced to physical possession, these waters become private property.[34]

Waters subject to the ownership or use of the landowner and reduced to the status of personal property may be used in any manner that is consistent with the public safety and that does not injure other property. There is ample authority for stating that these waters may be used for agricultural or other purposes on the lands on which captured, for such uses have been involved in western cases cited heretofore. The judgment in *Rasmussen* v. *Moroni Irrigation Co.*[35] to the effect that a landowner may not divert drainage waters held tributary to a watercourse to the substantial injury of prior appropriators, was modified by allowing him to use such waters on lands other than those from which drained if there is no substantial, material loss to the river appropriators. There appears to be no legal hindrance against the use of such waters on lands other than those on which captured, at least in the jurisdictions in which the courts have ruled definitely that such waters are the absolute property of the landowner. The laws governing watercourses, which in some instances limit the use of waters to certain lands, do not apply to diffused surface waters. The situation is analogous to that under the original common-law doctrine of the absolute ownership of ground waters, which permitted the landowner to extract ground water from his lands and transport it to distant lands regardless of the damage to other lands dependent upon the common ground-water supply.[36]

The law of ownership of diffused surface waters is comparatively undeveloped at the present time. Occasions for its development have been meager in contrast with those influencing the law of watercourses and of ground waters. Development in this country of the originally analogous law of ground waters has been definitely away from the theory of absolute ownership on the part of owners of overlying lands. So far as diffused surface waters are concerned, it is a reasonable assumption that extensive efforts to interfere with their free flow will result, in some jurisdictions, in some measure of modification of the absolute ownership rule. This is discussed further in the last portion of this chapter.

### The Residue of Unused Water Must Be Disposed of in Such Manner as Not to Injure Other Lands

In many instances of capture and utilization of diffused surface waters it is inevitable that there will be a residue of unused water,

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[33] *Terry* v. *Heppner* (59 S. Dak. 317, 239 N. W. 759 (1931)); *King* v. *Chamberlin* (20 Idaho 504, 118 Pac. 1099 (1911)).

[34] *King* v. *Chamberlin* (20 Idaho 504, 118 Pac. 1099 (1911)).

[35] 56 Utah 140, 189 Pac. 572 (1920).

[36] See Wiel, id., pp. 970–972, and discussion in chapter 4 below, concerning the rule of absolute ownership of percolating ground waters.

which must be disposed of. This is a part of the water that would have flowed to lower lands if the upper landowner had not detained it by artificial means. His action amounts to a technical interference with the natural flow of these waters from upper to lower lands.

However, to deny an upper landowner the right to have the residue flow from his lands to the lower lands in a reasonable manner would practically defeat or at least seriously interfere with his right to capture and utilize diffused surface waters, where he is held to have such right, for in many instances there will be no other outlet for the residue. If the upper landowner has the right to make a consumptive use of these waters while on his lands, and so handles the operation that the flow of the residue to the lower lands does them no injury, this use by the upper landowner is not unreasonable. It is therefore to be expected that he will be protected in a reasonable method of drainage.

Neither the civil-law rule nor the common-law rule as generally applied in this country gives a landowner the right to accumulate diffused surface waters artificially and cast them upon lower lands in such manner as to injure the latter.[37] Farnham states,[38] citing numerous authorities: "A well-settled rule is that surface water cannot be gathered together and cast in a body on the property of the lower owner." Nor does the fact that the drainage was done in the ordinary use and cultivation of the farm, create an exception. No dissent from this has been found in any of the cases read in connection with the present study. Thus the plan of using diffused surface waters for agricultural or other purposes must be such as to avoid this result.

### The Court Decisions Have Not Placed Any Limitation Upon the Character of Structure Which May Be Used for the Purpose of Capturing and Utilizing Diffused Surface Waters

Diffused surface waters may be captured or impounded by the landowner is such fashion as he chooses, provided only that he does not create a nuisance or injure the lands of others in so doing.[39]

The structures involved in most of the western decisions have been dams in channels or depressions. Reservoirs were thereby created, replenished by the accumulation of waters which the courts held to be diffused surface waters. In *Vanderwork* v. *Hewes*,[40] the waters were collected into a ditch and used for irrigation. In *Republic Production Co.* v. *Collins*,[41] rain water was collected in a large artificial tank.

The result of using a dam and reservoir is to accumulate a quantity of water susceptible of practicable use, or to retain water for use when needed. The result of capturing water by means of a ditch, or by plow furrows or low dikes or levees, is to control it for immediate use. If the landowner owns these waters so long as they are on his lands, or has the right to subject them to ownership and use, there is no limitation in water-right law upon the type of structure which he may employ to reduce them to private possession.

[37] Farnham, id., p. 2594; Kinney, id., p. 1145; *Miller* v. *Letzerich* (121 Tex. 248, 49 S. W. (2d) 404 (1932)).
[38] Farnham, id., p. 2578.
[39] *Terry* v. *Heppner* (59 S. Dak. 317, 239 N. W. 759 (1931)).
[40] 15 N. Mex. 439, 110 Pac. 567 (1910).
[41] 41 S. W. (2d) 100 (Tex. Civ. App. 1931).

The Montana statute provides that an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate them. It does not say that a landowner may not capture such waters on his own land by any other method.

However, the right of a landowner to collect waters in a channel or depression on his land is limited to those situations in which the channel or depression does not constitute a watercourse or form part of a watercourse. In the cases cited above, it was held that the channels did not constitute watercourses. Had they been held to be watercourses, the law of watercourses, and not that of diffused surface waters, would have been applied. This involves important factual distinctions and some conflicts which have been discussed in chapter 1.

Various States have statutes providing State administrative control over the construction of dams exceeding specified heights or impounding water in excess of specified quantities. Dams which exceed these designated limitations may be constructed only after securing a permit and the approval of State officials. These statutes have nothing to do with water rights or with the ownership of diffused surface waters; they are designed to protect the public from the hazards of improper construction of impounding dams. To that extent they provide limitations upon the character of dam by which a landowner may impound diffused surface waters even upon his own land.

## The Problem of Correlating Rights to Stream Waters and Tributary Diffused Surface Waters

All surface waters which augment the flow in watercourses, or which would reach watercourses if not intercepted by artificial means, obviously are physical sources of supply of such watercourses, so that the stream and its diffused surface tributaries are in reality a common water supply. However, the laws governing diffused surface waters have not been adequately correlated with the law of watercourses. The question as to whether waters diffused over the ground are tributary to watercourses, in the sense that the right to have them flow unimpeded to those streams belongs as a right of property to the holders of rights on the watercourses of which they form a source of supply, has not been squarely decided by the western courts. The closest approach is in dicta to the effect that the appropriator is entitled to all sources of supply, diffused surface waters not being involved in the controversies.

In some States diffused surface waters have been held to be the absolute property of the landowner; but in such cases the question of withholding waters from an appropriated stream of which they constituted a source of supply was not involved, and the rights of stream appropriators in relation to the diffused surface waters were not passed upon.

Conclusions as to the ownership of diffused surface waters, which constitute the proven source of supply of a watercourse, obviously cannot be drawn with certainty at this time; it is possible only to make assumptions, based upon a study of the factors involved. On this basis, the reasonable assumption is that in most Western States

surface waters flowing in channels, which do not in themselves constitute watercourses but which are directly traceable in their flow to watercourses and are a part of the supply thereof, belong to the watercourse. It is also a reasonable assumption that in many of the Western States diffused surface waters not yet concentrated in channels are subject to the right of the landowner to make a reasonable use of such waters while on his own lands. Exceptions are noted in the discussion below.

It is to be expected that the public welfare aspect of a program of watershed protection and erosion control will be of importance in controversies over interferences with the flow of diffused surface waters, particularly where it is shown that the program will not involve substantial and permanent injury to the rights of river appropriators.

### (A) Diffused Surface Supplies of Watercourses

#### ALL DIFFUSED SURFACE WATERS WHICH AUGMENT THE FLOW OF STREAMS ARE PHYSICAL SOURCES OF SUPPLY THEREOF, BUT THE DECISIONS ARE SILENT AS TO WHETHER THEY CONSTITUTE LEGAL TRIBUTARIES

Diffused surface water, the flow of which, if not intercepted by artificial devices, would reach a watercourse, is in physical fact an obvious source of supply of that watercourse. This is true whether the water flows in a diffused state into the stream channel over its banks, or whether it first collects in a channel which in itself does not constitute a watercourse in legal theory but which discharges its accumulations of diffused surface water into a watercourse.

It is also true that diffused surface water which sinks into the ground and later comes to the surface in a watercourse is one of its sources of supply, though not an immediate source. Part of the water diffused over the ground evaporates, part collects in surface channels, and part sinks into the ground. Most ground water, in turn, is moving to maintain the flow of surface streams. (See ch. 1 on the classification of diffused surface waters and ground waters.)

Various court decisions recognize that watercourses may be composed partly or largely of water which before entering the stream was diffused surface water.[42] Some decisions hold that streams originating wholly from rainfall are watercourses.[43]

The implication of the court decisions is that diffused surface waters are recognized as sources of supply of watercourses, regardless of the question of ownership of such waters before they enter a watercourse. It is recognized that they can be physically tributary to watercourses; but the question as to whether they are legally tributary—whether they "belong" to the watercourse—has seldom, if ever, been directly involved in supreme court decisions.

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[42] *Pyle* v. *Richards* (17 Nebr. 180, 22 N. W. 370 (1885)); *Rait* v. *Furrow* (74 Kans. 101, 85 Pac. 934 (1906)); *Lindblom* v. *Round Valley Water Co.* (178 Calif. 450, 173 Pac. 994 (1918)); *Barnes* v. *Sabron* (10 Nev. 217 (1875)); *Globe* v. *Shute* (22 Ariz. 280, 196 Pac. 1024 (1921)); *Gray* v. *Reclamation District* (174 Calif. 622, 163 Pac. 1024 (1917)); *Price* v. *Oregon Ry.* (47 Oreg. 350, 83 Pac. 843 (1906)); *Eastern Oregon Land Co.* v. *Willow River Land & Irr. Co.* (201 Fed. 203 (C. C. A. 9th, 1912)); *In re German Ditch & Res. Co.* (56 Colo. 252, 139 Pac. 2 (1913)).

[43] *Humphreys-Mexia Co.* v. *Arsenaux* (116 Tex. 603, 297 S. W. 225 (1927)); *Hoefs* v. *Short* (114 Tex. 501, 273 S. W. 785 (1925)); *Jaquez Ditch Co.* v. *Garcia* (17 N. Mex. 160, 124 Pac. 891 (1912)).

The only case touching on this point, found in a search of western cases, is *Eastern Oregon Live Stock Co.* v. *Keller.*[44] That decision does not answer the question; for although the waters in controversy, stated by the court to be "a kind of surface water," were in the watershed of the watercourse, there was a controversy as to whether they were, strictly speaking, physically tributary to the stream, and their use was not shown to have injured the downstream appropriators. All the case decides, in this relation, is that a downstream prior appropriator who fails to show that he is injured by a subsequent use of diffused surface water in the watershed, cannot restrain the use of such water.

### (B) Rights Governed by State Law

#### THE LAWS OF EACH STATE WILL DETERMINE WHETHER DIFFUSED SURFACE WATERS BELONG IN THAT STATE TO THE WATERCOURSE

It has been shown in chapter 2 that Congress, by its desert land legislation, left to each State the decision as to what system of water law should be applied to water on lands of the public domain thereafter passing to private ownership. In *California-Oregon Power Co.* v. *Beaver Portland Cement Co.*,[45] the Supreme Court stated, with reference to the Desert Land Act of 1877:[46]

> The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named.

The States concerned are Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

It was further stated:

> What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since "Congress cannot enforce either rule upon any state," *Kansas* v. *Colorado*, 206 U. S. 46, 94, the full power of choice must remain with the state.

The phrase "all non-navigable waters then a part of the public domain" leaves no room for doubt that each of the States concerned was left free to apply its own rule of law not only to nonnavigable watercourses, but to the ownership of diffused surface waters on private lands severed from the public domain since March 3, 1877, at least; and to determine for itself not only whether the doctrine of appropriation should apply to watercourses on such lands, but whether it should or should not be extended to include diffused surface waters thereon.

Further, as noted in chapter 2, the Supreme Court has consistently recognized the right of each State to adopt its own system of water law, regardless of the question as to whether the lands affected were

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[44] 108 Oreg. 256, 216 Pac. 556 (1923).
[45] 295 U. S. 142 (1935).
[46] 19 U. S. Stat. 377 (March 3, 1877).

once part of the public domain.[47] In *Connecticut* v. *Massachusetts*[48] the Court said:

> And every State is free to change its laws governing riparian ownership and to permit the appropriation of flowing waters for such purposes as it may deem wise.

It is the State laws, therefore, that must be looked to in this matter.

WHETHER THE STATE HAS ADOPTED THE COMMON LAW RULE OR THE CIVIL LAW RULE AS TO DIFFUSED SURFACE WATERS DOES NOT APPEAR TO CONTROL THE QUESTION OF APPROPRIABILITY OF SUCH WATERS

Several Western States have adopted the civil law rule as to diffused surface waters, notwithstanding the applicability of the common law as the rule of decision generally. For example, although the common law prevails generally in California as the rule of decision, the civil law rule concerning the drainage of diffused surface water was adopted in *Ogburn* v. *Connor*,[49] and the principle has been reaffirmed in many subsequent decisions. Colorado also adopted the civil law rule for such cases in *Boulder* v. *Boulder & White Rock Ditch & Reservoir Co.*,[50] and Nevada did the same in *Boynton* v. *Longley*.[51] These cases involved the drainage of such waters, not their capture as against the right of a lower landowner who wanted the water.

It has been noted above that the decisions in the western civil-law States have not accorded the lower landowner any rights to the continued flow of diffused surface water from upper lands not accorded in the common-law (or common-enemy) States; also that the Texas court has stated that in general the rules of the common law and civil law are, in that respect, the same.

In considering the appropriability of diffused surface waters, the question as to whether the State has adopted one rule or the other does not appear to be controlling.

### (C) Dedicated and Appropriable Waters

MOST OF THE WESTERN STATES HAVE DEDICATED WATERS TO THE PUBLIC, AND SEVERAL HAVE SO DEDICATED ALL WATERS. THE PURPOSE HAS BEEN TO EFFECTUATE THE BENEFICIAL USE OF WATER. THESE ACTS OF DEDICATION ARE SUBJECT TO VESTED RIGHTS. IN STATES IN WHICH DIFFUSED SURFACE WATERS ARE OR SHOULD BE HELD TO BELONG TO THE LANDOWNER, A DEDICATION TO THE PUBLIC CANNOT DIVEST THE RIGHTS OF LANDS THEN IN PRIVATE OWNERSHIP

A State may provide, either in its constitution or by legislative enactment, that all the waters within its boundaries are the property of the public, subject to regulation and control by the legislature. Such a dedication is subject to the rights of the Federal Government over navigation and as an owner of public land, and to private rights

[47] *United States* v. *Rio Grande Dam & Irr. Co.* (174 U. S. 690 (1899)); *Clark* v. *Nash* (198 U. S. 361 (1905)); *Kansas* v. *Colorado* (206 U. S. 46 (1907)).
[48] 282 U. S. 660 (1931).
[49] 46 Calif. 346, 13 Am. Rep. 213 (1873).
[50] 73 Colo. 426, 216 Pac. 553 (1923).
[51] 19 Nev. 69, 6 Pac. 437 (1885).

vested at the time of dedication.[52] Most of the Western States have made such dedication, as to all or a portion of waters within the State. These dedicatory provisions are summarized, by States, with citations, in chapter 2. (See p. 78.)

The purpose of dedicating waters to the public, or to the State, has been to vest control in the State over the application of water to beneficial uses under the doctrine of appropriation.

The dedication of waters to the public in the constitutions or statutes refers to *all* waters in California, Nevada, North Dakota, Oregon, South Dakota, Utah, and Washington, and therefore includes diffused surface waters. The Oklahoma dedication statute, which included diffused surface waters in areas in which irrigation was beneficial for agriculture, has been repealed. The Texas statute includes diffused surface waters.

However, in South Dakota the Supreme Court, without passing upon the effect of the dedication statute, has ruled specifically that diffused surface waters belong to the landowner. It may be noted that in *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.*,[53] involving a statutory adjudication of the waters of a creek claimed under appropriative and riparian rights, the dedicatory provision was held unconstitutional so far as it related to or interfered with vested property rights, and that it was subsequently amended by adding, at the beginning of the section, the clause "Subject to vested private rights." Furthermore, the South Dakota court has broadened the conception of diffused surface waters to include certain channel flows that in other jurisdictions would be held to be watercourses.[54] The decisions of the South Dakota Supreme Court were based on the construction of a statute which was originally part of the civil code of the Territory of Dakota,[55] and which was carried over into the statutes of North Dakota as well as those of South Dakota.[56] The North Dakota Supreme Court may or may not construe the statute similarly as to ownership of diffused surface waters, or at least as to lands passing to private ownership prior to the dedication; but even if the North Dakota court should adopt the South Dakota court's construction of the statute, it does not necessarily follow that the latter court's views as to what constitutes a definite stream will be adopted in North Dakota, particularly in view of the fact that another North Dakota statute defines "watercourse" in terms more in line with the generally accepted definitions.[57]

The Texas court has stated that the statute cannot affect rights previously accrued, but offered no opinion as to the rights of lands subsequently passing to private ownership.[58]

The effect of the Oklahoma dedication, and its subsequent repeal, has not been passed upon by the Oklahoma Supreme Court. The dedication section was quoted in a supreme court decision, but it was only the appropriation feature of the statute that was under consideration.[59]

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[52] Kinney, A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. I, p. 637 et seq.

[53] 32 S. Dak. 260, 143 N. W. 124 (1913).

[54] *Benson* v. *Cook* (47 S. Dak. 611, 201 N. W. 526 (1924)); *Terry* v. *Heppner* (59 S. Dak. 317, 239 N. W. 759 (1931)).

[55] Terr. Dak., Civ. Code, sec. 255 (approved Jan. 12, 1866).

[56] N. Dak. Comp. Laws, 1913. sec. 5341; S. Dak. Code 1939, sec. 61.0101.

[57] N. Dak. Comp. Laws, 1913, sec. 5341a.

[58] *Turner* v. *Big Lake Oil Co.* (128 Tex. 155, 96 S. W. (2d) 221 (1936)).

[59] *Gay* v. *Hicks* (33 Okla. 675, 124 Pac. 1077 (1912)).

Nor does it appear that the supreme courts of the other States named above have yet had occasion to pass upon the effect of dedication upon diffused surface waters.

As to the Western States other than those named above, the dedicatory provisions, at this time, refer specifically to waters of various classes, none of which are diffused surface waters.

Of course the terms of dedication may be broadened at any time. Some of the acts of dedication have been changed from time to time to make them more comprehensive. For example, as recently as 1935 the Utah statute was changed to include *all* waters, the statute prior to amendment having referred to the water of all streams and other sources, flowing above or under the ground in known or defined natural channels.

The dedication of waters to the public is always subject to private rights vested prior to the dedication. A State may not dedicate private water rights to the public unless the owners are compensated for their loss. For this reason riparian rights already vested can be divested neither by a dedication of the waters [60] nor by any proceeding under an appropriation statute.[61] And rights of landowners, whatever they may be, to the use of rain waters falling upon their lands, cannot be abrogated by a statutory declaration that such waters are public waters,[62] although they are doubtless subject to regulation under the State's police power.

While it is possible that a dedication of diffused surface waters to the public could be made to apply more literally to such waters appearing upon lands in public ownership at the time of the dedication than to waters appearing upon lands already in private ownership, it seems improbable that the dedicatory statutes will receive any such dual application. It is more probable that the correlation of the rights to diffused surface waters and waters in surface streams will proceed by means of a redefinition of the rights which are inherent in the ownership of the land. As indicated in the discussion below, even in those States in which diffused surface waters have been held to be the absolute property of the landowners, it is believed that the way is still open to holding such private rights subject to a reasonable use in relation to reasonable uses of the stream waters.

## WATERS SUBJECT TO APPROPRIATION ARE SPECIFIED IN THE STATUTES OF THE WESTERN STATES

It has been shown that the right to appropriate water is a statutory right, originating in local customs and sanctioned by early legislation upheld in the courts.[63] Each of the Western States, by constitutional or statutory provisions, has specified the waters that shall be subject to appropriation. These provisions are given for each State in the appendix.

The discussion of this chapter is concerned only with waters on the surface of the earth. The appropriability of such natural surface waters, as found in the State statutes, may be classified as follows:

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[60] *Bigelow* v. *Draper* (6 N. Dak. 152, 69 N. W. 570 (1896)).
[61] *Crawford Co.* v. *Hathaway* (67 Nebr. 325, 93 N. W. 781 (1903)).
[62] *Turner* v. *Big Lake Oil Co.* (128 Tex. 155, 96 S. W. (2d) 221 (1936)).
[63] See ch. 2 herein; Wiel, id., p. 66 ff; Kinney, id., p. 1038 ff.

*All waters.*—The statutes of Nevada, Utah, and Washington make all such natural waters available for appropriation. Appropriation is subject to existing rights, but no other exceptions are stated.

The list of appropriable waters in the Texas statute is broad enough to include all natural surface waters.

The North Dakota and South Dakota statutes refer to waters of all sources of water supply, though South Dakota excepts navigable waters; but other statutes of these States provide limitations in favor of landowners, as stated below.

The Oregon statute covers all water, with certain designated streams excepted; but another statute refers specifically to ground waters of certain classes only, and still another refers to waste, spring, and seepage waters and provides certain limitations in case of landowners, as stated more fully below.

The Montana statute refers to the unappropriated water of any natural source of supply, and also states the manner in which one may appropriate flood, seepage, and waste waters.

*Watercourses.*—The statutes of Colorado, Idaho, Kansas, New Mexico, and Wyoming refer primarily to watercourses by the use of the terms "river" or "natural stream." Those of Idaho and Wyoming refer also to springs and lakes, and Idaho to seepage and waste water. Colorado properly belongs in this group—natural streams, natural flowing springs, seepage, and waste water. (See discussion under "D," below.) The New Mexico statutes include both perennial and torrential streams.

*Canyons, ravines, coulees.*—In addition to streams, and in some instances lakes and springs, the Arizona, California, Montana, Nebraska, and Texas statutes authorize the appropriation of water flowing in such natural channels as canyons, ravines, or coulees. The flow of water in a canyon or ravine may or may not conform to the generally accepted definitions of a watercourse, but the statutes of these States specifically provide that such flows may be appropriated.

Arizona includes both perennial and intermittent flows, and flood and waste water. Montana, in addition to the unappropriated water of "any * * * natural source of supply," authorizes the appropriation of flood, seepage, and waste waters by impounding them in reservoirs. Texas includes storm, flood, or rain waters of all rivers, natural streams, canyons, ravines, depressions, or watersheds; but, as shown below, it has been held that this statute does not apply to rain waters on lands granted prior to enactment of the statute.[64]

*Limitations in favor of landowners.*—Several States by statute have given landowners preferential rights to certain waters. These are entirely aside from the common-law rights of owners of land riparian to watercourses, recognized in greater or less degree in various Western States. (See ch. 2.)

The statutes of North Dakota and South Dakota provide that waters from all sources of supply may be appropriated, though South Dakota excepts navigable waters. Oklahoma does not now state what natural waters are appropriable, although an otherwise complete appropriation code is provided applying to anyone "intending to

[64] *Turner* v. *Big Lake Oil Co.* (128 Tex. 155, 96 S. W. (2d) 221 (1936)).

acquire the right to the beneficial use of any water." The 1897 statute dedicating certain waters and subjecting them to appropriation was repealed in 1910. However, the statutes of all three of these States (North Dakota, Oklahoma, South Dakota) provide that the owner of land owns the water standing thereon, or flowing over or under its surface, but not forming a definite stream. These are believed to be the only unequivocal statutory declarations of ownership by the landowner of diffused surface water in the West. The South Dakota supreme court has held that a flow of short duration, from rainfall and snow, even though in a well defined channel, is not a definite stream within the meaning of the statute, and therefore not subject to appropriation.[65] An Oklahoma decision quoted this statute, but held that under the evidence the water involved was a definite stream and that therefore the parties had reciprocal rights.[66] Another Oklahoma decision, while not concerned with waters on the surface, holds that the statement that the landowner "owns" the waters under his lands other than in a definite stream does not give him a right of ownership free from the limitations usually applied to ownership of other kinds of property, and that his use must be reasonable.[67] It may be noted in this connection that a recent Oklahoma act authorizes financial assistance from counties to individual farmers in the building of ponds or reservoirs for the purpose of capturing, detaining, and conserving surface, subterranean, and drainage water which may be in or which may flow over their lands.[68]

North Dakota and South Dakota each has a special procedure for appropriation, by holders of agricultural land, of flood waters in channels not exceeding designated fractions of a second-foot during the greater part of the year—the "dry draw law." The South Dakota court has held that water in a channel, not constituting a "definite stream," may not be appropriated under this law, as such water "belongs" to the landowner.[69]

The Oregon statute authorizes the appropriation of all waters except water in certain named watercourses. However, it also provides that while ditches for the utilization of waste, spring, or seepage waters shall be governed by the same rules of priority as those diverting from running streams, the owner of land on which such waters first arise shall have the right to their use. A similar Colorado statute gives the prior right in such case to the landowner, if the waters can be used on his lands. The construction of these statutes by the supreme courts of Colorado and Oregon is discussed below in connection with the effect of appropriation statutes upon diffused surface waters. (See p. 129.)

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[65] *Terry* v. *Heppner* (59 S. Dak. 317, 239 N. W. 759 (1931)); *Benson* v. *Cook* (47 S. Dak. 611, 201 N. W. 526 (1924)).
[66] *Broady* v. *Furray* (163 Okla. 204, 21 Pac. (2d) 770 (1933)).
[67] *Canada* v. *Shawnee* (179 Okla. 53, 64 Pac. (2d) 694 (1936)).
[68] Okla. Sess. Laws 1937, ch. 35, art. 5, sec. 3, amended by Sess. Laws 1939, ch. 35, art. 8, pp. 224–225.
[69] *Benson* v. *Cook* (47 S. Dak. 611, 201 N. W. 526 (1924)).

WATERS SUBJECT TO APPROPRIATION IN THE MAJORITY OF THE WESTERN STATES CONSIST OF THOSE WATERS DEDICATED TO THE PUBLIC

In nine of the Western States the waters subject to appropriation under the terms of the statute are identical with the waters dedicated to the public.

In North Dakota and South Dakota all waters are so dedicated, and are made appropriable except as to navigable waters in South Dakota; but an early territorial statute, still in effect in each State, provides that certain waters belong to the landowner, as above stated. The effect of the dedication statute upon the operation of this early statute has not been construed in either State, although in South Dakota, as heretofore shown, the dedication statute has been amended to make the dedication specifically subject to vested private rights.

The Oklahoma dedication statute was repealed in 1910. Kansas has no dedication statute. Nevada and Oregon have dedicated all waters, but each provides for the appropriation of only part of the ground waters, and Oregon makes other reservations noted above. Idaho has dedicated the waters flowing in natural channels, etc., and then provided that subterranean waters may be appropriated. California in the civil code has dedicated all water to the public, and in the water commission act has dedicated to the public all waters in natural channels except those required for reasonable beneficial use on riparian lands or otherwise appropriated; and the supreme court has recently stated that this dedication of excess waters in the water commission act is implicit in the new State policy imposing reasonable beneficial use on the exercise of all water rights.[70] (See ch. 2, p. 83.)

The effects of discrepancies between acts of dedication and acts authorizing appropriation would appear to be:

1. Waters not specifically declared to be the property of the public nevertheless become public waters in law when made subject to appropriation.

Waters which are private property, or the use of which is a right of private property, cannot be subjected to appropriation by the public. Hence the effect of the appropriation statute is to make the stated waters public, except as to waters held by the courts to be private waters. Dedication of waters to the public may also be accomplished by court decision; for example, it is the court decisions in Colorado which have put ground waters tributary to a stream on the same basis as the stream itself, insofar as appropriative rights are concerned.

2. Diffused surface waters are impliedly dedicated to the public by the civil code in California, but not made directly appropriable by statute; and it is the dedication by the water commission act of excess waters in natural channels that has been specifically upheld by the court. Inasmuch as the courts of that State have coordinated rights to surface streams and tributary ground waters on a basis of reasonable beneficial use (see discussion in ch. 4, p. 202), the same reasoning may be found applicable to diffused surface waters tributary to watercourses.

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[70] *Meridian* v. *San Francisco* (13 Calif. (2d) 424, 90 Pac. (2d) 537 (1939)).

### (D) Effect of Appropriation Statutes Upon Diffused Surface Waters

IN THE STATES IN WHICH THE APPROPRIATION STATUTES APPLY LITERALLY TO DIFFUSED SURFACE WATERS, THE COURTS NEVERTHELESS HAVE NOT YET HELD THAT WATERS DIFFUSED OVER THE GROUND ARE SUBJECT TO EXCLUSIVE APPROPRIATION AGAINST THE WILL OF THE LANDOWNER, AT LEAST IF HE WISHES TO MAKE USE OF THEM IN GOOD FAITH ON THE LAND ON WHICH THEY OCCUR. HOWEVER, RIGHTS HAVE BEEN RECOGNIZED TO THE USE OF DRAINAGE WATERS ACQUIRED BY USAGE OF LONG STANDING, AS AGAINST THE LANDOWNER; AND IN SOME STATES THE COURTS HAVE MADE BROAD STATEMENTS TO THE EFFECT THAT ALL WATERS PHYSICALLY TRIBUTARY TO A STREAM SYSTEM ARE LEGALLY A PART OF THE STREAM AND SUBJECT TO THE CLAIMS OF PRIOR APPROPRIATORS THEREON

Harding states: [71]

The statutes regarding waters open to appropriation vary in the different states. In some states, all waters are made subject to appropriation; even in such states this has not been held to apply to the uncollected runoff; such wording affects ground-water rights however.

*Nevada and Washington.*—The language of the Nevada and Washington dedication and appropriation statutes, being all-inclusive, literally includes diffused surface waters, as shown heretofore. However, appropriation is subject to existing rights. If diffused surface waters are held by the courts to belong to the landowner under all circumstances, appropriation of such waters by others is necessarily subject to the right of the landowner to capture them for his own use. So far as a search of cases has disclosed, the courts of Nevada and Washington have not yet held squarely that the landowner has or has not this right, though there is a dictum in Washington to the effect that he "owns" such waters.[72] It may be noted in this connection that a Washington statute enacted in 1890 provided that ditches for the utilization of waste, seepage, and spring waters should be governed by the same laws as those diverting from streams, the owner of the lands upon which the seepage or spring waters first arose to have the prior right thereto if capable of being used upon his lands; [73] but that this was repealed in the enactment of the water code in 1917.[74]

*Utah.*—The Utah dedication of waters to the public is likewise all-inclusive; it came about in 1935, when comprehensive legislation on ground waters was enacted. It would appear from the decisions that as between two landowners, at least if their titles antedated the dedication, each has the right to make use of the diffused surface water on his land, but does not have an exclusive right to such water if it is a source of supply of a completely appropriated stream.

It was held in *Garns* v. *Rollins*,[75] that water seeping or percolating from one tract to another, arising from irrigation on the upper tract, was "nothing more in fact and in law than surface or waste water" to the continued flow of which the lower owner could acquire no right by prescription or otherwise except by grant. This was a contro-

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[71] Harding, id., pp. 24, 25.
[72] *Noyes* v. *Cosselman* (29 Wash. 635, 70 Pac. 61 (1902)).
[73] Wash. Sess. Laws 1889–90, p. 710, sec. 15.
[74] Wash. Sess. Laws 1917, ch. 117, sec. 47, p. 468.
[75] 41 Utah 260, 125 Pac. 867, Ann. Cas. 1915 C, 1159 (1912).

versy between two adjacent landowners, and did not involve appropriative rights. Based upon this decision, it was held in *Roberts* v. *Gribble*[76] that a landowner was entitled to drain his land and use the seepage water so produced for irrigation on his own land, where the seepage had resulted from irrigation on adjoining land, as against an appropriator of water in a stream to which the seepage would have percolated if not so intercepted.

The later decision in *Rasmussen* v. *Moroni Irrigation Co.*[77] involved the right of an owner of land to reuse water drained from his land, the seepage waters having resulted from the irrigation of lands watered from a tributary to a stream to which the return waters would seep if not interfered with, as against an appropriator of water from such stream, all its waters having been appropriated. The court stated that as *Roberts* v. *Gribble* had been based upon *Garns* v. *Rollins*, the facts of the latter case took it out of the principles which must control the instant case; that if the *Roberts case* should be so construed as to make it applicable to the facts of the case at bar, then that decision must be distinguished and if necessary so modified as to limit it to the facts of the *Garns case.* It was therefore held that the seepage and runoff which would reach the stream if not interfered with, belonged to that stream; and that the landowner might drain his land and use the drainage water, but could use it only if the return flow could be returned to the stream in substantially the same manner and quantity as in case of the original return flow.

In such cases the rights of prior appropriators may not be interfered with, not even by the owners of lands from, through, or underneath the surface of which the seepage and percolating water passes on its return to the stream or river system.

It was also stated that an appropriator acquires a right to all of the sources of supply, whether visible or invisible, or whether underneath or on the surface.

Water coming directly from rain and melting snow was not in controversy in these Utah cases; they dealt with return waters from irrigation. The apparent effect of the decisions, however, is that an appropriator on a stream is protected from substantial interference with tributary sources of supply of the stream, even from acts of interference by the owner of land on which such tributary waters are found to occur. Another statement concerning the right of a stream appropriator to all sources of supply has been made as recently as 1938, in *Richlands Irrigation Co.* v. *Westview Irrigation Co.*[78] This was a proceeding for adjudication of water rights, and a contest arose over the interpretation of a clause in a stipulation giving one appropriator certain rights to water "accumulating" and "yielded" in the river between two dams. The trial court had held that the meaning of such words must be confined to water coming into the river from flowing or percolating sources on either side of the channel; but the supreme court refused to accede to this limitation and stated:

The entire watershed to its uttermost confines, covering thousands of square miles, out to the crest of the divides which separate it from adjacent water-

[76] 43 Utah 411, 134 Pac. 1014 (1913).
[77] 56 Utah 140, 189 Pac. 572 (1920).
[78] 96 Utah 403, 80 Pac. (2d) 458 (1938).

sheds, is the generating source from which the water of a river comes or accumulates in its channel. Rains and snows falling on this entire vast area sink into the soil and find their way by surface or underground flow or percolation through the sloping strata down to the central channel. This entire sheet of water, or water table, constitutes the river and it never ceases to be such in its centripetal motion towards the channel. Any appropriator of water from the central channel is entitled to rely and depend upon all the sources which feed the main stream above his own diversion point, clear back to the farthest limits of the watershed.

The statements in these *Rasmussen* and *Richlands* decisions as to the right of an appropriator on the stream to the use of its tributary waters, are very sweeping indeed. Whether the owner of land on which rain waters fall would be restrained from interfering with the flow of such waters before they become concentrated in channels, if the stream appropriator brings suit to enjoin such interference, remains to be seen; and it is possible that these decisions may be construed as controlling precedents for so restraining him if the interruption of the flow results in a substantial diminution of the appropriator's water supply. Nevertheless, neither decision involved the right of a landowner to capture and use rain waters while still in a diffused state on his own land. Hence, the Utah courts may not necessarily be foreclosed by their own decisions from allowing a reasonable use of diffused surface waters on the land on which they are found; and this would seem to be particularly the case where such use is an integral part of a soil- and water-conservation program and where it does not result in substantial and permanent injury to appropriators on the stream into which such waters would flow if not interfered with. This matter is further discussed under "G," below.

*North Dakota and South Dakota.*—While the appropriation statutes of these States dedicate all waters from all sources of supply to the public and make such waters appropriable (except navigable waters in South Dakota), an earlier statute still in force in both States declares that the owner of land owns water standing on it or flowing over it if not forming a definite stream. Attention has heretofore been directed to the fact that the South Dakota court has upheld this statute as vesting in the landowner the right to diffused surface water on his land; that is, water not forming a definite stream.[79]

*Colorado and Oregon.*—Oregon by statute has dedicated all waters to the public and with certain exceptions, made all unappropriated waters subject to appropriation, whereas the constitutional dedication in Colorado applies only to the waters of natural streams. However, the courts in Colorado have extended the appropriative principle to percolating waters tributary to streams and have made broad statements concerning the claims of stream appropriators upon sources of supply. Furthermore, these two States have similar statutes subjecting waste, seepage, and spring waters to the same rules of priority as those of running streams, but giving a preferred right of use to the owners of lands on which such waters arise, and both of these statutes have been interpreted with respect to surface

[79] *Benson* v. *Cook* (47 S. Dak. 611, 201 N. W. 526 (1924)); *Terry* v. *Heppner* (48 S. Dak. 10, 201 N. W. 705 (1924); 59 S. Dak. 317, 239 N. W. 759 (1931)).

waters not in watercourses. It is therefore desirable to consider the two States together.

A fairly early Colorado case [80] involved the right-of-way of a ditch built across public land of the United States for the conveyance of water from a canyon for irrigation use on occupied public land. The canyon was not a running stream, but the water came entirely from rainfall in the surrounding hills. A railroad secured a right-of-way across the ditch from a party who had procured title to the intervening land after the ditch had been constructed. It was held that this was a valid appropriation of water under the statute in question, and as the ditch had been constructed on the public domain the land which it crossed was subject to the ditch easement.

In a subsequent Oregon case [81] an appropriation had been made of water from a gulch on public land, the source of supply being melting snows which flowed for several months in the spring in a clearly marked channel which emptied into a creek. The flow in this channel in the gulch was held to be that of a watercourse, subject to appropriation; but the court held that under another view of the subject of appropriation, the right to appropriate this water was valid under the statute providing that the laws governing priorities in the water of running streams should apply to ditches for the utilization of waste, spring, or seepage waters. This statute had been substantially copied from the Colorado statute which the Colorado Supreme Court, as above stated, had held applicable to water in a canyon, not a running stream, but fed entirely from rainfall in the surrounding hills; and the construction of that statute in Colorado appeared to the Oregon court "to be reasonable, and has our approval." The Oregon court stated further that the statutory preference in favor of the owner of land on which such waters arise did not apply under the circumstances of this case; and that even if it were not clearly established that the gulch was a watercourse for the purpose of appropriation,

> still, under our statute, water flowing there, even from surface water collected in the place, would be the subject of appropriation.

The court also referred to the Congressional Desert Land Act of March 3, 1877, which made the water, not only of lakes and rivers, but also other sources of water supply on the public domain and not navigable, the subject of appropriation.

> The conditions about the watershed of Quartz Gulch make it clearly a situation where the water is the subject of appropriation, under the liberal terms of the act of Congress referred to.

Hence one who subsequently entered land across which a ditch had been constructed to convey this water to a place of use, took the land subject to that burden.

Each of these cases, then, involved the question of a right-of-way across public land in favor of one who had appropriated water from a canyon or gulch, and not the right of the owner of lands on which such waters arose to use them as against an appropriator whose appropriation was made after the passing of the lands to private ownership.

In the light of subsequent Colorado decisions construing this statute, the preference accorded the owner of lands on which such

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[80] *Denver, Texas & Fort Worth R. R.* v. *Dotson* (20 Colo. 304, 38 Pac. 322 (1894)).
[81] *Borman* v. *Blackmon* (60 Oreg. 304, 118 Pac. 848 (1911)).

waters first arise would not apply if the waters constituted part of the supply of an appropriated stream. The court stated in 1905 that if valid at all, the statute is applicable only to appropriations of waste, seepage, and spring waters before they reach the channel or bed of a natural stream.[82] In the more recent case of *Haver* v. *Matonock*[83] it was held that where waters of a spring form no part of a natural stream, and their ordinary flow never could reach its channel either by surface flow or percolation except where carried along as part of a flood, the owner of the land on which the spring is located and who has made use of the spring waters, even though not continuously, may not be divested of his prior right by others who seek to initiate an appropriation of such waters. The language in the first opinion in *Nevius* v. *Smith*[84] tended to cast some doubt on this, but the case was eventually decided upon the point that the spring waters in litigation were actually a part of an appropriated stream, so that the principle of *Haver* v. *Matonock* has not been squarely rejected. In any event, the only waters to which a landowner has been specifically allowed the statutory preference were waters not tributary to an appropriated stream.

It is shown in chapter 5, in discussing rights to the use of spring waters in Oregon, that the landowner's first right to the use of a spring on his land has been upheld where it is not the source of a watercourse,[85] and denied where the spring discharges into a natural stream.[86] It has been stated heretofore in the present chapter that in *Eastern Oregon Live Stock Co.* v. *Keller*[87] a permit had been obtained from the State to appropriate what the court termed "a kind of surface water, and is not taken from any regular stream," but that the question as to whether this was a true appropriation was not involved; and as it was not shown that the use injured a prior appropriator in the watershed who claimed that such water was a part of his appropriated supply, the use could not be restrained.

The application of the statute in question to run-off from higher lands which may not have conformed to the strict definition of "waste, seepage, or spring waters" has therefore been upheld in both States; but in one case the waters had entered a canyon and in the other case they were flowing in a gulch. Furthermore, the right of a landowner to interfere with or capture or impound diffused surface water on his own land before it had collected in a natural channel was not involved in either instance. It would also appear, in both States, that such waters upon collecting in a natural channel and shown to be regularly a part of the supply of a watercourse on which appropriative rights have been established, would be subject to such established rights.

The Colorado courts in many decisions have held that the sources of supply of a stream system constitute a part of the stream flow and are subject to prior appropriative rights on the system as a whole; and that the sources of supply include seepage and return waters and percolating ground waters which if not intercepted by

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[82] *La Jara Creamery & Live Stock Assn.* v. *Hansen* (35 Colo. 105, 83 Pac. 644 (1905)).
[83] 79 Colo. 194, 244 Pac. 914 (1926).
[84] 86 Colo. 178, 279 Pac. 44 (1928, 1929).
[85] *Morrison* v. *Officer* (48 Oreg. 569, 87 Pac. 896 (1906)); *Henrici* v. *Paulson* (134 Oreg. 222, 293 Pac. 424 (1930)).
[86] *Low* v. *Schaffer* (24 Oreg. 239, 33 Pac. 678 (1893)); *Hildebrandt* v. *Montgomery* (113 Oreg. 687, 234 Pac. 267 (1925)).
[87] 108 Oreg. 256, 216 Pac. 556 (1923).

artificial means would eventually reach the stream. (See ch. 4.) The Colorado Supreme Court, in *In re German Ditch and Reservoir Co.*,[88] where a question had been raised as to whether a "natural stream" under the State constitution could be such if composed principally of waste and seepage from irrigation, stated that the word "tributaries" included all sources of supply which went to make up the natural stream, and that:

> The volume of these streams is made up of rains and snowfall on the surface, the springs which issue from the earth, and the water percolating under the surface, which finds its way to the streams running through the watersheds in which it is found.

Further, the words:

> "natural stream" as used in the constitution were intended to be used in their broadest scope and include within their definition all the streams of the state supplied in the manners above referred to, including tributaries and the streams draining into other streams.

The percolating ground waters involved in the Colorado decisions were, in the main, return water from irrigation, but necessarily included ground waters which had resulted from the penetration of diffused water into the soil. Waters so penetrating into the ground from rain and snow constitute the principal supply of many watercourses.

As a result of the consistent trend of the Colorado decisions in extending protection of appropriative rights on streams to all sources of supply, a question may be raised as to whether diffused surface waters would be excluded from the application of this principle if the question should be squarely raised. This is discussed in greater detail under "G," below.

*Montana.*—The statute, in addition to authorizing the appropriation of unappropriated water of watercourses, ravines, coulees, springs, lakes, or other natural sources of supply, states that an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate them. Hence, to the extent that diffused surface waters may be held to conform to the classification of flood, seepage, or waste waters, they may be impounded and thereby appropriated under this statute. Although the appropriator under the statute may capture such waters in his reservoir, there is still a serious question as to whether under ordinary circumstances he can compel an upper landowner to allow diffused surface waters to flow off the high land and into the reservoir on the lower land for the exclusive benefit of the latter. The Montana court apparently has not passed directly upon the point, in the absence of a long-established usage of drainage waters, but several decisions cast doubt upon the matter. It was stated in *Popham* v. *Holloron*,[89] concerning this statute, which was not controlling because of its late enactment and the applicability of which was questioned in any event:

> Prior to its enactment we had no provision for the appropriation of flood, seepage, and waste waters as such, and, in the absence of statutory authority to make use of such vagrant or fugitive water, no right could be acquired as against the owner who seeks to recapture them (*Stookey* v. *Green*, 53 Utah, 311, 178 Pac. 586), but, having passed beyond control of the owner they became "abandoned personalty" which could be taken up and used by the person first in the field * * *.

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[88] 56 Colo. 252, 139 Pac. 2 (1913).
[89] 84 Mont. 442, 275 Pac. 1099 (1929).

However, in *Popham* v. *Holloron* the waters had reached a watercourse and become a part thereof, and the right of a landowner to recapture them was not involved. In *Newton* v. *Weiler* [90] a lower landowner was seeking to compel an upper landowner to allow waste waters to flow to the lower land. The court held that the lower landowner had made a valid appropriation of the waste water, and that:

Defendant, as the proprietor of his land, has the right to use his land as he pleases, and has the right to change the flow of the waste waters thereon in the reasonable enjoyment of his own property, subject to the limitation embraced in the maxim, " '*Sic utere tuo ut alienum non laedas*,' or as is said in some of the cases, the use must be without malice or negligence."

The defendant, therefore, might not maliciously or arbitrarily change the flow of the waste waters to plaintiff's detriment, and must let them flow down as before if it could be done without substantial injury to his own property, particularly as some of the waters had come from lands other than those of defendant. A subsequent decision, *Rock Creek Ditch and Flume Co.* v. *Miller*,[91] citing *Newton* v. *Weiler*, stated:

* * * the owner of the right to use the water—his private property while in his possession—may collect it, recapture it, before it leaves his possession, but after it gets beyond his control it thus becomes waste and is subject to appropriation by another.

In a later case involving the adjudication of water rights, *Wills* v. *Morris*,[92] an appropriator of water from a stream objected to the granting of an appropriative right to an owner of land to which a drainage ditch led from higher land in the watershed of the stream. The water collecting in the drain came partly from springs but in large measure from seepage from irrigation of the higher land, the water for such irrigation having come from a source other than the stream in litigation. The landowner had utilized these drainage waters for irrigation since construction of the ditch. The supreme court held that as there was no evidence to the effect that, if the seepage waters were not collected in the drain and not utilized therefrom by the appropriator thereof the waters of the stream would have been augmented above their existing flow, and as the diversion of the drainage waters by the lower landowner was made after their loss by the owner of the land on which they arose, these waters when collected in the drain ditch were subject to appropriation and the appropriation in question was valid as against the protesting appropriator on the stream.

As recently as 1938 it was held, in *West Side Ditch Co.* v. *Bennett*,[93] that the fact that seepage water arises on one's land does not, of itself, necessarily give the landowner the exclusive right thereto, so as to prevent others from acquiring rights to such water. This was a case in which plaintiffs had appropriated water from a natural channel in 1900; in 1901 predecessors of defendant built a drainage system to drain a marsh into the natural channel, the marsh waters consisting of percolation and seepage from the irrigation of higher lands; and in 1925 defendants made an appropriation from the channel and contended that plaintiff's appropriation should be limited to the natural flow of the channel to the exclusion of the water added from the drainage ditch. It was held that this drainage increment was not developed

[90] 87 Mont. 164, 286 Pac. 133 (1930).
[91] 93 Mont. 248. 17 Pac. (2d) 1074 (1933).
[92] 100 Mont. 514. 50 Pac. (2d) 862 (1935).
[93] 106 Mont. 422, 78 Pac. (2d) 78 (1938).

water, for it would have reached the channel irrespective of the drainage ditch. Defendant had not attempted to make beneficial use of the water for 24 years after construction of the drain. The drainage system in contemplation of law amounted to only a change of the channel of the appropriated stream, so that the drainage waters inured to the benefit of the prior appropriator.

The waters in all these cited Montana cases were waste waters from irrigation. Such waters in the *Rock Creek case* were stated by the court to be the property of the irrigator while on his own land and under his physical control, for the irrigation waters from which they were derived constituted his private property. In the *Wills case* the fact that the drainage waters were diverted after their loss by the owner of land on which they arose was emphasized. In the *West Side Ditch case* the landowner was held to have no prior right to the seepage arising on his land and drained into a channel, where he had made no beneficial use of such waters for 24 years and where the drainage ditch had become in contemplation of law part of the natural stream channel.

A search of the Montana decisions had disclosed no case in which the supreme court has held that diffused surface waters from rain and melting snow are the property of the owner of land on which they occur. That they are the landowner's property is, of course, the general rule; and the implication of the foregoing Montana decisions is that a landowner has the right to make at least a reasonable use of such waters while they remain on his land, as against an appropriator on the stream to which they would flow if not intercepted, unless foreclosed by reason of circumstances such as those in the *Newton* and *West Side Ditch cases.* As to the landowner, some further question may be raised as to the effect of an appropriation of "flood, seepage, and waste waters" by impounding them, where it is shown that such waters are of regular recurrence and constitute part of the supply of an appropriated stream. The statute apparently is broad enough to protect the right of the prior appropriator on the watercourse against interceptions of water flowing in ravines or coulees which discharge into the watercourse; but a case might well arise in which precipitation is intercepted by means of furrows prior to entrance into a natural channel and thence drained into a reservoir. In the event that the landowner undertakes to make a reasonable use of waters from rain and melting snow, particularly those resulting from precipitation on his own land, such waters may conceivably be treated as "flood, seepage, and waste waters" of which he may make an independent appropriation under the statute by impounding them in a reservoir.

*Texas.*—The Texas statute authorizes the appropriation of storm, flood, or rain waters in any watercourse, canyon, ravine, depression, or watershed. This literally includes diffused surface waters, certainly if they are flowing in a natural channel or depression and regardless of the attributes of the channel as a watercourse; and if literally construed, the statute may be held to include rain waters not yet concentrated in drainage channels within the watershed.

The Texas court has stated in a recent case [94] that in the light of the constitution and of the common law and Mexican civil law, the owners of land on which rains fall and surface waters gather are the proprietors of the water so long as it remains on their land and prior to entrance into a natural watercourse to which riparian rights may attach. This case did not involve the use or appropriation of diffused surface waters, but did involve the question as to whether they were public waters of the State to which the anti-pollution statute applied. It was stated that while the appropriation statute might be construed to make such waters public waters, nevertheless the right of the landowner to rain water falling on his land is a property right which vested in him when the grant was made and cannot be taken from him by the Legislature. Consequently, to sustain the validity of this section of the appropriation statute, the court would be compelled to say that it could not affect diffused surface waters on lands granted prior to the statute; but no opinion was expressed as to whether it applied to lands granted subsequently, as that question was not involved.

*In general.*—The statutes of several States, then, either in general or specific terms or by implication, make diffused surface waters public waters subject to appropriation. However, no case has been found in which, in the absence of special circumstances such as long-continued use of specific drainage waters or malicious interception by the upper landowner, the courts have yet gone to the extent of holding that waters resulting from precipitation and still diffused over the ground are subject to exclusive appropriation as against the right of a landowner to intercept and utilize them while still on his land, on the ground either that such waters had been specifically appropriated by another, or that they constituted part of the supply of an appropriated stream and that their flow over the land and into the stream was necessary to satisfy the prior appropriative rights attaching to the watercourse. The courts of some States, on the other hand, have made sweeping statements as to the rights of stream appropriators to all sources of supply, and in such jurisdictions there is a question as to whether such application of the appropriation doctrine would be made in a contest between an appropriator and an owner of land who wished to intercept and use the diffused surface waters on his land.

EXCEPT WHERE A SPECIAL STATUTE PREVAILED, DIFFUSED SURFACE WATERS UPON COLLECTING IN CHANNELS HAVE BEEN HELD IN MOST CASES SUBJECT TO APPROPRIATION ONLY WHERE THE CHANNELS WERE HELD TO BE WATERCOURSES, IF THE CLASSIFICATION OF THE WATER WAS IN CONTROVERSY

Arizona, California, and Nebraska, in addition to Montana and Texas, extend the appropriation statute to waters in canyons, ravines, and coulees—in other words, definite natural channels. As some channels of this character might otherwise be held to be not watercourses, but subject to the law of diffused surface waters, the apparent effect of these provisions is to exempt from appropriation only those diffused

[94] *Turner* v. *Big Lake Oil Co.* (128 Tex. 155, 96 S. W. (2d) 221 (1936)).

surface waters not yet concentrated in channels of the character specified in the statutes.

With respect to California, Harding [95] states:

> Section 1410 of the Civil Code of California defined waters open to appropriation as "running water flowing in a river or stream or down a canyon or ravine." This was intended as the equivalent of water flowing in a natural watercourse. Water not flowing in a regular channel, such as the uncollected runoff resulting from direct precipitation, may be taken at will by the owner of the land on which the supply originates (see ch. ii). When such runoff has collected sufficiently to form a regular channel, it becomes subject to all the rights to use that may exist on such a stream. The point at which the runoff passes from the control of the landowner and becomes a part of the flow of a stream is a question of fact in each case; the dividing line is difficult to draw under some physical conditions.

With the exception of Texas, the courts of these five States have not yet construed these dedicatory and appropriation provisions as to their effect upon the rights of landowners on whose property diffused surface waters may be flowing in channels other than watercourses; and the Texas court has not done so in a controversy between the two classes of claimants.

Where, in controversies over the use of water flowing in channels, the courts have classified the waters as diffused surface waters, the holdings in most cases have been that they belonged to the landowner and were not subject to appropriation by others. The New Mexico court stated, in *Vanderwork* v. *Hewes:* [96]

> It would be doing violence to the Act of 1907, to hold, that the Territorial Engineer was empowered by it, to authorize another applicant to go upon lands held in private ownership, construct ditches and appropriate seepage water or waters from snows, rain or springs, not traceable to or forming a stream or water course, or from constructed works, as the limitations contained in sections 1 and 53, defining the waters over which the engineer has been given jurisdiction, plainly indicates.

The Idaho court, in *King* v. *Chamberlin*,[97] stated that the State engineer had no right to grant permits to one man to use another's property, in that case an artificial collection of diffused surface water, which the landowner had a right to collect on his own land in any manner that did not injure someone else.

The effect of the Colorado and Oregon statutes subjecting waste, spring, and seepage waters to appropriation has been discussed immediately above. The statutes were respectively interpreted as applicable to waters in a canyon, not a running stream, and to waters flowing in a gulch irrespective of its character as a watercourse; but the rights of the owners of lands on which such waters originated were not involved. Generally, however, it appears that where diffused surface waters had become concentrated in channels and where the classification of the waters was in controversy, the courts have either held the waters to be diffused surface waters and therefore not subject to the law of watercourses, or they have held the channels to be watercourses and the waters therefore subject to appropriation or to vested riparian rights.

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[95] Harding, id., p. 24.
[96] 15 N. Mex. 439, 110 Pac. 567 (1910).
[97] 20 Idaho 504, 118 Pac. 1099 (1911).

### (E) Present Lack of Coordination of Rights

CONTROVERSIES OVER THE APPROPRIABILITY OF DIFFUSED SURFACE WATERS HAVE NOT INVOLVED THE RIGHTS OF CLAIMANTS ON WATERCOURSES, OF WHICH THE DIFFUSED WATERS CONSTITUTE A SOURCE OF SUPPLY. RIGHTS TO DIFFUSED SURFACE WATERS HAVE NOT BEEN ADEQUATELY CORRELATED WITH RIGHTS TO WATERCOURSES

There appear to be no decisions in which the right of a claimant to water in a watercourse was pitted against the right of a landowner to impound diffused surface waters which the former contended to be a part of the source of supply of the watercourse. *Eastern Oregon Live Stock Co.* v. *Keller*[98] is the closest approach yet found, but it is not decisive, as stated heretofore. The connection between diffused surface waters which sink into the ground and eventually come to the surface in streams is even more remote and has not been the subject of court decisions.

The controversies reaching the State supreme courts, other than those concerning waste from irrigation, have been between parties who claimed to own or to have appropriated directly the diffused surface waters; and these waters were flowing in channels which the courts were called upon to classify either as diffused surface waters or as watercourses. As shown immediately above, where the waters were classified as diffused surface waters, the right of the owner of land on which they occur to use them has been upheld as against the right of another to appropriate them; and in those cases in which the waters (other than waste) were held subject to appropriation under a special statute, the right of the owner of land on which they arose was not involved.

The result is that the rights to the use of diffused surface waters have not yet been adequately correlated with the rights of appropriators and riparian owners on the watercourses to which the diffused surface waters are physically tributary.

### (F) Tributary Surface Waters in Channels

WATERS NOT PUBLIC, AND NOT SUBJECT TO DIRECT APPROPRIATION UNDER THE STATUTE, DO NOT BELONG TO APPROPRIATORS ON A STREAM AS PART OF THE SOURCE OF SUPPLY

Waters not subject to direct appropriation under the statutes, and not dedicated to the public or held by the courts to be public waters, cannot be claimed as a part of the supply of appropriable streams.

Only public waters may be appropriated, as shown heretofore. If a given supply of water cannot be appropriated because it is private property, then it of course does not belong to the public and could not have been included in the public waters which were appropriated from the watercourse, or in the waters of that watercourse to which private riparian rights attach.

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[98] 108 Oreg. 256, 216 Pac. 556 (1923). The right to drain such waters from land, as against the claimant of the use of a stream fed by such waters, was upheld in the English case of *Broadbent* v. *Ramsbotham* (11 Ex. 602, 156 Eng. Reprint 971 (1856)).

Nor can a right based solely upon prescription be claimed, unless there is an actual interference with possible uses above the point of diversion. Generally speaking, there can be no adverse use by lower claimants against those above, so far as watercourses are concerned, inasmuch as in most cases downstream use cannot interfere physically with the flow from upstream sources of supply; the exceptions being those cases in which the one claiming the adverse use had actually invaded the right of the upstream owner, such as by going on his land to make the diversion. (See ch. 6, p. 399.) As this principle applies to watercourses, there appears to be no reason why it does not apply with equal force to water in tributary channels however classified.

### IN MOST WESTERN STATES THE RIGHT OF AN APPROPRIATOR ON A WATERCOURSE PROBABLY INCLUDES THE RIGHT TO THE CONTINUED FLOW OF TRIBUTARY SURFACE WATERS FLOWING IN CHANNELS, PARTICULARLY IF SUCH WATERS HAVE BEEN DEDICATED TO THE PUBLIC, REGARDLESS OF WHETHER THEY ARE INCLUDED IN THE LIST OF WATERS SPECIFIED IN THE STATUTE AS SUBJECT TO DIRECT APPROPRIATION, AND NOTWITHSTANDING THE FACT THAT SUCH CHANNELS UNDER OTHER CIRCUMSTANCES MIGHT NOT BE HELD TO BE WATERCOURSES

One of the cardinal principles of the appropriation doctrine is that the appropriator is protected from injury to his right through interference with the flow of water from which he has made his appropriation. This protection has been extended in many decisions to the flow of upstream tributaries; an attempted diversion of water from an upstream tributary, at a time when needed by prior appropriators below on the main stream, will be enjoined.[99] The need of this protection is obvious; for unlimited acquisition of rights on tributaries would eventually deprive the main-stream prior appropriators of their water supply and thus destroy their water rights.

In Colorado, where rights to ground waters have been correlated with those to surface waters, tributary waters include percolating waters.[1] They may also, in Colorado, include waste, seepage, and drainage waters and sewage.[2] It is stated, in *McClellan* v. *Hurdle:*[3]

> It is probably safe to say that it is a matter of no moment whether water reaches a certain point by percolation through the soil, by a subterranean channel, or by an obvious surface channel. If by any of these natural methods it reaches the point, and is there appropriated in accordance with law, the appropriator has a property in it which cannot be divested by the wrongful diversion by another, nor can there be any substantial diminution. To hold otherwise would be to concede to superior owners of land the right to all sources of supply that go to create a stream, regardless of the rights of those who previously acquired the right to the use of the water from the stream below.

The quotation given heretofore from *Vanderwork* v. *Hewes* suggests the possibility that the New Mexico court in that case might have held differently if the waters had been "traceable to or forming a stream or water course."

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[99] 27 R. C. L. 1277. See also ch. 6, p. 328 and following.

[1] *Faden* v. *Hubbell* (93 Colo. 358, 28 Pac. (2d) 247 (1933)).

[2] *Ogilvy Irr. & Land Co.* v. *Insinger* (19 Colo. App. 380, 75 Pac. 598 (1904)); *Pulaski Irr. Ditch Co.* v. *Trinidad* (70 Colo. 565, 203 Pac. 681 (1922)).

[3] 3 Colo. App. 430, 33 Pac. 280 (1893).

Generally, the sources of an appropriable stream which are entitled to protection on behalf of prior appropriators thereon include springs which feed the stream.[4] (See ch. 5.) The statement has also been made in the Colorado and Utah cases discussed herein that an appropriator acquires a right to all sources of supply of the stream, whether visible or invisible, and whether underneath or on the surface; and this is undoubtedly the logical conclusion in a State in which the exclusive appropriation doctrine is applied to waters of every character. In any event, it is fundamental that the appropriator, to claim protection, must show that the acts of interference with sources of supply constitute a material invasion of his rights. (See ch. 6, p. 335.)

The decisions that have stated that specific waters, though physically part of the supply of streams, did not belong to prior claimants on the stream, have concerned principally ground waters under the common-law doctrine of ownership, and developed, foreign, and waste waters.[5]

It would therefore follow that if the waters claimed as sources of supply consist of surface waters in channels, directly traceable in flow to a watercourse, the right of the appropriator on the watercourse includes the right of protection from substantial injury, at least in those jurisdictions in which the courts have not held that such waters belong to the landowner, and probably in some others as well.

Some diffused surface waters are flowing in channels which ordinarily would not be held to constitute, in themselves, definite watercourses. However, it is evident that the court decisions as to whether channels were or were not watercourses have often taken into account the whole situation presented, rather than some arbitrary formula. (See ch. 1, p. 16.) It is not doubted that a wholesale interruption of the flows in small channels which clearly supply a watercourse, and which thereby cause substantial injury to prior appropriations below, would be regarded in at least some of the Western States as an unwarranted interference, either on the ground that the appropriator is entitled to all sources of supply, or that the small tributary channels themselves constitute watercourses.

The foregoing conclusion applies particularly:

1. To tributary surface waters dedicated to the public.

2. To surface waters in jurisdictions in which such waters have not been dedicated to the public by the constitution or statute, but in which the courts have stated or intimated that all waters belong to the watercourse to which they would flow if not intercepted by artificial means. (For example, Colorado; and also Utah, in which all waters, subject to existing rights, were dedicated to the public in 1935.)

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[4] *Strait* v. *Brown* (16 Nev. 317 (1881)); *Ryan* v. *Tutty* (13 Wyo. 122, 78 Pac. 661 (1904)); *Josslyn* v. *Daly* (15 Idaho 137, 96 Pac. 568 (1908)); *Holman* v. *Christensen* (73 Utah 389, 274 Pac. 457 (1929)).

[5] *Maricopa County M. W. C. Dist.* v. *Southwest Cotton Co.* (39 Ariz. 65, 4 Pac. (2d) 369 (1931)); *Platte Valley Irr. Co.* v. *Buckers Irr. Mill. & Impr. Co.* (25 Colo. 77, 53 Pac. 334 (1898)); *San Luis Valley Irr. Dist.* v. *Prairie Ditch Co. and Rio Grande Drainage Dist.* (84 Colo. 99, 268 Pac. 533 (1928)); *E. Clemens Horst Co.* v. *New Blue Point Min. Co.* (177 Calif. 631, 171 Pac. 417 (1918)); *Hagerman Irr. Co.* v. *East Grand Plains Drainage Dist.* (25 N. Mex. 649, 187 Pac. 555 (1920)).

### (G) Tributary Surface Waters Not Collected in Channels

WATERS TRULY DIFFUSED OVER THE GROUND, YET WHICH CONSTITUTE A VITAL PART OF THE SUPPLY OF A WATERCOURSE, PRESENT ANOTHER AND MORE DIFFICULT PROBLEM. COORDINATION OF THE RIGHTS OF THE LANDOWNER AND THE STREAM APPROPRIATOR WILL REQUIRE THE ADJUSTMENT OF CONFLICTING PRINCIPLES

The situation is different, where the surface waters which feed the watercourse have not yet entered definite channels, but are truly diffused over the ground and are still in an essentially vagrant natural state. Such waters are unequivocally diffused surface waters. The law of watercourses has been considered distinct from the law of diffused surface waters. The break between the two fields is at the point at which diffused surface waters concentrate to form a watercourse, when they no longer are capricious but are definite in flow. Coordination of the law of diffused surface waters with that of appropriation of waters of watercourses will require the adjustment of two conflicting principles—one that the landowner "owns" the diffused surface water on his land, or at least has some rights to such water; the other, that the appropriator on a watercourse is entitled to the flow from sources of supply to the extent necessary to preserve his prior valid right. Each of these principles involves the protection of a valuable property right. When a situation arises in which they materially conflict, it will be necessary to decide, either that one right is paramount, or that the rights are correlative and must be exercised with mutual regard for each other. Such a situation may conceivably arise where the diffused surface waters throughout a watershed are so interfered with by operations designed to use the waters and to conserve water and land as to reduce the flow in the watercourse which drains the watershed and thereby cause damage to the holders of appropriative rights on the watercourse. At the risk of repetition it should be stated here that the courts of only a few of the Western States have passed upon the ownership of diffused surface waters as between landowners, and that where the matter has been decided the holdings have been apparently consistent to the effect that such waters while on one's land are the property of the landowner.

*Where the right of the landowner is paramount.*—The landowner's right to the use of diffused surface waters on his lands as against attempted appropriations of the specific waters has been stated in the decisions in several jurisdictions—South Dakota, Wyoming, Idaho, New Mexico, and Texas (as to lands granted prior to the appropriation statute). Likewise, in a State such as Arizona, where under the decisions ground water is presumed to be percolating and is not subject to appropriation unless proved to be flowing in a definite underground channel, the same reasoning may conceivably apply to surface waters (excepting in natural channels, and such waters as are held to be "flood, waste or surplus water") claimed by a downstream appropriator.

Nevertheless, it should be emphasized that the decisions to the present time have arisen between individuals, and have not involved the wholesale interruption of flows of diffused surface waters to the substantial injury of rights on important streams of which such waters constitute a material source of supply. Should that situation develop,

a question may be raised as to whether, granting that the landowners have the right to use tributary diffused surface waters, they would not be held to a measure of reasonableness in such use. That this is not improbable may be judged by the fact that the courts in various States, including some of those in the West, have modified their original holdings confirming absolute ownership of percolating ground waters in the owners of overlying lands, and have imposed upon such owners a measure of reasonable use and in certain jurisdictions have approved the application of the doctrine of appropriation to such waters. (See ch. 4.) Unless the courts of the States which have upheld the paramount right of the landowner to diffused surface waters while on his land, should feel that they have taken a position from which they cannot now recede, it is not believed that they are necessarily foreclosed from holding, in a proper case, that the river appropriators below have some rights to diffused surface waters which feed the river and that the landowner may not unreasonably interfere with such waters.

*Where the appropriative right has been protected from all interference.*—The landowner's right to intercept the flow of tributary diffused surface waters across his land will necessarily be limited to whatever extent the courts apply the general rule that an appropriator of water from a stream is entitled to protection from interference with all sources of supply of that stream. While this rule, so far as has been ascertained, has not yet been applied in any State to tributary surface waters not collected in channels, some courts have applied it broadly with reference to other known sources of supply.

For example, the statements in the decisions from Colorado and Utah, heretofore referred to under "D," are very comprehensive and inclusive as to the right of the prior appropriator of water from a stream to have the flow of water from all sources of supply continue to his point of diversion.

The landowner in Colorado, as well as in other States, has certain rights relating to the flow of diffused surface water. He has the right to protect his land and improve it for agricultural and other uses by draining the diffused surface water from it upon that of another owner, if by so doing he does not cause greater injury to the lower land than would have been caused by the natural drainage.[6] From this, it may conceivably follow that he may protect his land by soil erosion-control practices as well as by drainage upon lower land. In the one case he discharges unwanted water upon the lower land, which is an actual or theoretical detriment to the latter; in the other case he withholds water that otherwise would feed a surface stream, or else he delays the passage of the water to the stream, which is or may be a detriment to the prior appropriators thereon. In either case he is taking reasonable means to protect his land and to make it more useful for farming or grazing purposes.

However, the Colorado cases on surface waters not concentrated in channels have dealt principally with the riddance of such waters, rather than with their capture and utilization, and apparently the right of a landowner to capture and use diffused surface water has not yet been squarely passed upon, even as against his neighbor.

[6] *Boulder* v. *Boulder & White Rock Ditch & Res. Co.* (73 Colo. 426, 216 Pac. 553 (1923)).

The early decision in *Denver, Texas & Fort Worth R. R.* v. *Dotson*,[7] heretofore discussed, involved no right of a landowner to the use of such waters; but it did apply the doctrine of appropriation to surface water collected in a canyon which was not a running stream, as related to a right-of-way question, by holding that such appropriation was valid under the statute relating to waste, seepage, and spring waters. Furthermore, as noted in the discussion, the first right of a landowner to spring water under this same statute does not obtain as against prior appropriators from a stream to which the spring is tributary. (See pp. 130–131.)

The courts of Colorado have repeatedly stated that all waters which if not intercepted would reach a stream, belong to the stream and are governed by the law of prior appropriation, and to the present time they have not recognized that the ownership of lands on which such tributary waters arise gives any right to intercept the waters if needed by the stream appropriators. In view of these consistent holdings as to stream sources of various character, the question arises as to whether, in a controversy between a landowner who wishes to intercept diffused surface waters on his land and an appropriator who claims that such waters belong to the watercourse toward which they are flowing, the courts of that State would feel bound by the literal language of their previous general statements concerning all sources of supply of a stream, even though claims of landowners to the use of diffused surface waters were not involved therein; or whether they would recognize an exception in favor of the landowner on account of the peculiar circumstances arising from the problems of erosion control. Inasmuch as such exception is a new situation with special features, there is naturally a possibility that it would be so recognized.

The matter is also open to serious question in Utah, in view of the statements of the courts concerning all sources of an appropriated supply, the holding that return waters from irrigation from an appropriated stream do not belong exclusively to the owner of land from which they flow, and the recent dedication of all waters to the public. However, as heretofore stated, the Utah courts may not necessarily be foreclosed by their decisions from adopting a correlation of these conflicting claims on a basis of reasonable use of water and land in the interest of conservation of both resources, particularly where it is shown that the rights of stream appropriators are not permanently injured.

### (H) Practicability of Correlating These Conflicting Rights

#### THE COORDINATION OF RIGHTS TO WATERCOURSES AND TRIBUTARY DIFFUSED SURFACE WATERS ON A BASIS OF REASONABLE USE APPEARS PRACTICABLE IN AT LEAST SOME OF THE STATES

No specific examples of correlation of rights to watercourses with those diffused surface waters tributary thereto have been found in the western cases. However, coordination of such conflicting rights on a basis of reasonable use of water and land would appear to be in harmony with the present water-law doctrines of at least some of the States.

[7] 20 Colo. 304, 38 Pac. 322 (1894).

Some light on the problem may be obtained from the language of the Wyoming Supreme Court in *Yyoming* v. *Hiber:*[8]

> The fact that water in the arid regions is necessary for irrigation or domestic use is no reason in itself why the owner of land should be deprived of all rights in connection therewith, for when the benefit accruing from appropriation is offset by the detriment to another, the public welfare is not, in the absence of other circumstances, thereby increased. Hence we are permitted to pursue inquiry into our subject by consultation of authorities in any jurisdiction.

From this statement it is evident that the court believed: First, notwithstanding the preeminence of Wyoming as an appropriation-doctrine State, in which riparian rights on watercourses are wholly denied, the landowner has some rights to the diffused surface water on his land. Second, the public welfare is not increased by depriving the landowner of a right of this character that is of value to him, for the purpose of enhancing another's appropriative right, in the absence, at least, of special circumstances.

It may be noted in this connection that the California Supreme Court held in a fairly early case that an injunction would not lie against the felling of timber, by an owner of riparian land upstream from the riparian land of another, the effect of which was to diminish the flow of the stream by facilitating evaporation; the cutting of timber being a lawful use of one's own land.[9]

This suggests the possibility of a correlation of rights—allowing the landowner to make any reasonable use of the diffused surface waters while on his land, but only while on the land, even though such waters are part of the supply of a definite watercourse, and of course holding the stream appropriator to a reasonable use of the stream water in connection with his own appropriation; all uses of land and water to be reasonable in relation to all other uses of the common water supply.[9a]

Reasonable use of diffused water in connection with reasonable use of land might involve some measure of consumptive use of the water, and might further alter the rate of flow of unconsumed water to the stream. The appraisal of reasonableness would involve, among other things, the necessity and value of such use of water in connection with utilization of the land, and determination of questions as to whether the alteration of stream flow is temporary or permanent and whether the resulting injury, if any, to downstream water users is substantial or otherwise.

If the diffused surface waters have been dedicated to the public, or are held to be public waters regardless of the fact of specific dedication, then a correlation of rights may recognize and make possible the beneficial use of such waters by the public—in this case, by both landowners and stream appropriators.

If such waters have been held to be private waters as between adjacent landowners, the way is still open to a holding that such decisions must be confined to the facts of the cases in point, and that the

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[8] 48 Wyo. 172, 44 Pac. (2d) 1005 (1935).

[9] *Fisher* v. *Feige* (137 Calif. 39, 69 Pac. 618 (1902)).

[9a] It may be noted in this connection that Kinyon, S. V., and McClure, R. C., Interferences with Surface Waters, 24 Minn. Law Rev., No. 7 (June 1940), p. 915, suggest that the fact that in each of the cases in which an upper proprietor was upheld in appropriating diffused surface water, such water was actually appropriated for some beneficial purpose, supports at least inferentially the view that the "reasonable use" doctrine is applicable to such situations, as well as to those involving alterations in the flow of these waters.

use of the diffused surface waters, in relation to the rights on the watercourse, must be a reasonable use.

In those States in which early statutes declared the ownership of waters not flowing in definite streams to vest in the landowner (North Dakota, South Dakota, Oklahoma), such waters presumably are the property of the owners of those lands which passed to private ownership before the acts of dedication to the public, subject to uses which do not injure the lands of others or conflict with the public welfare. Even so, the problem of correlating such rights with appropriative rights on watercourses, on a basis of reasonable use, does not appear impossible of solution. It is noteworthy that the Supreme Court of Oklahoma, in construing the portion of this statute relating to percolating ground waters, held that the ownership of such waters nevertheless was subject to reasonable use by the owner of the land under which they happened to be found.[10] The syllabus by the court states, concerning the Oklahoma statute vesting ownership in the landowner:

> Section 11785, O. S. 1931, vesting ownership of percolating water in the owner of the land above it, does not thereby vest said owner with the right to such an unreasonable use as will enable him to destroy his neighbor's property by forcibly extracting and exhausting the common supply of water for sale at a distance; such use being subject to the same restrictions as are imposed upon ownership of other classes of property.

It is true that in this Oklahoma case the unreasonableness of use by the landowner consisted, not in the withdrawal of waters solely from under its own lands for use on such lands, but in pumping the water out, and in taking it away to a distant point, in such quantities as to deplete the supply under the lands of adjoining landowners to their substantial injury. This diversion of ground water was held to be outside the scope of a reasonable relationship to the natural use of the land. Possibly the export of diffused surface water, wanted for use on the land of a lower proprietor, would be held similarly to be unreasonable. The unreasonable use by the landowner of diffused surface water wanted by a downstream appropriator may be conceded to be in a somewhat different category; but in a contest between a landowner and a claimant to the use of stream flow fed by diffused surface water from the former's land, this case affords a precedent for the right of a landowner to make reasonable use of such diffused surface water while on his land, and for only a reasonable use.

In the States in which, on the other hand, the courts have repeatedly declared that an appropriator of water from a stream is entitled to the flow of water from all sources of supply (notably Colorado), and have not yet recognized exceptions or passed upon the ownership of diffused surface waters even as between landowners, the problem of correlation may be equally or even more difficult. There, to be effected, it may be based upon the existence of a condition not contemplated in the earlier decisions, and therefore upon a consideration of the interrelationship between waters in streams and tributary diffused surface waters as a question of first impression in the State court.

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[10] *Canada* v. *Shawnee* (179 Okla. 53, 64 Pac. (2d) 694 (1936)).

### (I) The Element of Public Welfare

THE PUBLIC WELFARE ASPECT OF A PROGRAM OF WATERSHED PROTECTION IS AN IMPORTANT CONSIDERATION IN THE POSSIBLE CORRELATION OF THESE CONFLICTING RIGHTS

The decisions concerning the ownership and rights of use of diffused surface waters have dealt with the rights of private litigants. In no known case has the question of public welfare been specially presented to the court.

Protection of a watershed from denudation, aside from the phase of protecting individual tracts from destruction and making beneficial use of them, obviously is a matter of general public welfare. That aspect of the situation is important in a possible correlation of rights, particularly in cases in which it is shown that the private rights of appropriators or riparian owners on the watercourse will not be substantially or permanently impaired.

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Chapter 4

# GROUND WATERS

## PART I. OWNERSHIP AND RIGHTS OF USE

### Nature of Ground Waters

"Ground water" has been defined and described in chapter 1. For the purpose of this discussion, ground water is treated as all available water under the surface of the earth—water which exists under one's land, and which passes laterally from the subsurface of one tract to that of another, or which joins or leaves the surface flow or subflow of a stream. Rights to such waters have been involved in decisions of the supreme courts of nearly all the Western States.

The courts generally have differentiated between waters flowing in defined subterranean channels and those not confined to definite channels—the latter being termed "percolating waters"—and have held these classes of ground water subject to different rules of law. Ground-water hydrologists affirm that nearly all ground water (except that lost by transpiration and evaporation) is moving to maintain the flow of surface streams, which means that, in general, the subterranean water in a given stratum constitutes part of the supply of some surface stream or body of water, except in situations such as those in which the ground water is impounded by subterranean obstructions. The implication is that an interference with the flow of ground water in most places is a technical interference with the flow of some surface stream—in a given case, it may or may not be a substantial interference—and that therefore there is no logical basis for separately classifying rights to waters which essentially are all part of one common supply. The purpose of this discussion, however, is to state the law as it has developed and as it appears to be at the present time. It will be shown that attempts toward coordination of rights to common supplies of surface and ground waters have been made in some jurisdictions.

The greatest difficulty in attaining complete coordination of surface and ground waters, where the courts are disposed to attempt it, is in making proof of their actual interdependence in a given area. Considerable advance has been made in ground-water hydrology, and in the technique of estimating the direction and rate of flow of ground waters. However, in many situations the problem remains a most difficult one, owing to the invisibility of subterranean waters and the mass of data required to prove satisfactorily their origin, quantity, and movements.

Attention is directed to the discussion of some of the physical aspects of ground waters in chapter 1. A detailed discussion of the ground-water law of each of the Western States is contained in part 3 of this chapter.

## Summary of Doctrines Governing Ownership and Use of Ground Waters in Western States

In the following summary, under "Percolating waters," so-called "ownership" of percolating waters under his land by the owner of land as a part of the soil, is the English rule. While the English decisions on percolating waters were not rendered until comparatively modern times—the first separate consideration having been in 1843 [1]—the English rule is frequently referred to in this country as the "common-law" rule. This use of the term as applied to the absolute-ownership rule of percolating waters has been criticised by the Supreme Court of Hawaii,[2] but it appears in many of the reports.

The American or "reasonable use" rule means that the landowner's right to abstract water is not unlimited or absolute, but is subject to the exercise of reasonable use in connection with the land from which the water is withdrawn, qualified in greater or less degree by the rights of other landowners having similar rights. This is discussed more fully below.

**Arizona.**

*Definite underground streams.*—Subject to appropriation, by statute and court decision.

*Percolating waters.*—Owned by landowner according to court decisions, with court dictum favoring limitation to reasonable use.

*Artesian waters.*—Flowing well—waste therefrom is declared by statute to be a misdemeanor.

**California.**

*Definite underground streams.*—Subject to appropriation, by statute; subject to riparian and appropriation doctrines by court decision.

*Percolating waters.*—Subject under court decisions to reasonable use and correlative rights of owners of overlying lands; common supply apportionable in event of shortage; surplus above reasonable requirements of overlying lands subject to appropriation for distant use.

*Artesian waters.*—(a) In determining applicable water-rights doctrine, have not been classified separately from other ground waters.

(b) Wells in which water naturally flows to the surface for any length of time are regulated by statute in interest of beneficial use and prevention of waste; waste is a misdemeanor; and the statute has been upheld by court decision.

**Colorado.**

*Definite underground streams.*—Subject to appropriation, by court decision.

*Percolating waters.*—(a) When naturally tributary to a stream, including waste from irrigation, they are subject to appropriation by court decision, and are necessarily subordinate to prior rights on the stream and superior to junior rights on the stream.

(b) When not naturally tributary to a stream, but drained artificially into a stream, they have been held by the courts subject to

[1] Wiel, S. C., Water Rights in the Western States. 3d ed., vol. II sec. 1039, p. 970.
[2] *City Mill Co.* v. *Honolulu Sewer & Water Commission* (30 Haw. 912 (1929)).

independent appropriation out of the drainage ditch and not subordinate to prior appropriative rights on the stream.

(c) Where natural percolating waters are not tributary to a stream, the rights of owners of overlying lands apparently have not been specifically in issue, but the appropriation doctrine has been applied by the courts to such waters in course of drainage to a stream as against the claims of stream appropriators. The more reasonable assumption appears to be that such waters are subject to prior appropriation as against rights of owners of overlying lands, not based upon appropriation, and on this basis the tentative conclusion appears justified that percolating waters generally are subject to appropriation.

*Artesian waters.*—Wells which, if properly cased, will flow continuously over adjacent ground at any season—waste therefrom is declared by statute to be a misdemeanor. Water from such wells in certain areas may not be pumped under prescribed circumstances.

**Idaho.**

*Definite underground streams.*—Subject to appropriation, by statute and court decision. Statute relates to "subterranean waters."

*Percolating waters.*—Subject to appropriation, by statute and court decision.

*Artesian waters.*—(a) Decisions on percolating waters involved artesian waters.

(b) Wells in which water naturally flows to the surface for any length of time—regulated by statute, under administrative procedure. Violation of statute is a misdemeanor.

**Kansas.**

*Definite underground streams.*—(a) In northwest portion of State, by statute, all natural subterranean waters shall be devoted first, to irrigation, subject to domestic use, and second, to other industrial purposes, and may be diverted from natural beds, basins, or channels therefor, provided vested appropriative rights for the same or a higher purpose are not interfered with.

(b) In southwest portion of State, subterranean watercourses, sheets, and lakes are declared by statute to belong to and be appurtenant to overlying lands and shall be devoted to the purposes above stated with reference to the northwest portion of the State, appropriations theretofore made not to be affected.

*Percolating waters.*—(a) In northwest portion of State, subject to "diversion" from natural beds, basins, or channels for purposes and under limitations above stated with reference to definite underground streams, by statute.

(b) Under court decision, without specific limitation to a particular part of the State, are owned by the landowner. Statutes above stated with reference to definite underground streams contain modifications for western part of State.

(c) Tributary to surface streams—statute forbids taking, to prejudice of prior appropriators on the stream.

*Artesian waters.*—(a) Subject to prior appropriation for beneficial use, by statute.

(b) Wells sunk to artesian stratum over 400 feet deep—regulated by statute. In case of waste, cost of repair by supervisor is a lien on the land.

**Montana.**

*Definite underground streams.*—Subject to appropriation, by court decision.

*Percolating waters.*—Owned by landowner under court decision; control to be exercised without malice or negligence.

**Nebraska.**

*Definite underground streams.*—No definite decisions; presumably subject to the law of watercourses, that is, to the riparian and appropriation doctrines.

*Percolating waters.*—Subject to reasonable use by landowner, by court decision, with reasonable apportionment in case of shortage.

*Artesian waters.*—Wells in artesian areas—statutory prohibition against waste. Violation of statute is cause for arrest and fine.

**Nevada.**

*Definite underground streams.*—Subject to appropriation, by statute and court dictum.

*Percolating waters.*—Subject to appropriation, by statute, with minor exceptions. Early court decisions held that such waters were owned by landowners; no decisions for many years, and none since enactment of first statute subjecting ground waters to appropriation.

*Artesian waters.*—(a) Subject to appropriation, by statute.

(b) Artesian wells—installation and operation in proven artesian districts regulated by statute, under administrative procedure. Violation of statute is a misdemeanor.

**New Mexico.**

*Definite underground streams.*—Subject to appropriation, by statute and court decision.

*Percolating waters.*—(a) Waters in underground streams, channels, artesian basins, reservoirs, or lakes, having reasonably ascertainable boundaries, are subject to appropriation, by statute. Principle has been approved by court decision.

(b) Other percolating waters, not having reasonably ascertainable boundaries—presumably owned by landowner, under early decisions.

*Artesian waters.*—(a) If boundaries ascertainable, are subject to appropriation, by statute and court decision.

(b) Artesian wells deriving supply from any artesian stratum or basin—installation and use regulated by statute, under administrative procedure. Original statute has been upheld by the court.

**North Dakota.**

*Definite underground streams.*—Statute provides that they may be used by landowner, but that he may not prevent the natural flow.

*Percolating waters.*—Statute provides that owner of land owns water flowing under the surface, but not forming a definite stream.

*Artesian waters.*—Artesian or flowing wells—installation and use regulated by statute, under administrative procedure. Interference with administration is a misdemeanor.

**Oklahoma.**

*Definite underground streams.*—Statute provides that they may be used by landowner, but that he may not prevent the natural flow.

*Percolating waters.*—Statute provides that owner of land owns water flowing under the surface, but not forming a definite stream. Under court decision, notwithstanding statute, such waters are sub-

ject to reasonable use by landowner; but according to the decision this does not mean that there must be an apportionment.

**Oregon.**

*Definite underground streams.*—Subject to the law of watercourses, by court decisions.

*Percolating waters.*—(a) In eastern portion of State, waters in underground streams, channels, artesian basins, reservoirs, or lakes, with reasonably ascertainable boundaries, with minor exceptions are subject to appropriation, by statute.

(b) Courts have held that percolating waters belong to the landowner; no decisions since enactment of ground-water appropriation statute.

*Artesian waters.*—(a) In eastern portion of State, if boundaries ascertainable, are subject to appropriation, by statute.

(b) Artesian wells—statute provides that they must have control devices, and that ground water must not be wasted; State engineer has power to fix maximum quantities to be used.

**South Dakota.**

*Definite underground streams.*—Statute provides that they may be used by landowner, but that he may not prevent the natural flow. Court decisions state that surface and underground watercourses are governed by the same rules.

*Percolating waters.*—Statute provides that subject to the statutes relating to artesian wells and water, the owner of land owns water flowing under the surface, but not forming a definite stream. Statute has been upheld by court, which stated that the doctrine is not affected by law relating to regulation of artesian wells.

*Artesian waters.*—(a) Considered by court distinct from percolating waters, but no definite holding as to their ownership.

(b) Artesian wells—subjected to control for purposes of conservation and prevention of waste, by statute, under administrative procedure. Statute was referred to by court as not affecting percolating waters, but was not construed directly.

**Texas.**

*Definite underground streams.*—Underflow of streams is subject to appropriation, by statute; to riparian doctrine, by court decision.

*Percolating waters.*—Owned by landowner, under court decisions.

*Artesian waters.*—(a) Artesian wells in which, if properly cased, waters will rise by natural pressure above the first impervious stratum below the surface—subjected to regulation, by statute, under administrative procedure. Waste is a misdemeanor.

(b) Water wells encountering salt water or other solutions injurious to vegetation—required by statute to be so controlled as to confine the water to the strata in which found. Refusal to do so, upon administrative order, is a misdemeanor.

**Utah.**

*Definite underground streams.*—Subject to appropriation, by statute and court decision. Statute refers to all ground waters.

*Percolating waters.*—(a) Subject to appropriation, by statute.

(b) Subject to appropriation, by court decision, if they are in artesian areas, or if they supply waters subject to appropriation. Status of law is somewhat uncertain on account of previous decisions holding percolating waters subject to reasonable use by landowner.

*Artesian waters.*—(a) Subject to appropriation, by statute relating to all ground waters, and by court decision.

(b) Wells—installation and operation regulated by statute, under administrative procedure.

**Washington.**

*Definite underground streams.*—Subject to same laws as surface watercourses, under court decision.

*Percolating waters.*—Subject to reasonable use by landowner in relation to use of overlying land, under court decision.

*Artesian waters.*—Artesian wells—in areas in which irrigation is practiced, subjected to control by statute. Violation is a misdemeanor, and proper control may be effected by neighboring landowners, expense to be a lien on the land.

**Wyoming.**

*Definite underground streams.*—No statutes or court decisions. Presumption is that they are subject to appropriation doctrine under the constitutional provision relating to "all natural streams."

*Percolating waters.*—If developed artificially, owned by landowner, under court decision.

## Defined Underground Streams

### The Rules Applicable to Surface Watercourses Apply to Defined Underground Streams

The courts in most Western States have made this statement in one form or another. The appropriation and riparian doctrines, to the extent that they govern rights to surface watercourses in any jurisdiction, apply equally to watercourses under the ground. No dissent has been found in any of the decisions.

The rule has sometimes been stated by way of differentiating between percolating waters and defined underground streams, where the evidence failed to sustain a finding as to the existence of a definite stream; thus holding that percolating waters are subject to a different rule of law from that governing watercourses.

### The Statutes of Some States Specifically Include Underground Streams Among Waters Subject to Appropriation

As noted from the foregoing summary, this is the case in several jurisdictions, and in several others it is covered in more general terms.

The references in the North Dakota, Oklahoma, and South Dakota statutes purport to apply the common-law riparian rule to underground streams. The apparent effect of the Kansas law dealing with the southwest portion of the State is to apply the riparian doctrine with modifications.

### Court Decisions Invariably Have Upheld the Appropriability of Unappropriated Waters of Known and Defined Underground Streams, Subject to Vested Rights

This is not a controversial question in any Western State, regardless of whether or not the statutes refer to underground streams. The decisions and dicta all support the statement. Appropriations necessarily are subject to existing rights to waters of the stream system under the laws of the particular jurisdiction.

### The Underflow of a Stream Is a Part of the Stream, and the Same Rules of Law Apply to the Surface and Subsurface Portions

Apparently all of the decisions involving the underflow of streams have so held, directly or by necessary implication. The position thus taken is that the underflow or subflow of a surface stream through the soil adjacent to the stream bed—where this condition exists, as it does frequently though not invariably—is necessary to the support of the surface stream and is a part of its supply, and therefore is governed by the same rules of law.[3] In States which recognize the riparian doctrine, riparian rights attach to the underflow.[4]

The Kansas statute [5] providing that waters in subterranean channels in the southwestern portion of the State belong and are appurtenant to the lands under which they flow, states that they are subject to use, in order of preference, for domestic, irrigation, and other industrial purposes.

One who has no legal right to the surface flow of a stream may not, by indirection, acquire that right by a subterranean diversion to the injury of holders of rights on the stream.[6]

### An Underground Stream, Subject to the Law of Watercourses, Has the Essential Elements of a Surface Watercourse

Kinney's discussion of subterranean watercourses has been referred to on numerous occasions in court decisions and elsewhere.[7] He points out that under the common law, rights to ground waters flowing in known and defined channels having all the characteristics of surface watercourses were governed by the law of watercourses, and that ground waters in channels still undefined and unknown were treated as mere percolations until such time as their characteristics as underground watercourses had become defined and known. Continuing:

> And in this connection it will be well to say that the word "defined" means a contracted and bounded channel, though the course of the stream may be undefined by human knowledge; and the word "known" refers to the knowledge of the course of the stream by reasonable inference.

None of the western decisions that have been read have taken issue with the foregoing definition and classification; but as would be

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[3] *Kansas* v. *Colorado* (206 U. S. 46 (1907)); *Los Angeles* v. *Pomeroy* (124 Calif. 597, 57 Pac. 585 (1899)); *Smith* v. *Duff* (39 Mont. 382, 102 Pac. 984 (1909)).

[4] *Verdugo Canyon Water Co.* v. *Verdugo* (152 Calif. 655, 93 Pac. 1021 (1908)); *Motl* v. *Boyd* (116 Tex. 82, 286 S. W. 458 (1926)); *Texas Co.* v. *Burkett* (117 Tex. 16, 296 S. W. 273 (1927)).

[5] Kans. Gen. Stats. Ann. 1935, sec. 42–305.

[6] *Emporia* v. *Soden* (25 Kans. 588, 37 Am. Rep. 265 (1881)); *Montecito Valley Water Co.* v. *Santa Barbara* (144 Calif. 578, 77 Pac. 1113 (1904)).

[7] Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, secs. 1154, 1155, p. 2097 et seq.

expected, the applications to specific circumstances have not been altogether harmonious. The following are typical of the varied situations in which the courts have held that ground waters are, or are not, definite streams:

Two decisions, from California and South Dakota, quoted the above statement by Kinney and applied it as follows: In *Los Angeles* v. *Pomeroy*[8] the waters of Los Angeles River emerged through the outlet of San Fernando Valley, on the surface and beneath it. This was considered to be a sufficiently known and defined channel to come within the definition. Subsequently, in *Los Angeles* v. *Hunter*,[9] the entire body of water underlying San Fernando Valley was held from the evidence to constitute, not exactly an underground stream, but a subterranean lake which was the source of the river.

The South Dakota case was *Deadwood Central R. R.* v. *Barker*,[10] The court stated that there was no crevice or opening in the bedrock through which the water could flow, that the water apparently had no well-defined banks or channel, and that it merely flowed through gravel in seeking a lower level; consequently the evidence did not sustain a finding that there was a definite underground stream. Such term, according to this decision, is usually meant to apply only to streams in arid regions which flow partly on the surface and partly under the surface, but in a well-defined channel and within well-defined banks. However, this latter statement is a narrower interpretation than is usually made in the western decisions.

The Supreme Court of Washington, in a decision antedating the foregoing ones from California, declined to consider the ground water in a valley traversed by a creek as all a part of the creek[11] The valley had an underlying impervious stratum covered by a porous deposit, the trend being toward the bed of the canyon; no defined limits were shown to the waters percolating down the hillsides. These waters were held to be not part of a defined underground stream.

In a Utah case,[12] springs in a canyon were part of the supply of an appropriated stream. It was held that a defined underground stream ran down the canyon, and a shaft under the springs which substantially diminished the flow was held to be an interference with the flow of the underground stream connected with the springs. A well above another spring was held, from the evidence, not to interfere with the flow in that spring.

A fairly recent Oregon case involved ground water in a canyon.[13] It was held that all the elements of an underground stream were present. The bed and banks were marked by the bed and walls of the canyon; the bed was porous soil underlain by impervious bedrock; and the flow of a spring in the canyon was constant and of volume indicating distant origin of the water.

In a Montana case[14] the water of a surface stream disappeared in the bed of a canyon and did not reappear on the surface within the

[8] 124 Calif. 597, 57 Pac. 585 (1899).
[9] 156 Calif. 603, 105 Pac. 755 (1909).
[10] 14 S. Dak. 558, 86 N. W. 619 (1901).
[11] *Meyer* v. *Tacoma Light & Water Co.* (8 Wash. 144, 35 Pac. 601 (1894)).
[12] *Whitmore* v. *Utah Fuel Co.* (26 Utah 488, 73 Pac. 764 (1903)).
[13] *Hayes* v. *Adams* (109 Oreg. 51, 218 Pac. 933 (1923)).
[14] *Ryan* v. *Quinlan* (45 Mont. 521, 124 Pac. 512 (1912)).

next 3,600 feet traversed by the canyon before reaching another surface stream toward which it sloped. The court held that ground water is not presumed to be tributary to any surface stream, and that evidence would be necessary to show the existence of an underground stream connecting this surface stream with the lower surface stream.

Ground water which has left the subflow of a stream, and which no longer supports or contributes to the stream supply and does not itself flow in a definite underground channel, is no longer a part of the stream but has become percolating water.[15] The question as to whether or not rights to percolating waters which have severed connection with a stream are correlated with the rights to the stream waters, as is done in some jurisdictions, does not affect their physical classification.

#### The Burden of Proof Is Upon the Party Who Asserts That a Defined Underground Stream Exists

The presumption that ground waters are percolating runs through many of the decisions. This presumption may of course be rebutted, but the proof is often very difficult. The burden of proof, therefore, is upon the party who asserts that a defined underground stream exists. If not theretofore known, he must make it known by competent testimony. The rules recently laid down by the Arizona Supreme Court[16] are probably as strict as those in any of the western decisions, and would appear to be difficult to comply with. All the elements of a surface watercourse are specifically adopted, and the certainty of location as well as existence of the stream must be proved by the asserting party "by clear and convincing evidence." Geologic theory or even visible physical facts proving that "a stream *may* exist in a certain place, or probably or certainly does exist *somewhere*," are not sufficient; the specific places, and extent of the banks, must be proved to the court's satisfaction.

Some of the courts, as noted above, have accepted testimony as to the impervious character of the bed and walls of a canyon as competent evidence of the bed and banks of a defined underground stream, provided the flow of water is also shown. Furthermore, the determination "by reasonable inference" is sometimes recognized.[17] If the asserted stream is not in a canyon or valley of moderate size, the difficulties of proof under the test of the Arizona case are measurably increased.

The subflow of a surface stream generally presents less of a problem of proof, although the Supreme Court of Arizona, in the *Maricopa case*, laid down a rule that under some circumstances may be difficult to apply. The test stated in the foregoing discussion of this case applies to the determination of the existence of a defined underground stream, without particular regard to its being part of the subflow of a surface watercourse or connected directly with it. On the question as to whether particular ground waters are a part of the subflow of a surface stream, and therefore a part of the stream itself, the court stated in that same case that

[15] *Maricopa County M. W. C. Dist.* v. *Southwest Cotton Co.* (39 Ariz. 65, 4 Pac. (2d) 369 (1931)); *Washington* v. *Oregon* (297 U. S. 517 (1936)).

[16] *Maricopa County M. W. C. Dist.* v. *Southwest Cotton Co.* (39 Ariz. 65, 4 Pac. (2d) 369 (1931)).

[17] *Medano Ditch Co.* v. *Adams* (29 Colo. 317, 68 Pac. 431 (1902)).

the test is whether drawing off the subsurface water tends to diminish appreciably and directly the flow of the surface stream.

The courts apparently have invariably recognized the existence of the subflow of a surface stream, where the question has been in issue. The Colorado Supreme Court, which has gone farther than the courts of most States in bringing waters physically tributary to streams within the rule of appropriation, has held that one who seeks to divert water which reaches a stream through a natural channel and disappears in the stream bed, has the burden of establishing that such water does not become part of the main stream, subject to priorities thereon.[18] This is not, in reality, an exception to the rule that the party who asserts the existence of an underground stream has the burden of proving it, for the water reached the main stream through a natural surface channel which thereby became a tributary channel. Various surface streams in the West disappear and reappear on the surface during seasons of low-water flow, and the fact has recognition in the court decisions.

However, the subflow extends laterally from the surface stream as well as below it, and within limits that must be reasonably well defined to retain the character of stream underflow.[19] It is doubtful if the burden of proof, upon a party who asserts interference with a stream by tapping the subflow, is generally less than upon one who asserts the existence of a separate underground stream.

## Percolating Waters

The principles governing ownership and use of percolating ground waters have been developed mainly by the courts. In the absence of statutory declaration, the tendency has been to apply the English or so-called common-law doctrine of absolute ownership on the part of the owner of overlying land in the earliest controversies, and later to adopt modifications.

Three Western States adopted the doctrine of absolute ownership by statute: North Dakota,[20] Oklahoma,[21] and South Dakota.[22] According to these statutes, the owner of land "owns" water standing thereon, or flowing over or under its surface, but not forming a definite stream. Notwithstanding the statutory declaration, Oklahoma has modified the absolute-ownership rule by court decision.[23]

Several States by statute have subjected percolating waters to appropriation, to the extent to which the application of that doctrine is practical.

As stated above in discussing rights to waters in underground streams, ground waters are presumed to be percolating. This rule appears to be of uniform application in jurisdictions in which either the English rule of absolute ownership or the American rule of reasonable use obtains.

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[18] *Platte Valley Irr. Co.* v. *Buckers Irr., Mill. & Impr. Co.* (25 Colo. 77, 53 Pac. 334 (1898)).

[19] *Los Angeles* v. *Pomeroy* (124 Calif. 597, 57 Pac. 585 (1899)).

[20] N. Dak. Comp. Laws 1913, sec. 5341.

[21] Okla. Stats. 1931, sec. 11785; Stats. Ann. (1936), title 60, sec. 60.

[22] S. Dak. Code 1939, sec. 61.0101. However this ownership is made subject to the provisions of the Code relating to artesian wells and water. See discussion for South Dakota, below, pp. 247, 250.

[23] *Canada* v. *Shawnee* (179 Okla. 53, 64 Pac. (2d) 694 (1936)).

### (A) Ownership by the Landowner—The English Rule

The English or common-law rule of absolute ownership of percolating waters, by the owner of overlying land, was originally accepted by decision or dictum in nearly all the Western States. It is the easiest rule for a court to apply. The Texas court, in adopting the rule as between adjoining landowners, reasoned that (1) the source and flow of these waters are so unknown that it is impossible to formulate any legal rules governing them; and (2) the recognition of correlative rights would substantially interfere with many important public projects, such as drainage of lands.[24]

The result of extreme application of the rule of absolute ownership, however, is that a landowner may not only abstract water from his land for any legitimate enterprise, but in so doing may exhaust the common supply otherwise available for use by his neighbor without liability for any resulting injury, regardless of the length of time the neighbor may have been using the ground waters beneficially. It is obvious that a rule with such implications would not long be able to withstand the repeated attacks certain to be made in many jurisdictions in the water-conscious West.

#### WITHOUT QUALIFICATION

The rule of absolute ownership is still adhered to, however, without apparent qualification in North Dakota, South Dakota, Texas, and Wyoming. The rule is based upon statutory declarations in North Dakota and South Dakota. However, there appear to have been no decisions in North Dakota, only one in Wyoming,[25] and only a few in South Dakota [26] and Texas.[27] In none of these States has the problem of best utilization of ground waters yet led to statutory or judicial modification of the rule of absolute ownership, although it is noteworthy that serious discussions of the matter of legislative control over the use of ground waters have recently been held in several of the States concerned.

The South Dakota court apparently considers artesian waters as in a different legal status from ordinary percolating waters. While not construing the statute [28] subjecting artesian wells to control, it has held that such statute does not affect the law relating to percolating waters.[29]

#### QUALIFICATIONS AS TO USE

*Arizona.*—No decisions have been rendered in controversies between owners of land overlying a common supply of percolating water. The early decisions, involving attempted appropriations as against the rights of landowners, stated the rule of ownership by the landowner, without imposing any limitation of reasonable use.[30] There is a recent dictum favoring the rule of reasonable use.[31] How-

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[24] *Houston & Texas Central Ry.* v. *East* (98 Tex. 146, 81 S. W. 279 (1904)).
[25] *Hunt* v. *Laramie* (26 Wyo. 160, 181 Pac. 137 (1919)).
[26] The rule is stated in *Metcalf* v. *Nelson* (8 S. Dak. 87, 65 N. W. 911 (1895)).
[27] The rule is stated in *Houston* v. *Texas Central Ry.* v. *East* (98 Tex. 146, 81 S. W. 279 (1904)).
[28] S. Dak. Code 1939, secs. 61.0407 to 61.0415 (Laws 1919, ch. 100).
[29] *Madison* v. *Rapid City* (61 S. Dak. 83, 246 N. W. 283 (1932)).
[30] *Howard* v. *Perrin* (8 Ariz. 347, 76 Pac. 460 (1904); affirmed 200 U. S. 71 (1906)).
[31] *Fourzan* v. *Curtis* (43 Ariz. 140, 29 Pac. (2d) 722 (1934)).

ever, it cannot be said that the English rule has yet been squarely rejected.

*Montana.*—None of the decisions involve controversies between rival landowners. One decision, in approving the rule, stated that it is subject to the limitation that the use of the water be made without malice or negligence.[32]

### STATUTORY QUALIFICATION IN PORTION OF STATE

*Kansas.*—An early Kansas decision indicated acceptance of the English or common-law rule.[33] A later decision stated that the development of the law was away from that principle, and refused to apply it to the extent of permitting one landowner to deposit salt on his land to the injury of a neighbor's land through contamination of the ground water.[34] This, however, does not amount to abrogation of the common-law doctrine as applied to uses of ground water.

A statute [35] of the State passed in 1891 provided that all subterranean waters in the area west of the 99th meridian were subject to diversion from natural beds, basins, and channels for stated purposes, prior vested rights of appropriation not to be interfered with; and a later statute [36] passed in 1911 made water in subterranean channels, sheets, or lakes, in the area west of the 99th meridian and south of township 18, appurtenant to the overlying lands and provided that they should be devoted to certain uses. Considering the statutes and decisions together, the apparent result is that percolating waters not conforming to this definition in the southwestern portion of the State, and all percolating waters in the eastern portion, are still subject to the English or common-law rule, but with the reasonable probability of modification in favor of reasonable use; and that in the northwest portion the rule has been qualified by statute.

### STATUTORY QUALIFICATIONS AS TO CHARACTER OF WATER

The courts of Nevada, New Mexico, and Oregon accepted or at least recognized the English rule of absolute ownership in early decisions.[37] However, in New Mexico and Oregon there are statutes subjecting to appropriation waters in underground streams, channels, artesian basins, reservoirs, or lakes having reasonably ascertainable boundaries, as discussed hereinafter; and the Nevada statute has recently been reenacted to include all ground waters excepting small nonartesian draughts used for domestic purposes, although prior to 1939 it applied only to ground waters with definite boundaries. The Oregon appropriation statute applies only to the eastern portion of the State. The result is that in New Mexico and eastern Oregon the common-law absolute-ownership doctrine apparently still applies to those percolating waters which do not conform to the foregoing statutory classifications; in western Oregon it applies to all percolating waters. In Nevada, prior to the 1939 reenactment, the common-

[32] *Ryan* v. *Quinlan* (45 Mont. 521, 124 Pac. 512 (1912)).
[33] *Emporia* v. *Soden* (25 Kans. 588, 37 Am. Rep. 265 (1881)).
[34] *Gilmore* v. *Royal Salt Co.* (84 Kans. 729, 115 Pac. 541 (1911)).
[35] Kans. Gen. Stats. Ann. 1935, sec. 42–301, modified by sec. 42–305.
[36] Kans. Gen. Stats. Ann. 1935. sec. 42–305.
[37] *Mosier* v. *Caldwell* (7 Nev. 363 (1872)); *Keeney* v. *Carillo* (2 N. Mex. 480 (1883)); *Taylor* v. *Welch* (6 Oreg. 198 (1876)).

law doctrine applied to percolating waters the course and boundaries of which were not determinable, unless they originated from springs which were the proven source of a stream.[38] The apparent effect of the Nevada statute is to abolish the common-law rule except as to very small domestic wells drawing nonartesian water.

#### PERCOLATING WATERS TRIBUTARY TO WATERCOURSES

In most of the States which adhere definitely to the English or common-law rule of absolute ownership of percolating waters on the part of the landowner, exceptions have not been made in favor of claimants of waters of streams supplied by such waters. In fact, the common-law rule has been adopted in some of the States as the result of attempted appropriations as against the landowner, rather than in controversies between rival landowners.

The Nevada court in its early decisions indicated an exception—that a clear distinction should be drawn between percolating waters generally, and waters constituting the source of a creek but which in reaching the creek either percolate through the earth or are conveyed by unknown subterranean channels. Rights to the use of such waters belong to appropriators on the creek.[39] Under the facts of this case, however, the waters originally flowed in a surface channel from springs to a creek but later reached the creek by some subterranean means not clearly established; the springs were the established source. The court's statement was broader than necessary to the decision.

Kansas likewise provides an exception. There a statute[40] prohibits the taking of subterranean waters naturally discharging into a surface stream, to the prejudice of prior appropriators on the stream.

### (B) Reasonable Use by the Landowner—The American Rule

Injustices resulting from unreasonable withdrawal of waters from a common underground supply, to the injury of a landowner who had been making beneficial use of the water, have led the courts of some States to impose upon each landowner some measure of reasonable use. No western supreme court which has been called upon repeatedly to decide controversies between landowners over a common supply of ground water has continued to adhere to the doctrine of absolute ownership and absence of limitation to reasonable use.

The so-called American rule of reasonable use did not originate in the West. California, which has had more cases on ground waters than any other Western State, and the first of that group to adopt the rule of reasonable use, did not do so until 1902–3, 40 years after the New Hampshire decision in *Bassett* v. *Salisbury Manufacturing Co.*[41]

The four Western States which adopted and still recognize the rule of reasonable use are California, Nebraska, Oklahoma, and Washington. Utah has changed to the appropriation doctrine. The California decisions have involved so many kinds of situations that the rule has become more widely developed there than elsewhere in the

[38] *Strait* v. *Brown* (16 Nev. 317 (1881)).
[39] *Strait* v. *Brown* (16 Nev. 317 (1881)).
[40] Kans. Gen. Stats. Ann. 1935, sec. 42–306.
[41] 43 N. H. 569, 82 Am. Dec. 179 (1862).

West. It is called the rule of correlative rights. Essentially, it is one form of the rule of reasonable use, with an apportionment of common ground water between landowners in event of shortage in the supply. The supreme courts of the three other States (Nebraska, Oklahoma, and Washington) regard export of water for commercial purposes as not a reasonable use if it depletes a neighbor's water supply. The Nebraska court has approved of the principle of apportionment, but has not had occasion to apply it. The rule and its application are as follows:

### CALIFORNIA RULE OF CORRELATIVE RIGHTS

Early California decisions accepted the English or common-law doctrine of absolute ownership in the landowner, provided there was no negligence, wantonness, or malice on the part of the landowner in making use of the percolating water.[42] The absolute-ownership rule was abrogated in *Katz* v. *Walkinshaw*,[43] and a new rule of reasonable use was adopted as being better suited to the natural conditions of the State. This, as developed in subsequent decisions, has come to be known as the California doctrine of correlative rights.

The controversy in *Katz* v. *Walkinshaw* concerned the relative rights of owners of land overlying a common artesian basin, one making use of the water on the overlying land and the other transporting it for sale at distant points. As a result of this and later decisions, owners of land overlying common water-bearing strata have correlative rights in the common supply; and such landowners and owners of land riparian to a stream to which such waters are tributary, or with which they are so interconnected that interference with either surface or ground waters affects the other class, have correlative rights in the common supply.[44] Further, as affecting the claims of appropriators, interconnected surface and ground waters are treated as a common supply, all claimants, whatever their basis of title, being restricted by a State constitutional amendment,[45] to reasonable, beneficial use.[46]

So far as rights of owners of land to the use of underlying percolating waters are concerned, the correlative doctrine is comparable in many respects to the doctrine of riparian rights of owners of land contiguous to watercourses. The two doctrines have been more nearly comparable since the constitutional amendment imposing reasonable use upon riparians was adopted, and applied to all ground-water uses as well, than they were previously.

Under the correlative doctrine, owners of overlying lands have equal rights to the ground-water supply for use on such lands, and each is entitled to an equitable apportionment if the supply is not enough for all. The courts have power to make and enforce an equitable apportionment;[47] although, as noted on page 204, no case has come to attention in which the water of an underground basin has actually been apportioned among all the landowners or water users

[42] *Hanson* v. *McCue* (42 Calif. 303, 10 Am. Rep. 299 (1871)).
[43] 141 Calif. 116, 70 Pac. 663 (1902), 74 Pac. 766 (1903).
[44] *Hudson* v. *Dailey* (156 Calif. 617, 105 Pac. 748 (1909)); *Rancho Santa Margarita* v. *Vail* (11 Calif. (2d) 501, 81 Pac. (2d) 533 (1938)).
[45] Calif. Const. art. XIV, sec. 3 (1928).
[46] *Peabody* v. *Vallejo* (2 Calif. (2d) 351, 40 Pac. (2d) 486 (1935)); *Lodi* v. *East Bay Municipal Utility Dist.* (7 Calif. (2d) 316, 60 Pac. (2d) 439 (1936)).
[47] *Burr* v. *Maclay Rancho Water Co.* (154 Calif. 428, 98 Pac. 260 (1908); 160 Clif. 268, 116 Pac. 715 (1911)).

entitled to its use. (A comprehensive determination is now being made in an area in southern California.) As between owners of overlying lands, priority of use is not a factor. The landowner's right for use on such land is paramount to that of a taker for distant use; but any surplus over the reasonable requirements of overlying lands may be appropriated. The "regular" supply of such lands may likewise be appropriated pending such time as the landowner elects to use it. Prescriptive rights to the use of percolating water may be acquired as against the landowner, but the latter may be protected by a declaratory decree against loss of his right and against destruction of or injury to the supply.

### NEBRASKA RULE

The American rule of reasonable use has been recently approved, without previous adherence to the English rule.[48] Under this rule export to distant lands would be permitted if others having substantial rights to the waters are not thereby injured. If the supply is not sufficient for all owners, each is entitled to a reasonable proportion of the whole; there has not yet been opportunity to apply this principle of apportionment. This conforms more closely to the basic California rule than does that of any other Western State.

### OKLAHOMA RULE

Oklahoma has a statute[49] with language identical with that of North Dakota, providing for ownership by the landowner. In the one decision rendered in this State on ground waters, in 1936, the supreme court has held that this statute does not vest in the landowner such an absolute ownership as to result in injury to others with similar ownership.[50] The American rule of reasonable use is adopted, each landowner being restricted to a reasonable exercise of his own rights in view of the similar rights of others; and exhaustion of a neighbor's ground-water supply, for transport to distant lands, is not such a reasonable use. But according to the court, this does not necessarily mean that there must be, in actual practice, an apportionment between landowners.

### WASHINGTON RULE

Although the early decisions indicated adoption of the English or common-law rule,[51] the American rule of reasonable use, or correlative rights as between landowners, was adopted in 1913 as being more sound and equitable.[52] The right of each landowner to make a reasonable use of the water on his own land, without undue interference with the rights of others to make a like use, was stated.

A court decision in 1935 retains the requirement of reasonable use, but upholds the right of a landowner to make a use that is reasonable in the enjoyment of his land even though the result is to cut off the

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[48] *Olson* v. *Wahoo* (124 Nebr. 802, 248 N. W. 304 (1933)).
[49] Okla. Stats. 1931, sec. 11785; Stats. Ann. (1936), title 60, sec. 60.
[50] *Canada* v. *Shawnee* (179 Okla. 53, 64 Pac. (2d) 694 (1936)).
[51] *Meyer* v. *Tacoma Light & Water Co.* (8 Wash. 144, 35 Pac. 601 (1894)).
[52] *Patrick* v. *Smith* (75 Wash. 407, 134 Pac. 1076 (1913)).

ground-water supply of a neighbor.[53] It was stated that restrictions would be applied where injury resulted from waste or from appropriation by one landowner for commercial purposes. This necessarily negatives any idea of an apportionment between landowners; but it should be noted that under the facts of this case one party was making a drainage use rather than a use of the water on the overlying land and that the principle of apportionment of the water was not involved or discussed in the opinion.

#### PERCOLATING WATERS TRIBUTARY TO WATERCOURSES

In California, percolating waters tributary to streams are subject to correlative rights on the part of both owners of overlying lands and owners of land riparian to the streams, as heretofore stated. The surface stream and ground waters supplying it or dependent upon it, are treated as a common supply for all who have rights to portions of the supply.[54] Thus rights to surface and ground waters in California are coordinated on a basis of reasonable, beneficial use.

The Nebraska court apparently leans toward this view, although relative rights have not been passed upon. In a recent case involving the right to divert waters from one stream system to another, riparian owners were allowed to appear because of the value to their lands of the ground waters under them.[55]

### (C) Appropriation

The principle of ownership of percolating waters by the owner of overlying land, either absolutely or subject to reasonable use, has been so thoroughly grounded in American jurisprudence as to make introduction of the appropriation doctrine a difficult matter.

Ownership of overlying land is analogous in some respects to ownership of land riparian to a surface stream. One might expect to find the rule of reasonable use by landowners applied to percolating waters in States holding to the riparian doctrine, and abrogated in States which have abrogated that doctrine; yet the courts of Arizona and Wyoming—strictly appropriation States so far as watercourses are concerned—have refused to apply the appropriative principle to percolating waters.

One of the main reasons for the slow growth of the appropriative principle, with regard to percolating waters, has been the practical difficulty in identifying such waters and proving their characteristics. To protect an appropriator adequately, it is not sufficient to establish the existence of the ground-water supply, but the origin, destination, boundaries, and quantity and rate of flow must likewise be ascertained within reason. This is a very different matter from making proof of right on a surface watercourse. Another reason has been the paucity of developments of ground waters in many States, in contrast with stream developments; the necessity of protecting the supply as against

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[53] *Evans* v. *Seattle* (182 Wash. 450, 47 Pac. (2d) 984 (1935)).

[54] *Peabody* v. *Vallejo* (2 Calif. (2d) 351, 40 Pac. (2d) 486 (1935)); *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.* (3 Calif. (2d) 489, 45 Pac. (2d) 972 (1935)); *Lodi* v. *East Bay Municipal Utility Dist.* (7 Calif. (2d) 316, 60 Pac. (2d) 439 (1936)); *Rancho Santa Margarita* v. *Vail* (11 Calif. (2d) 501, 81 Pac. (2d) 533 (1938)).

[55] *Osterman* v. *Central Nebraska Public Power & Irr. Dist.* (131 Nebr. 356, 268 N. W. 334 (1936)).

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encroachments by later users has not engaged so much attention. In line with this, uses have become vested upon the basis of court decisions recognizing ownership by the landowner, after which any declaration of public ownership and appropriability immediately raises constitutional questions.

However, several States have subjected all or some kinds of percolating waters to appropriation, by statute or court decision or both. In considering the appropriability of percolating waters it is necessary to subdivide them further.

### ALL PERCOLATING WATERS

All ground waters, by statute, are subject to appropriation in Idaho,[56] Nevada,[57] and Utah.[58] A statute relating to northwestern Kansas makes all subterranean waters in that area subject to diversion for stated purposes; [59] and while the act does not call this process an "appropriation," there is no restriction placed upon the quantity of water allowed to be diverted or upon the place of use, so that possibly such diversion may be considered to be a form of appropriation. However, the construction of the statute is questionable, as discussed more fully hereinafter (see p. 222). The courts of Idaho and Utah have accepted the appropriative principle, at least in relation to ground water of character susceptible of practicable appropriation. The courts of Colorado have applied the appropriation doctrine to all percolating waters which have been in litigation, and the fair conclusion is that such doctrine governs percolating waters generally.

*Idaho.*—The most recent decisions adhere to the appropriation doctrine, though the development of the law has not been consistent and uncertainties resulted from the previous decisions. These recent decisions involve artesian waters. However, it was stated in *Hinton* v. *Little* [60] that it is fairly well established that all ground waters are percolating waters. The appropriation rule was likewise accepted in *Silkey* v. *Tiegs* (1931).[61] It was also held in this case that such waters may be appropriated by either the statutory permit method or by diversion and application to beneficial use; that by whichever method made, the appropriation has priority over subsequent appropriations. It was held in *Union Central Life Insurance Co.* v. *Albrethsen* [62] that ground waters naturally tributary to a surface stream were subject to appropriation, notwithstanding the fact that they had been gathered into an artificial drain which discharged into the stream; hence they were part of the supply of the stream and included in the adjudication of the stream waters. As Idaho follows the appropriation doctrine exclusively as to watercourses, the present trend, therefore, is toward coordination of rights to surface and ground waters on an appropriative basis.

*Nevada.*—The few early court decisions applied the English or common-law rule to percolating waters, and prior to 1939 the appropriation statute applied to all underground waters except percolating

[56] Idaho Code Ann., 1932, sec. 41–103.
[57] Nev. Sess. Laws, 1939, ch. 178.
[58] Utah Rev. Stats., 1933, sec. 100–1–1, as amended by Laws 1935, ch. 105.
[59] Kans. Gen. Stats. Ann., 1935, sec. 42–301, modified by sec. 42–305.
[60] 50 Idaho 371, 296 Pac. 582 (1931).
[61] 51 Idaho 344, 5 Pac. (2d) 1049 (1931).
[62] 50 Idaho 196, 294 Pac. 842 (1930).

waters, the course and boundaries of which were incapable of determination. The legislature passed a new ground-water law in 1939 [63] and repealed the earlier statutes. The present law subjects all ground waters to appropriation, subject to existing rights to their use; but does not apply to the developing and use of ground water for domestic purposes where the draught does not exceed 2 gallons per minute and where the water developed is not from an artesian well.

There have been no decisions of the supreme court on rights to percolating waters for many years, and none since long before the enactment of the first statute subjecting ground waters to appropriation. While the early decisions affirm the rule of absolute ownership, the riparian doctrine as to watercourses, which had been recognized to a certain extent for 13 years, was rejected by the court in 1885.[64] It is a reasonable assumption, in view of the legislative and judicial backgrounds, that the appropriative principle now applies to all ground waters to which it could have practical application.

*Utah.*—Utah is essentially an appropriation-doctrine State, having invariably applied this rule to watercourses. However, the earliest court decisions recognized the rule of absolute ownership of percolating waters by the landowner, as against attempted appropriations, where the lands had passed to private ownership before the appropriations were initiated.[65] As controversies developed, and the absolute-ownership rule was found to be incompatible with the fundamental aversion of appropriation-doctrine adherents to water monopoly incident to location of land without regard to beneficial use, the court adopted the doctrine of correlative rights as between owners of land overlying a common artesian basin.[66] Even here, however, there was an evident effort to harmonize this doctrine with features of the appropriation doctrine.[67] And although the correlative doctrine, as modified, appeared then to be established, the court has recently rejected that doctrine and applied the appropriative principle to waters in an artesian basin.[68] The implication is that this rule affects ground waters, whether or not under artesian head, where interconnected with ground waters claimed by other users, or with water in a surface stream. Following these latest decisions, the Legislature made all ground waters appropriable.[69]

Although the two late decisions, rendered in 1935, are specific in accepting the appropriation doctrine, the court was divided. Dissenting opinions were equally specific; the minority felt that grave injustice might result from altering the rule of the correlative-rights decisions. Altogether, it is believed that positive conclusions as to the Utah ground-water law must await further decisions by the supreme court, particularly a decision construing the statute as applied to all ground waters. However, granted that the statute is valid, the appropriation doctrine applies to all ground waters to which it could have practical application, thus correlating rights to surface and ground waters on an appropriative basis.

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[63] Nev. Sess. Laws, 1939, ch. 178.
[64] *Jones* v. *Adams* (19 Nev. 78, 6 Pac. 442 (1885)).
[65] *Crescent Min. Co.* v. *Silver King Min. Co.* (17 Utah 444, 54 Pac. 244 (1898)).
[66] *Horne* v. *Utah Oil Refining Co.* (59 Utah 279, 202 Pac. 815 (1921)).
[67] *Glover* v. *Utah Oil Refining Co.* (62 Utah 174, 218 Pac. 955 (1923)).
[68] *Wrathall* v. *Johnson* (86 Utah 50, 40 Pac. (2d) 755 (1935)); *Justesen* v. *Olsen* (86 Utah 158, 40 Pac. (2d) 802 (1935)).
[69] Utah Rev. Stats. 1933, sec. 100-1-1, as amended by Laws 1935, ch. 105.

*Kansas.*—No supreme court decisions interpreting the statute or discussing the appropriability of percolating waters have been found.

*Colorado.*—In all cases in which rights to the use of percolating waters have been specifically in issue, the courts have applied the appropriation doctrine. There may still be a question as to the rights of owners of lands overlying percolating waters not tributary to a stream, but the more reasonable assumption appears to be that no exception exists in their favor; and the tentative conclusion seems warranted, therefore, that the appropriation doctrine governs percolating waters generally. This is stated more fully below in the discussion of percolating waters physically tributary to streams.

#### GROUND WATERS IN DESIGNATED CLASSES, HAVING REASONABLY ASCERTAINABLE BOUNDARIES

Such waters are subject to appropriation, by statute, in New Mexico and eastern Oregon. The New Mexico court has approved the principle.

*New Mexico.*—The statute makes appropriable the waters of underground streams, channels, artesian basins, reservoirs, or lakes, having reasonable ascertainable boundaries.[70]

The first statute authorizing the appropriation of ground waters was held void as violating a constitutional provision against amending or extending a law by reference to its title only.[71] However, the decision laid the basis for passage of an act free from technical objections, by stating that the act in question, while objectionable in form, was not subversive of rights of owners of lands overlying artesian waters, but was declaratory of existing law and was fundamentally sound. The new act was passed in 1931. As New Mexico recognizes the exclusive doctrine of appropriation as to surface streams, the law governing subterranean waters with definite boundaries is now in harmony with it.

*Oregon.*—The statute, based upon that of New Mexico, makes waters of those designated classes, in the counties east of the summit of the Cascades, subject to appropriation.[72]

There have been no decisions of the supreme court construing the statute. The few court decisions, all of which antedate enactment of the statute, are to the effect that percolating waters belong to the landowner; but the only decision actually based upon a controversy between rival owners of land overlying percolating waters was rendered in 1876.[73] The statute can doubtless be upheld without doing violence to statements in the previous decisions.

In Oregon the doctrine of appropriation has become the dominant rule governing rights to surface streams, as noted in chapter 2. The effect of the ground-water statute, which protects vested rights to ground waters economically and beneficially used—just as did the general appropriation statute in case of preexisting riparian rights—is to harmonize surface and ground-water rights in the semiarid portion of the State.

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[70] N. Mex. 1938 Supp. to Stats. Ann., sec. 151–201.
[71] *Yeo* v. *Tweedy* (34 N. Mex. 611, 286 Pac. 970 (1930)).
[72] Oreg. Code Ann. 1930, sec. 47–1301; Supp. 1935, sec. 47–1302.
[73] *Taylor* v. *Welch* (6 Oreg. 198 (1876)).

PERCOLATING WATERS PHYSICALLY TRIBUTARY TO STREAMS

*Colorado.*—The supreme court has upheld the appropriability of percolating waters which constitute the source of supply of streams, placing them in the same category as tributaries on the surface, thus coordinating rights to surface and tributary ground waters on an appropriative basis. The statutes do not refer specifically to ground waters.

Most of the decisions have involved return waters from irrigation.[74] Nevertheless, in reaching conclusions, ground waters from natural sources have been included.[75] Such waters if tributary to a stream are subject to appropriation, as against the claims of owners of overlying lands.[76]

A statute gives the person on whose lands seepage or spring waters first arise, the prior right of use thereof on his lands.[77] If such waters form no part of a natural stream, the statute applies.[78] But if naturally tributary to a stream, they do not belong to the landowner, regardless of the statute, but are subordinate to the stream appropriations.[79]

Waters placed in the ground by artificial means—that is, as the result of irrigation of overlying lands—and together with the ground waters naturally there, artificially drained into a surface stream to which they would not flow naturally, have been held not subject to priorities on such stream as against an independent appropriation out of the drainage ditch.[80] The rights of owners of overlying lands were not involved in the decision, and the court stated that the waters flowing in the drainage ditch were not susceptible of use on the lands within the drainage district. Consequently the rights of such owners of overlying lands apparently have not been squarely decided as against the claims of intending appropriators for distant use, where percolating waters not tributary to a stream are involved; but the courts have gone so far in applying the appropriation doctrine to all percolating waters which have been in litigation that the assumption that no exception exists in favor of overlying lands appears to be more reasonable than the assumption that owners of such lands have some preferred right to use the nontributary percolating waters. On the basis of this assumption, the tentative conclusion seems warranted that the appropriation doctrine governs rights to the use of percolating waters generally.

One claiming the use of developed waters must prove, by clear and satisfactory evidence, that he has produced such waters.[81]

*Kansas.*—The statutory declaration protecting stream appropriators from interference with tributary percolating waters has been referred to.

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[74] One of the leading cases is *Comstock* v. *Ramsey* (55 Colo. 244, 133 Pac. 1107 (1913)). See discussion below, for Colorado, p. 208.

[75] *In re German Ditch & Res. Co.* (56 Colo. 252, 139 Pac. 2 (1913)).

[76] *Nevius* v. *Smith* (86 Colo. 178, 279 Pac. 44 (1928, 1929)).

[77] Colo. Stats. Ann. 1935, ch. 90, sec. 20.

[78] *Haver* v. *Matonock* (79 Colo. 194, 244 Pac. 914 (1926)).

[79] *Nevius* v. *Smith* (86 Colo. 178, 279 Pac. 44 (1928, 1929)).

[80] *San Luis Valley Irr. Dist.* v. *Prairie Ditch Co. & Rio Grande Drainage Dist.* (84 Colo. 99, 268 Pac. 533 (1928)).

[81] *Leadville Mine Dev. Co.* v. *Anderson* (91 Colo. 536, 17 Pac. (2d) 303 (1932)).

SURPLUS ABOVE THE REASONABLE REQUIREMENTS OF OVERLYING LANDS

*California.*—While the right of an owner of land overlying percolating water is paramount to that of a taker for distant use, nevertheless the landowner is limited to reasonable, beneficial use. Hence, any surplus above the reasonable requirements of overlying lands may be appropriated for distant use. The "regular" supply for such lands, if not being used, may also be appropriated, subject to the right of the landowner to begin use at any time.[82]

## Artesian Waters

### (A) Rights to the Use of Artesian Waters

Ground waters are artesian if under sufficient pressure to rise above the saturated zone, whether or not they reach the surface. An artificial flowing well, therefore, is necessarily an artesian well; but a well may be artesian without flowing. The term "artesian" has been used in some statutes and court decisions without adherence to its scientific definition.

Percolating waters in a given stratum, then, may or may not be artesian waters. The decisions in some States on ownership and appropriability of percolating waters have been rendered in controversies between owners of land overlying common artesian basins. In California and Idaho, rights to the use of artesian waters have not been differentiated from those pertaining to the use of nonartesian waters. In Kansas,[83] Nevada,[84] New Mexico,[85] eastern Oregon,[86] and Utah,[87] artesian waters are made appropriable by statute. In South Dakota, the court apparently considers artesian waters not the same, from a legal standpoint, as percolating waters generally, as stated in the discussion of the doctrine of absolute ownership in that State.

### (B) Statutory Regulation of Artesian Wells

Most of the Western States, as noted in the summary of doctrines relating to ground waters, have statutes imposing restrictions upon the installation and operation of artesian wells, or declaring waste therefrom to be a misdemeanor.[88] The only Western States in the statutes of which some reference to artesian-well control has not been found, are Montana, Oklahoma, and Wyoming. The constitutionality

[82] *Burr* v. *Maclay Rancho Water Co.* (154 Calif. 428, 98 Pac. 260 (1908); 160 Calif. 268, 116 Pac. 715 1911)); *Peabody* v. *Vallejo* (2 Calif. (2d) 351, 40 Pac. (2d) 486 (1935)).

[83] Kans. Gen. Stats. Ann. 1935, sec. 42–307.

[84] Nev. Sess. Laws 1939, ch. 178.

[85] N. Mex. 1938 Supp. to Stats. Ann., sec. 151–201.

[86] Oreg. Code Ann. 1930, sec. 47–1301; Supp. 1935, sec. 47–1302.

[87] Utah Rev. Stats. 1933, sec. 100–1–1, as amended by Laws 1935, ch. 105.

[88] *Arizona:* Rev. Code 1928, sec. 4872; *California:* Stats. 1907, ch. 101, p. 122, amended Stats. 1909, ch. 427, p. 749; *Colorado:* Stats. Ann. 1935, ch. 11, sec. 1 to 8; *Idaho:* Code Ann. 1932, secs. 41–1401 to 41–1405; *Kansas:* Gen. Stats. Ann. 1935, secs. 42–330 to 42–332, 42–339, and 42–401 to 42–429; *Nebraska:* Comp. Stats. 1929, secs. 46–172 and 46–173; *Nevada:* Sess. Laws 1939, ch. 178; *New Mexico:* 1938 Supp. to Stats. Ann., secs. 6–101 to 6–115 and 6–201 to 6–222; *North Dakota:* Supp. 1913–1915, secs. 2790 b1 to 2790 b8, amended Laws 1927, ch. 88, p. 80; *Oregon:* Code Ann. Supp. 1935, sec. 47–1308, Code Ann. 1930, secs. 47–2001 to 47–2013; *South Dakota:* Code 1939, secs. 61.0401 to 61.0415; *Texas:* Vernon's Tex. Stats. 1936, Rev. Civil Stats., arts. 7600 to 7616, Penal Code, arts. 845 to 848a; *Utah:* Laws 1935, ch. 105; Laws 1937, ch. 130; Laws 1939, ch. 111; *Washington:* Rem. Rev. Stats. 1931, secs. 7404 to 7407.

of such statutes has been upheld in California and New Mexico.[89] The South Dakota court referred to the statute, but without construing it, there being no occasion to do so.[90]

The statutes of Arizona, California, Colorado, and Idaho refer specifically to flowing wells. Those of the other States are sufficiently broad in their definitions of or references to wells, to include those artesian wells that do not flow.

The primary purpose of these acts is to prevent the waste of artesian waters. In some of the statutes, waste is defined. For example, the California law includes in the definition of waste, the escape from land of more than 5 percent of artesian water used thereon, and authorizes storage for later defined beneficial use. The Texas and Nevada laws specifically prohibit waste into the overlying strata penetrated by the well, as well as upon the ground; and the Nevada statute further includes in the definition of waste the loss from beneficial use of more than 20 percent of the water discharging from a well.

The well-control provisions are embodied in the ground-water appropriation statutes of Nevada, Oregon, and Utah, thus bringing the acquisition of rights to the water and operation of the wells under one administrative supervision. The State engineer of New Mexico has general supervision, but in certain instances has concurrent authority with artesian conservancy districts. Several other statutes provide for supervision by a State official or some other public agency.

The reason for statutory regulation of a well which, if not provided with control devices, will flow upon the surface, is that at least part of a valuable natural resource will be wasted, intermittently or continuously, inasmuch as the flowing water will not necessarily be applied to continuous beneficial use. Thus the situation differs materially from that in which water must be pumped to the surface, and in which positive action must be taken and expense incurred in lifting the water during periods in which it is required for use.

Generally speaking, the artesian-control statutes operate as between the State and the individual well owner or driller or user of the water, and have no bearing upon the relative rights of owners of lands overlying artesian areas, other than to prohibit each owner of a well from wasting artesian water which is the common supply of a community. It is not necessary for a neighbor to prove injury to his water supply; violation of the statute is the injury. The statutes are equally operative, whether there is one well or many in an artesian area. To this extent they impose a limitation upon the absolute ownership of such waters by the owner of overlying land, in the States which recognize such absolute ownership with respect to percolating waters generally. It may be noted, further, that the California decision upholding the validity of the statute discussed the phase of reasonable use of such waters. The Colorado statute prohibits pumping water from artesian wells under certain conditions in certain parts of the State, but is extremely circumscribed in its application.

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[89] *Ex Parte Elam* (6 Calif. App. 233, 91 Pac. 811 (1907) ; *In Re Maas* (219 Calif. 422, 27 Pac. (2d) 373 (1933)) ; *Eccles* v. *Ditto* (23 N. Mex. 235. 167 Pac. 726 (1917)).

[90] *Madison* v. *Rapid City* (61 S. Dak. 83, 246 N. W. 283 (1932)).

## PART 2. GROUND WATERS: PROTECTION IN MEANS OF DIVERSION

### Summary

**Is an Appropriator, or Other Claimant to the Use of Water From an Underground Source, Entitled to Enjoin a Later Diversion From Such Source Which Results in Lowering the Ground-Water Table, Thereby Forcing Higher Costs Upon the Earlier User, but Which Does Not Deplete the Supply of Water Available at Lower Depths?**

The circumstances surrounding the diversion of ground waters make the question of protection of the method of diversion more important to the water user than is generally the case when he diverts from a surface stream. Ground waters, to be made available for use, must be brought to the surface from depths which range from a few feet to hundreds of feet. Unless the ground water is under pressure sufficient to raise it naturally to the surface, pumping must be resorted to, and the cost of equipment and power for pumping increases with the height to which the water must be lifted, that is, it increases with the depth at which the water table stands during the period of pumping. Each additional draft on the ground-water supply tends to lower the level of the water table, and in case of artesian water (ground water under pressure), each additional well results in some lowering of the height to which the water will rise naturally in the well. Consequently, as development in a ground-water basin progresses, the earliest users find it necessary to deepen their wells, install larger pumps, and use more power to raise a given quantity of water to the surface than was the case when they first began to use the ground water. The question arises as to what protection, if any, the first user is afforded in maintenance of the conditions under which he first began to divert the ground water, or as to whether he is entitled to compensation for the additional cost of pumping if later claimants are to be permitted to share the common water supply.

So far as diversions from surface streams are concerned, the comparatively few decisions have accorded the appropriator substantial protection in a means of diversion that was reasonable in the light of all the circumstances, and have denied protection otherwise. The junior appropriator is not thereby precluded from access to the common supply, but the prior appropriator is not required to bear the expense of a new diversion to accommodate the later comers, provided his existing diversion is entirely reasonable; such expense, if necessary, must be borne by the subsequent appropriators.

Where appropriations of ground water were involved, the few decisions, from four States, have protected the appropriator from the necessity of incurring substantial increased expense for a new diversion to accommodate junior appropriators. The methods of diversion in these cases were reasonable. The Arizona and California courts have indicated that physical solutions should be worked out, affording (1) substantial protection to existing rights and (2) best utilization of public water resources.

None of the decisions have involved appropriations under State administrative procedure for the acquirement of rights to ground

waters in which a determination is made as to whether or not there is unappropriated water in the proposed source. The controlling statutes of four States which have provided for such procedure in case of ground waters—Nevada, New Mexico, Oregon, and Utah—provide for findings by the State engineer as to unappropriated waters. Such findings necessarily involve considerations of safe yield and its accessibility. It is believed that the senior appropriator under such statutes and specific findings of safe yield has little ground for insisting upon maintenance of the ground-water level at the point at which he first pumps it under his permit, provided his appropriation can be satisfied within the conditions previously determined by the State engineer as affecting safe yield.

The English or common-law rule governing ownership of percolating water does not protect the landowner from a lowering of the water level under his land, resulting from his neighbor's operations.

In jurisdictions which have adopted the American rule of reasonable use of percolating water, the question as to protection in the means of diversion, where uses only on overlying lands were involved, apparently has not been squarely decided. In Washington, under such circumstances, it is believed that the landowner would have no redress against a neighbor whose use of his own land in relation to the ground water is reasonable and beneficial. The reasonableness of use appears to relate to the requirements of the one who intercepts the ground water, and not to be limited by the need for water by owners of other overlying lands. In California, under such circumstances, it is believed that (1) as between uses on overlying lands, the correlative doctrine does not give either landowner a right to maintenance of the ground-water level, under ordinary circumstances, for his sole accommodation; (2) as against a taking for distant use, the landowner may expect protection in a reasonable means of diversion for use on his overlying land.

## Appropriations From Surface Streams

### The Decisions Have Accorded the Appropriator Substantial Protection in a Method of Diversion That Was Reasonable in the Light of All the Circumstances, and Have Denied Protection Where Maintenance of the Particular Method Was Not a Reasonable Requirement

In a fairly early California case, an appropriator was denied an injunction against a junior upstream diversion which, by reason of its location on the body of slack water above the senior appropriator's dam, would require him to use flashboards on his dam in periods of high flow as well as low flow in order to secure his appropriated supply.[91] It was held that an appropriator must use reasonably efficient appliances in making his diversion, in order not to deprive others of the use of the surplus water, and if his diversion method becomes insufficient by reason of inherent defects when the surplus is diverted above him, he must take the usual and reasonable measures to perfect his diversion. In recent California decisions the rule has been stated that a prior appropriator may be subjected to some

[91] *Natoma Water & Min. Co.* v. *Hancock* (101 Calif. 42, 31 Pac. 112 (1892), 35 Pac. 334 (1894)).

inconvenience or extra expense within limits that are not unreasonable, but cannot be required to suffer substantial damage [92] nor incur material expense in order to accommodate a subsequent appropriator; [93] and the rule of reasonableness has also been applied as between riparian users.[93]

A Federal decision from Idaho denied the right of an appropriator to enjoin the raising of the surface stream level by means of a downstream dam subsequently installed, which destroyed the current of the plaintiff's upstream water wheel and thus rendered that means of diversion impractical.[94] It was held that the particular method of diversion adopted did not attach as an appurtenance to the appropriation, nor was the right to the current of the stream such an appurtenance. There had been no diversion or appropriation of water for power purposes. Further, the right of appropriation must be exercised with some regard for the rights of the public, which would not be served by devoting the current of an entire stream to lifting a comparatively small quantity of water over the banks. Such use of water would not be reasonable. This decision was affirmed by the United States Supreme Court.

An Oregon decision,[95] citing the foregoing case, held that while an appropriation of water may be made to propel a water wheel for lifting water from a stream for irrigation, the appropriation of the current necessarily must be reasonable; and that under the circumstances of that particular case, it would be unreasonable to permit a water user to hold five or six times the quantity of his appropriation claimed for irrigation simply to operate a water wheel. The Supreme Court of Oregon has also held that subsequent appropriators of water for artificial storage in a lake have the burden of constructing devices, at their own expense, for properly dividing the water artificially stored from that naturally stored in the lake and claimed by prior appropriators.[96]

The Washington Supreme Court held that the water between the high- and low-water marks of a navigable lake was subject to appropriation for irrigation, and allowed a junior appropriator to store water in the lake and divert the same plus the surplus there, but stated that at all times a sufficient supply of water must be reserved in the lake to insure delivery to the prior appropriator of his supply "throughout the irrigation period by the appliances now in use when kept in good working order." [97]

The Supreme Court of Utah has held that an original appropriator from a stream or body of water has the right to continue to use the method of diversion which he installs.[98] Otherwise it is stated that appropriators of small quantities of water could have their diversions

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[92] *Peabody* v. *Vallejo* (2 Calif. (2d) 351, 40 Pac. (2d) 486 (1935)).

[93] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.* (3 Calif. (2d) 489, 45 Pac. (2d) 972 (1935); *Lodi* v. *East Bay Municipal Utility Dist.* (7 Calif. (2d) 316. 60 Pac. (2d) 439 (1936)). For application of the rule as between riparian owners, one desiring to use more than his fair share of the water, see *Rancho Santa Margarita* v. *Vail* (11 Calif. (2d) 501, 81 Pac. (2d) 533 (1938)).

[94] *Schodde* v. *Twin Falls Land & Water Co.* (161 Fed. 43 (C. C. A. 9th, 1908); affirmed, 224 U. S. 107 (1912)).

[95] *In re Owyhee River* (124 Oreg. 44, 259 Pac. 292 (1927)).

[96] *Oliver* v. *Jordan Valley Land & Cattle Co.* (143 Oreg. 249, 16 Pac. (2d) 17 (1932), 22 Pac. (2d) 206 (1933)).

[97] *Ortel* v. *Stone* (119 Wash. 500, 205 Pac. 1055 (1922)).

[98] *Salt Lake City* v. *Gardner* (39 Utah 30, 114 Pac. 147 (1911)); *Big Cottonwood Tanner Ditch Co.* v. *Shurtliff* (56 Utah 196, 189 Pac. 587 (1919, 1920)); *Logan, Hyde Park & Smithfield Canal Co.* v. *Logan City* (72 Utah 221, 269 Pac. 776 (1928)).

rendered ineffective by subsequent large appropriations, which would be a confiscation of property rights. It is stated further, however, that a subsequent application to appropriate surplus water should not be denied simply because its granting might require a change in the prior appropriator's means of diversion. But the right of the prior appropriator to his full appropriated supply will be protected and preserved; and if prior appropriators are required to incur expense in excess of what they would otherwise incur, for the purpose of diverting their water supplies, by reason of later appropriations, these later appropriators must take the risk involved and should bear the expense so required. If it is practicable for the junior appropriators to divert water under circumstances which will protect the prior appropriator adequately, the court stated that they should be permitted to do so under the direction and supervision of the trial court.

In a recent Colorado case a prior appropriator diverted water from a reservoir by means of a gravity outlet pipe and also used the reservoir as a conduit for water entering by a ditch.[99] Junior appropriators diverted from the reservoir by pumping. The quantity of water in the reservoir above the level of the prior appropriator's outlet pipe was sufficient to satisfy his decreed right, and the quantity below the level of the outlet was sufficient for the junior appropriators. The latter threatened by means of their pumping to lower the water level below the outlet pipe. It was not feasible to lower the pipe; hence, if the water level were so lowered in the reservoir, the prior appropriator would be prevented from satisfying his right from the reservoir, and his ditch entering the reservoir would be rendered useless. The court held that, both upon principle and authority, the senior ditch and reservoir rights were being unlawfully interfered with; they were being practically nullified by the junior appropriators; and the senior appropriator could not, against its will, be compelled to bear the expense of pumping water upon its lands which by gravity would reach them if it were not for this unwarranted interference with its prior right. The lower court was given discretion to grant the junior appropriators the right to continue pumping if they made up the deficiency to the prior appropriator, both as to quantities of water and timeliness of delivery.

A Montana decision in 1939[1] held not subject to demurrer a statement of ultimate facts, that the plaintiff's diversion from a stream by means of a wing dam was suitable, efficient, reasonably adequate, and reasonably constructed and maintained, notwithstanding fluctuations in flow incidental to reasonable and lawful use of the stream by others; and that the reduction of flow resulting from storage upstream by junior appropriators made it impracticable to use such diversion in getting water into his ditch, otherwise than by large expenditures in constructing a new diversion system or a pumping plant. Defendants maintained that an appropriator's vested interest is only in the use of the quantum of water appropriated, without reference to means of diversion, however reasonably efficient; that not reasonable efficiency but absolute efficiency is required. The supreme court could not assent to this theory "without doing violence to the entire principle

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[99] *Joseph W. Bowles Reservoir Co.* v. *Bennett* (92 Colo. 16, 18 Pac. (2d) 313 (1932)).
[1] *State ex rel. Crowley* v. *District Court* (108 Mont. 89, 88 Pac. (2d) 23, 121 A. L. R. 1031 (1939)).

of water rights by appropriation." It was felt that the abandonment of reasonably efficient diversion systems is not justified by the necessity of minimizing the waste of water resources, important as that is, where the expense of new systems would not be warranted by the benefit from actual saving of water. Subsequent appropriators take with notice of the conditions existing at the time of their appropriations, including existing diversion systems of prior appropriators. And the prior appropriator's right was held to be the right to divert and use the water, not merely to have it left in the stream bed. The principle of the Utah decisions was relied upon, and the Federal decision was distinguished.

Other decisions have stated that the methods of diverting water must be reasonably efficient.[2]

The foregoing decisions include the only ones which have come to attention in which a prior appropriator claimed that notwithstanding the adequacy of water in a surface stream to fill his appropriation, the usefulness of his existing diversion was or would be impaired or destroyed by reason of diversions by junior appropriators. While the decisions are not numerous, they support the principle that a prior appropriator of water is entitled to protection in a reasonable means of diverting the water as against a subsequent appropriator, who will not be allowed to divert water in such manner as to render the prior user's reasonable appliances ineffective, unless he provides at his own expense an adequate substitute method by means of which the prior appropriation can be satisfied.[3]

In the California, Oregon, and Federal decisions the facts of which are above outlined, perpetuation of the particular methods of diversion insisted upon would have been unreasonable in their effect upon later appropriations and not in the public interest. The other decisions all upheld the right to a reasonable method of diversion; none of them sanctioned the continuance of a method which was unreasonable in relation to other appropriators under the circumstances involved; and it is noteworthy that certain decisions intimated that the junior appropriator, where the senior appropriative diversion was considered reasonable, might be allowed to solve the situation at his own expense. Where an appropriator's method of diversion is reasonable, in the light of all the circumstances including long-established customs in the community, it is doubtful if he would be required, in many jurisdictions, to submit to substantial expense to accommodate junior appropriators. As will be noted in the discussion of reasonableness of an appropriative right, in chapter 6, a method of diversion and use that is reasonable at one time or in one place may not be reasonable at another time or in another area. (See p. 306 et seq. and 316 et seq.)

Since the adoption of the 1928 amendment to the constitution of California [4] no water user, whatever his basis of title, has the right to an unreasonable method of diversion.[5] It would appear, in general, that reasonableness of the method of diversion is an element of the

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[2] Among such decisions are *Hough* v. *Porter* (51 Oreg. 318, 98 Pac. 1083 (1909)); *Hardy* v. *Beaver County Irr. Co.* (65 Utah 28, 234 Pac. 524 (1924)); *Dern* v. *Tanner* (60 Fed. (2d) 626 (D. Mont, 1932)).
[3] 121 A. L. R. 1044, case note to *State ex rel. Crowley* v. *District Court,* cited in footnote 1.
[4] Calif. Const., art. XIV, sec. 3.
[5] *Peabody* v. *Vallejo* (2 Calif. (2d) 351, 40 Pac. (2d) 486 (1935)).

appropriative right.[6] As shown more fully in chapter 6, in discussing the purposes for which water rights may be acquired, local customs have considerable weight in the determination as to whether a particular method of diversion is or is not reasonable under existing circumstances. (See pp. 306 and 316.)

## Appropriations of Ground Water

### Extant Decisions From Four States Afford Substantial Protection to the Appropriator in His Method of Diversion; That Is, With His Existing Pumping Equipment

Four recent or fairly recent decisions from four States involve the right of an appropriator of ground water to enjoin a lowering of the water level by operations of subsequent appropriators, which will have the effect of rendering his existing wells and equipment inadequate and will entail substantial additional expense in obtaining the quantity of water covered by his prior appropriation.

*Arizona.*—In *Pima Farms Co.* v. *Proctor* (1926),[7] both parties diverted the water by pumping from wells, and both relied upon the doctrine of appropriation. It was assumed or conceded that the appropriated supply was a definite underground stream (percolating waters are not subject to appropriation in Arizona). Plaintiff was the prior appropriator. Defendant installed a number of wells on premises upstream from but contiguous to plaintiff's tract; the abstraction of water therefrom resulted in so lowering the water level at plaintiff's wells that his pumping equipment proved inadequate to furnish him his appropriated supply. There was ample water at lower levels, which could be reached at substantially increased cost. The facts were not disputed.

The supreme court held that while the method of diversion is a secondary consideration, it is not inconsequential. The senior appropriator may insist that his water reach him in the natural channel or by artificial means equally effective, and is entitled to protection against what under the facts of this case would amount to a destruction of his water right. However, inasmuch as the State policy favored the broadest possible use of public waters, defendant should be permitted to appropriate the surplus if the prior appropriator is properly safeguarded. Hence the court approved the trial court's action in enjoining defendant from withdrawing waters so as to prevent plaintiff from obtaining his water with his present equipment, and in suspending judgment pending acceptance by defendant (a public carrier) of a plan to furnish plaintiff with water at reasonable rates, fixed by the court.

*California.*—In *Lodi* v. *East Bay Municipal Utility District* (1936),[8] rights to a ground-water supply fed by percolations from a surface stream were in issue. Plaintiff city was a prior appropriator of such ground waters, by pumping from wells; and defendant district was a junior appropriator of the stream waters, with a point of diversion

[6] Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, sec. 724, p. 1246.
[7] 30 Ariz. 96, 245 Pac. 369 (1926).
[8] 7 Calif. (2d) 316, 60 Pac. (2d) 439 (1936).

upstream from the area in which the waters percolated away from the river into the plaintiff's pumping area. The California Supreme Court treats such interconnected surface and ground waters as a common supply for those holding rights to their use.

The trial court found that the waters in the river constituted the sole source of replenishment for the appropriated ground waters, and that in the preceding 15 years the quantity taken from underground equalled the annual replenishment from the river, so that the balance would be maintained only if there were no further substantial interference with the river. The water level would be lowered by defendant's diversion; this would require plaintiff to deepen its wells, and the lower levels would not produce as potable a supply as the higher levels. However, one of plaintiff's witnesses conceded that the level could decline at least 25 feet more without danger or substantial injury to the plaintiff.

The supreme court stated that under existing conditions plaintiff's method of diversion was reasonable, and sent the case back for evidence as to the level to which the water in the wells could decline without substantially endangering the city's water supply. The duty of the district would be to supply water to the plaintiff city if the underground-water level reached the danger point, or else release sufficient water in the stream to raise the ground-water level. If the district should not comply within a reasonable time, injunction should issue.

Further, in view of the constitutional amendment imposing reasonable use and reasonable methods of diversion of water in the interest of conservation, the trial court had the power to suggest and enforce a physical solution even if the parties could not agree upon one. If the physical solution should require the city to change its method of appropriation, any major expense involved in the solution should be borne by the district; for the city, as the prior appropriator, should not be subjected to any expense to accommodate the subsequent appropriator. The court said:

> Although the prior appropriator may be required to make minor changes in its method of appropriation in order to render available water for subsequent appropriators, it cannot be compelled to make major changes or to incur substantial expense.

*Colorado.*—In *Faden* v. *Hubbell* (1933),[9] the parties were engaged in extracting ground water for raising fish, a nonconsumptive use, on adjoining lands. The waters flowed under these lands to a river and therefore under the Colorado law, were open to appropriation. Defendant, a senior appropriator, was engaged in deepening his diversion, the effect of which would be to change the lines of underground flow and reduce the water levels to the injury of the junior appropriator. The water supply was limited, there being scarcely enough for all claimants.

It was held that the prior appropriator of such ground waters had no right, by thus deepening his own diversion and so changing the characteristics of the underground flow, so to interfere with the natural flow as to injure a junior appropriator; that the junior appropriator has a vested right, as against the senior, in a continuation of

[9] 93 Colo. 358, 28 Pac. (2d) 247 (1933).

the conditions existing at the time he made his appropriation. Accordingly an injunction was granted against defendant.

*Idaho.*—In *Noh* v. *Stoner* (1933),[10] both parties were appropriators of water from the same artesian basin. Defendants, the junior appropriators, sank a well to a greater depth than plaintiff's and so lowered the ground-water level that plaintiff's pump was rendered inadequate to provide him with his appropriated supply. The cost of lowering plaintiff's well and increasing the power of his pump would be substantial.

The court held that any substantial expense required in changing the prior appropriator's diversion to accommodate junior appropriators must be borne by the latter. It is evident from the decision that these junior appropriators had not agreed to assume that expense. It was also stated that the change in plaintiff's diversion would in turn damage defendants' diversion and hence not solve the problem. Therefore an injunction was granted against defendants.

An earlier Idaho decision had held that the fact that the use of a well, subsequently installed, might force the earlier users to change their method of diversion would not alone be sufficient ground for an injunction. To warrant an injunction, an actual, permanent loss of water must be proved.[11] However, the language in the recent decision in *Noh* v. *Stoner* is specific.

*Discussion of Cases.*—These decisions hold uniformly that the holder of a valid prior appropriation of ground water is entitled to protection in the quantity of water so appropriated, and to enjoin an interference with it that results in lowering the ground-water level below the lowest point at which his present equipment can make that quantity available for use. No decision to the contrary—or at least, no decision not superseded by the foregoing—has been found in any of the cases on appropriation of ground water, although the cases found on this point have not involved interpretations of the ground-water statutes of Nevada, New Mexico, Oregon, or Utah. Where one has had the right to appropriate ground waters from a particular source, he has been protected in the reported decisions in the right to continue his existing means of diversion.

The California case does not offer protection to *all* diversions of appropriable ground waters. It was specifically held that the diversion in litigation was a reasonable means of diversion. An unreasonable method would not be sanctioned under the constitutional amendment. The court indicated clearly that a lowering of the ground-water level which did not endanger the appropriated supply or require substantial expense for a deeper diversion, would not be actionable, and sent the case back for evidence as to the danger point. Note that the criterion was substantial additional expense for a new diversion. Whether a greater cost for pumping with a higher lift with present equipment, to yield the quantity of water appropriated, would be subject to injunction, was not stated. Presumably such higher lift involving somewhat greater expense for power, would not be a material invasion of the appropriative right, for some lowering of the water level when others pump is inevitable. On the other hand, from the spirit of the decision, it does not seem likely that the appropriator

[10] 53 Idaho 651, 26 Pac. (2d) 1112 (1933).
[11] *Bower* v. *Moorman* (27 Idaho 162, 147 Pac. 496 (1915)).

would be required to suffer such an increase in operating cost as would appear altogether inequitable and unreasonable, solely for the benefit of subsequent appropriators. In any event, whether the additional expense would be so substantial as to warrant an injunction, would be a matter for the court to decide in view of all the circumstances, including reasonableness of the original method of diversion.

The Arizona case likewise raised the issue of destruction of the water right. Both the Arizona and California courts left the way open for solutions that would protect the prior appropriator from material additional expense in securing his water, and that would make it possible for other appropriators to use the surplus and thus effectuate the State policy of greatest possible use of water resources. The burden of providing for an alternative water supply, if that is the only solution, is upon the junior appropriator.

The Idaho case also holds that substantial expense for a new diversion by the senior must be borne by the junior appropriator. The reasonable implication is that an adequate solution which would make subsequent appropriations possible, without material injury to the senior appropriator, would meet with approval.

The Colorado case involves an exceptional physical situation, but the court adheres to the principle of appropriative rights on surface streams—that an appropriator, whatever his priority, is entitled to a continuance of the conditions existing at the time of his appropriation.

In view of the ensuing discussion, it must be repeated that none of the foregoing decisions involved appropriations under an administrative procedure applying especially to ground waters and including determinations by the State engineer of the existence of unappropriated ground waters in the proposed source of supply.

**The Statutes of Several States, Authorizing Appropriation of Ground Water, Provide for Determinations of Unappropriated Water by the State Engineer. While There Are No Decisions in Point in These States, It is Believed That the First Appropriator Under Such Statutes Has Little Ground for Insisting Upon Maintenance of the Water Level at the Point at Which He First Pumps It, Provided His Appropriation Can Be Satisfied Within the Conditions Determined by the State Engineer as Affecting Safe Yield**

Four States—Nevada,[12] New Mexico,[13] Oregon (eastern portion of State),[14] and Utah [15]—have provided administrative procedure governing the appropriation of ground waters from determinable sources. The Utah law covers all ground waters, and gives a junior appropriator the right of replacement of water, at his sole expense, if his proposed development will diminish the quantity or injuriously affect the quality of ground water already appropriated.[16]

The Oregon law is the only one which specifically limits the appropriative right to a feasible method of diversion. In all these States the State engineer has authority to determine whether there is unappropriated water in an area in which development is proposed, and grant-

[12] Nev. Sess. Laws 1939, ch. 178.
[13] N. Mex. 1938 Supp. to Stats. Ann., secs. 151–201 to 151–212.
[14] Oreg. Code Ann. 1930, secs. 47–1301, 47–1303, 47–1307, 47–1309 to 47–1311; Code Ann. Supp. 1935, secs. 47–1302, 47–1304 to 47–1306, 47–1308.
[15] Utah Laws 1935, ch. 105; Laws 1937, ch. 130; Laws 1939, ch. 111.
[16] Utah Laws 1935, ch 105, adding sec. 100–3–23 to Utah Rev. Stats. 1933.

ing the application to appropriate ground water is contingent upon the existence of unappropriated water in the proposed source; but in Oregon, determination of the safe yield of a ground-water basin is expressly made contingent upon a reasonable or feasible pumping lift in case of pumping developments, or a reasonable or feasible reduction of pressure in case of artesian developments. However, regardless of the quantity of unappropriated water in any subterranean source, ground water is not available for use under any circumstances unless it can be brought to the surface in a feasible manner; a yield assuredly is not "safe" if not susceptible of practicable use. Therefore, it would appear that the feasibility of diversion of the entire safe yield is a factor which must certainly govern the administrative findings of safe yield under any of these statutes.

Economic feasibility is as important as engineering feasibility. The ground-water supply in a given case might be adequate for irrigation of all overlying land if lifted 400 feet; but the value of crops which it is possible to produce on that land may be far too low to justify the cost of pumping with such a lift. Economic feasibility in that area may depend upon the use of only the water available at less depths.

The views of one who is himself an administrator of surface-water appropriations are instructive in this connection. Harold Conkling, California deputy State engineer in charge of water rights, states, with regard to legal control of ground waters (California does not provide for administrative control of ground waters, other than in definite underground streams): [17]

In isolated basins with no surface stream outlet the problem is less complicated by traditional concepts of what constitutes a water right. The average recharge and draft can be estimated with reasonable accuracy after thorough study. At first thought, it would seem that a simple solution would be to issue permits up to the amount of recharge as a greater draft which may be sustained for a period would only necessitate a future decrease. However, decrease in draft most often occurs because cost of pumping from a lowered water-table becomes too great for some users and not because the water has become physically unavailable. The recharge during a long period of years may be deficient due to vagaries of the climate. Even though pumping draft is less than the long-time average recharge the water-table will drop during such periods, and excessive pumping costs will occur so that some users quit. The result is different only in degree from that which would be the case with actual long-time overdraft. Obviously, the administrator is faced with consideration of water costs to determine the safe yield in such situations and this, instead of merely quantity of water available, may guide his decision.

After the State administrator has determined that there is unappropriated water available for use in the ground-water supply, and has issued a permit to appropriate, the question arises as to whether the holder of that permit has a vested right to the maintenance of the water level at substantially the point at which he first pumps it. None of the foregoing statutes state that the permittee has such right; nor is his appropriative right made contingent by statute upon the height to which he must lift the water to make it available for use. Successive appropriations will inevitably lower the ground-water level below the point at which the first appropriator diverts it, but many appropriations may take place before the supply is de-

[17] Conkling, Harold, Administrative Control of Underground Water: Physical and Legal Aspects, Trans. Amer. Soc. Civ. Eng., vol. 102 (1937), p. 782.

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pleted at lower levels from which the water may be lifted economically. In the ordinary case the first applicant will not install the maximum equipment ultimately to be required; for years may elapse before further development is initiated by others.

On the other hand, if the State has found by investigation that a given safe yield exists, contingent upon a given feasible pumping lift, that is the basis upon which applications to appropriate are granted. All applicants, from the first one on, are on notice to that effect. This would seem to be an implied condition of the appropriation. While there are no court decisions exactly in point in these States, it is believed that if permits to appropriate ground water are actually granted under these conditions, then the first applicant, who for reasons of economy chooses to install a small pumping plant, serviceable for the time being, would have little ground for insisting that all later applicants share with him the cost of deepening his well and installing and operating more powerful equipment, up to the time at which the safe yield is being fully utilized with a feasible pumping lift. If his appropriation is to be one out of a number of appropriations feasible under the conditions found to govern safe yield, he is not injured so long as he can obtain his appropriated supply under those conditions.

Of course, where no real investigation preceded the granting of the first application, and the State engineer approved all details of the proposed pumping diversion, the appropriator might have some justification in claiming, under the decisions heretofore cited, that the value of his existing right be not impaired, and that he be not put to substantial expense to accommodate subsequent appropriators. However, these ground-water laws contemplate real investigations and scientific findings. Their purpose is to provide for an orderly development of ground-water supplies, in the interest of best utilization of this natural resource. It is not believed that they were intended to sanction the perpetuation of a method of diversion which would be unreasonable in its effect upon complete development of the safe yield found to exist in the area and therefore not in the public interest. These laws are new; the question of long-standing diversions is not yet involved. Under all the circumstances, the reasonableness of the method of diversion bears a close relationship to utilization of the entire safe yield. The character of administration may have a bearing upon the decision as to whether the first appropriator under such a law is to be protected in his means of diversion, should such a case arise, as it is likely to do.

The fact that the use of wells necessarily and inevitably affects the water level in wells previously sunk into the same water-bearing formation, has been emphasized by ground-water hydrologists. Thompson, of the United States Geological Survey, has stated:[18]

Another important fact, which is not generally appreciated, is that, as stated by Mr. Conkling under "Administration: Underground Water," it is impossible to take water from any well either by natural flow from an artesian well in which the static head is above the surface, or by pumping from wells in which it is below the surface, without causing a drop in head, or static level, beneath the territory surrounding the well. Theoretically, this drop in head should extend

[18] Thompson, David G., discussion of Conkling's Administrative Control of Underground Water: Physical and Legal Aspects, Trans. Amer. Soc. Civ. Eng., vol. 102 (1937), pp. 813–814.

ultimately to the outermost borders of the ground-water body under consideration. The loss of head resulting from the withdrawal of water from several wells if within the cones of influence of each other, may be significant in amount over a large area, perhaps many square miles. Some loss of head cannot be avoided even if the quantity of water withdrawn is only a small part of the total safe yield of the aquifer; and if a considerable part of the safe yield is to be obtained in some regions there must be a considerable loss of head. It should be distinctly understood, however, that loss of head does not necessarily mean that the permanency of a well owner's supply is endangered. * * *

It is common knowledge that pumping from a body of ground water, whether or not under artesian head, creates a cone of depression which affects the water level in other wells within the area affected. This does not necessarily endanger the other well user's water supply, but it does affect the conditions of withdrawal during the period of draw-down. Under some circumstances it is quite possible that rotation of use within an affected area would offer an equitable solution. There is ample precedent for this in irrigation practice generally.

Thompson and Fiedler, in a recent article on legal control of ground water, make reference to the Idaho decisions in *Bower* v. *Moorman* [19] and *Noh* v. *Stoner*,[20] and their implications, as follows: [21]

There is no indication in the decisions that the defendants set up as their justification, that by the laws of nature it would generally be impossible for any subsequent user of ground water to pump from the same water-bearing formation without affecting to some degree the water level and yield of every well previously installed in the area. Carried to an ultimate conclusion, these decisions might mean that in many areas the first appropriator could require damages from every subsequent appropriator and each subsequent appropriator, in turn of priority, could require damages from all later appropriators, until the last one would have to pay tribute to all. If the doctrine of appropriation is to accomplish the desired end of making full use of the ground-water resources of the state, it must be recognized that some lowering of the water table or of the artesian pressure is a reasonable result of a reasonable method of diversion (pumping) of the water, and should not constitute a basis for damages.

Even more recently it has been stated: [21a]

If future decisions should hold that rights to divert and use water from ground-water bodies include the right to maintenance of the elevation of the water in the wells through which such water is diverted, it would be a severe blow to the interest of conservation and highest utilization of such supplies. There is a great need for clarification of this phase of ground-water law.

The present author is in full accord with these statements. On the whole, it seems obvious that to accord the first appropriator under a ground-water administrative statute the right to have the water level maintained at the point at which he first pumps it, or damages in lieu thereof, so long as there is an adequate water supply of equivalent quality available at lower depths from which it is feasible to pump, would unduly complicate the administration of water rights in the area and might seriously curtail the fullest utilization of the ground-water supply, for later uses under such a handicap may prove to be economically impracticable. This result would be out of line with the purpose of the statute. Accordingly these factors and implications are worthy of consideration in determining the question of reasonableness of the first appropriator's diversion under such circumstances.

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[19] 27 Idaho 162, 147 Pac. 496 (1915).

[20] 53 Idaho 651, 26 Pac. (2d) 1112 (1933).

[21] Thompson, David G., and Fiedler, Albert G., Some Problems Relating to Legal Control of Use of Ground Waters, Jour. Amer. Water Works Assn., vol. 30, No. 7 (July 1938), p. 1075.

[21a] Baker, Donald M., Proc. Amer. Soc. Civ. Eng., vol. 66, No. 2 (February 1940), p. 380, discussing Tolman and Stipp's paper, Analysis of Legal Concepts of Subflow and Percolating Waters, Proc. Amer. Soc. Civ. Eng., vol. 65, No. 10 (December 1939), pp. 1687–1706.

## Diversions of Percolating Ground Waters Under Doctrines of Absolute Ownership and Reasonable Use

### The English or Common-Law Doctrine Gives No Protection to the Landowner in His Method of Diversion

The English or common-law doctrine of absolute ownership of underlying percolating waters in the owner of overlying land, precludes any cause for redress against diversion of percolating water by a neighbor which results in lowering the water level under surrounding land. Each landowner has the right to extract such water from his own land in unlimited quantities, at will.

### The Question Apparently Has Not Been Decided in Jurisdictions Adhering to the American Doctrine of Reasonable Use on Overlying Land, Where the Question of Taking for Distant Use Is Not Involved

The American rule recognizes the right of a landowner to make a reasonable use of underlying ground waters in connection with such land. Where this rule is in effect, the question as to whether a use by one landowner on his overlying land, that results in lowering the water level beyond the capacity limit of the neighbor's existing and otherwise useful equipment, but without depleting the supply at lower levels, does not seem to have been squarely involved in the decisions. None that have been read are exactly in point.

### Same: In Washington, a Lowering of the Water Level Beyond the Capacity Limit of Existing Pumps Would Probably Not Be Actionable, if Use by the Party Causing the Injury Is Otherwise Reasonable

Where the rule of reasonable use is as broadly applied in favor of the landowner making such use as it is in Washington, injury to a neighbor's diversion would apparently not be actionable, so long as the party causing the injury uses the water in a reasonable and beneficial manner on or in connection with his own land. No other conclusion appears justified, in view of the recent decision in *Evans* v. *Seattle*.[22]

### Same: In California, It Is Not Believed That the Correlative Right of an Individual to the Reasonable Use of Water on His Overlying Land Includes Maintenance of the Ground-Water Level for His Sole Accommodation, Where Other Landowners Are Not Taking the Water for Distant Use

*Taking for distant use.*—The matter of lowering the water level has been in issue in several cases, but the grievance has been against the party appropriating for distant use. This was not a function of the correlative right.

*Burr* v. *Maclay Rancho Water Co.*[23] is typical. There both parties owned land overlying a common water supply, having obtained their tracts from a common grantor who had previously taken water for distant use. Defendant acquired the tract on which the grantor's

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[22] 182 Wash. 450, 47 Pac. (2d) 984 (1935).

[23] 154 Calif. 428, 98 Pac. 260 (1908) ; second appeal: 160 Calif. 268, 116 Pac. 715 (1911). See also, as to the effect of the water level in an area from which water was being taken for distant use: *Newport* v. *Temescal Water Co.* (149 Cal. 531, 87 Pac. 372 (1906)), where drought and pumping by third parties as well as by the defendant were substantially responsible; *Corona Foothill Lemon Co.* v. *Lillibridge* (8 Cal. (2d) 522, 66 Pac. (2d) 443 (1937)) ; and *Hillside Water Co.* v. *Los Angeles* (10 Cal. (2d) 677, 76 Pac. (2d) 681 (1938)).

original wells were located. Plaintiff installed pumping equipment and used the water on one of his tracts. Defendant later began taking larger quantities for distant use than the grantor had taken; the effect was to lower the water in plaintiff's wells beyond the capacity of his pumps. In addition, depletion of the supply was threatened. It was held that defendant had succeeded to the appropriation by the common grantor; but beyond that, its right was subject to plaintiff's right to make use of the water on his overlying land. Defendant was enjoined from pumping to such an extent, after his appropriation was satisfied, as to deplete the water supply in the basin or to lower the water level in plaintiff's wells beyond the capacity of his existing pumps.

On this point the decision in *Burr* v. *Maclay Rancho Water Co.* affords protection to the landowner, in his means of diversion, against an appropriation for distant use. Under the decision in *Lodi* v. *East Bay Municipal Utility District*,[24] *supra*, the landowner's diversion, to have such protection, undoubtedly must be a reasonable method of diversion.

*Use on overlying lands.*—As between uses on overlying lands, the California correlative doctrine purports to give owners of all such lands coequal rights to the common supply.

Apparently Justice Shaw, in *Katz* v. *Walkinshaw*,[25] felt that the method of diversion might be involved in the right to make a reasonable use under the correlative doctrine. He spoke of the possibility, under the absolute-ownership rule, of a landowner's taking unlimited quantities of water by means of stronger pumps and deeper wells than those of his neighbor; and then stated that the doctrine of reasonable use affords some measure of protection to property now existing, and greater incentive to make new developments. But under the facts of that case the diversion which was complained of was for use on distant lands; and the question of actually enjoining an owner of land from lowering the water level under his neighbor's land by means of a deeper diversion than his own, the use of water being on overlying land in both cases, does not appear to have been decided in California or other jurisdictions adhering to the rule of reasonable use.

The California constitutional amendment of 1928 [26] provides that the right to water in a natural stream

> does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

This has been interpreted as applying to the correlative right of the owner of overlying land.[27] The question then arises, Is the diversion of the first user of water for use on land overlying a groundwater stratum a reasonable method of diversion if its maintenance precludes other landowners from tapping the common underground supply for use on their overlying lands?

Priority of use is not a factor as between uses on overlying tracts, according to the early decisions. If this is still the law—and there have been no subsequent decisions to the contrary—it is difficult to see why there should be priority in the means of diversion,

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[24] 7 Calif. (2d) 316, 60 Pac. (2d) 439 (1936).
[25] 141 Calif. 116, 70 Pac. 663 (1902), 74 Pac. 766 (1903).
[26] Calif. Const. art. XIV, sec. 3.
[27] *Peabody* v. *Vallejo* (2 Calif. (2d) 351, 40 Pac. (2d) 486 (1935)).

which is essentially a means of effectuating use. The decisions accord all owners coequal rights in the common supply; and they do not predicate these rights upon the portion of the supply available at the depth at which the first user encounters it. A coequal right obviously is not an exclusive right. To require the maintenance of the entire body of water in a subterranean basin at a given level in order to render one existing diversion continuously useful is tantamount to requiring the full flow of a surface stream to accommodate the diversion of one riparian owner. This may be reasonable, or it may not be, depending upon the circumstances. Whether the use of underground basins simply to support the flow of a surface stream, is or is not a reasonable, beneficial use, is a question of fact that must be passed upon in each case.[28]

It is believed, therefore, that under the correlative doctrine as developed in California, and particularly in view of the constitutional amendment and subsequent decisions, owners of land overlying a ground-water basin are not precluded, in an ordinary situation, from access to such supply for reasonable, beneficial use on their overlying lands, simply because such use may force other owners in that basin to deepen their existing diversions.

# PART 3. THE SEVERAL RULES OF GROUND-WATER LAW, BY STATES

## Arizona

### 1. Summary

1. The statutes provide that waters flowing in definite underground channels are subject to appropriation. Waste of water from a flowing well is a misdemeanor.

2. The courts have held the waters of definite underground streams subject to appropriation, even prior to adoption of the statutory provision. A strict test has been applied to determination of existence and location of underground streams. The burden of proof is on the party who asserts the existence of an underground stream, and the existence and location must be proved by clear and convincing evidence. An appropriator from an underground stream is entitled to protection against depletion of his supply obtainable with existing equipment by a lowering of the water level by junior appropriators.

3. The underflow of a stream is a part of the stream. However, ground waters originating from the underflow of a surface stream, but the withdrawal of which by pumping or other means does not appreciably and directly diminish the surface flow, are no longer a part of the stream but are subject to the rules applying to percolating waters.

4. Percolating waters are not subject to appropriation as against the owners of overlying land, but are held to belong to the landowner.

5. In none of the cases have the rights of rival owners of land overlying a common supply of percolating water been directly in issue. In the earlier cases the English or common-law rule of ownership was stated, without imposing any limitations upon exercise of the

[28] *Rancho Santa Margarita* v. *Vail* (11 Calif. (2d) 501, 81 Pac. (2d) 533 (1938)).

right of ownership. In a very recent case there is a dictum favoring the rule of reasonable use. The court, therefore, leans toward the rule of reasonable use, but has not yet squarely adopted either rule to the exclusion of the other.

#### 2. Constitutional and Statutory Provisions

The constitution contains no direct reference to ground waters. It does provide:

> The common law doctrine of riparian water rights shall not obtain or be of any force or effect in the State.[29]
>
> All existing rights to the use of any of the water in the State for all useful or beneficial purposes are hereby recognized and confirmed.[30]

The present statute states: [31]

> The water of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belongs to the public, and is subject to appropriation and beneficial use, as herein provided.* * *

Willful failure to prevent, by suitable control devices, the waste of water from a flowing well is a misdemeanor.[32]

#### 3. Waters in Definite Underground Channels

SUCH WATERS ARE SUBJECT TO APPROPRIATION

The present statute specifically provides for the appropriation of waters flowing in definite underground channels.

The appropriation statutes originally made no reference to ground waters of any character. The Bill of Rights referred only to "streams, lakes, and ponds of water" [33] and the Howell Code referred only to "rivers, creeks, and streams of running water." [34] However, prior to the enactment of the present statute, the Territorial court stated (in 1904) in the case of *Howard* v. *Perrin* [35] that subterranean streams, flowing in natural channels between well-defined banks, were subject to appropriation under the same rules as surface streams, but that waters percolating through the soil in undefined and unknown channels belonged to the owner of the soil. Both parties agreed as to the law in the premises. The waters in that case were held to be percolating waters not subject to appropriation, inasmuch as the burden of proof was upon the party alleging that there was a subterranean stream and the evidence was held insufficient to sustain the allegation. The decision was upheld on appeal to the United States Supreme Court.[36] Years later, in 1931, the court stated in *Maricopa County Municipal Water Conservation Dist. No. 1* v. *Southwest Cotton Co.*[37] that whether or not the statement in the 1904 case of *Howard* v. *Perrin* was dictum, it had been accepted as the law in Arizona

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[29] Ariz. Const., art. XVII, sec. 1.
[30] Ariz. Const., art. XVII, sec. 2.
[31] Ariz. Rev. Code 1928, sec. 3280.
[32] Ariz. Rev. Code 1928, sec. 4872.
[33] Terr. Ariz. Bill of Rights, art. 22.
[34] Terr. Ariz. Howell Code (1864), ch. LV, sec. 1.
[35] 8 Ariz. 347, 76 Pac. 460 (1904).
[36] 200 U. S. 71 (1906).
[37] 39 Ariz. 65, 4 Pac. (2d) 369 (1931).

and that now it would be reasonable to assume that the statement was correct.

THE COURT HAS LAID DOWN STRICT RULES FOR DETERMINING THE EXISTENCE OF A DEFINITE UNDERGROUND STREAM, AND HAS STATED THAT ONE ASSERTING SUCH EXISTENCE MUST PROVE THE ASSERTION BY CLEAR AND CONVINCING EVIDENCE, AND MUST PROVE THE LOCATION AS WELL AS THE EXISTENCE OF THE STREAM

The decision in the *Maricopa case* states that the presumption is that underground waters are percolating in their nature, and that one who asserts that they are not must prove his assertion by clear and convincing evidence. A watercourse, whether surface or subterranean, is stated to have essentially a channel, consisting of a well-defined bed and banks, and a current of water which need not flow continuously. Before an underground stream is subject to appropriation, there must be certainty of location as well as existence of the stream, for

It is not sufficient that geologic theory or even visible physical facts prove that a stream *may* exist in a certain place, or probably or certainly does exist *somewhere.*

Surface indications were held not exclusive; other kinds of evidence are important, such as borings, tunnels, the color and character of the water from these wells, the sound of the running water, etc. The following finding was held erroneous as not fixing the exact locations:

All of said waters * * * join the subflow of said river and or flow into and through known, definite, dependent underground channels extending laterally from various points along and beneath the bed of said river to and under the lands, wells and pumping plants of the plaintiffs, which said known, definite, dependent underground channels run in a general southerly direction and have their ultimate outlets in the Gila River.* * *

The court said that even assuming that deductions as to the existence of underground streams were correct, the specific places where these so-called subterranean streams began, where they ended, or how far the banks extended, were not proved to the satisfaction of either an ordinary man or an expert.

Under this test the presumption that ground waters are by their nature percolating will often be difficult to overcome. However, it is of interest to note that Smith, irrigation engineer of the University of Arizona, has recently published two bulletins—one on ground-water law in Arizona and neighboring States,[38] in which the Arizona Supreme Court decisions are discussed in considerable detail; and one on the occurrence of ground water in Arizona,[39] designed in part to provide a basis for differentiating between percolating water and ground water moving in definite underground channels, for use in court determinations under the dual system of water law applied to ground waters in Arizona. This second bulletin develops a basis on which commercial ground-water supplies in the important valleys of southern and central Arizona may be brought within the definition of waters in definite undeground channels, subject to appropriation.

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[38] Smith, G. E. P., Groundwater Law in Arizona and Neighboring States, Ariz. Agr. Exp. Sta. Tech. Bul. 65 (1936).

[39] Smith, G. E. P., The Physiography of Arizona Valleys and the Occurrence of Groundwater, Ariz. Agr. Exp. Sta. Tech. Bul. 77 (1938).

AN APPROPRIATOR FROM A SUBTERRANEAN STREAM IS PROTECTED AGAINST A LOWERING OF THE WATER LEVEL BY JUNIOR APPROPRIATORS

A senior appropriator of water from an underground stream, flowing within well-defined and known channels the course of which can be distinctly traced, may enjoin a junior appropriator from withdrawing water in such quantity as to prevent the senior from obtaining his appropriated supply with his present equipment, according to a decision rendered in 1926.[40] This is the case, even though there is ample water at lower levels which can be reached at additional substantial cost. Both parties relied upon the doctrine of appropriation, and it was assumed or conceded that the appropriated supply was from a definite underground stream. The court stated:

We think in such a case the first appropriator should be protected, and is entitled to protection upon the same principle that affords protection to an appropriator of surface water in a running stream against depletion of the undercurrent to the extent of preventing the free flow of his appropriation in quantity and quality to the head of his ditch.

It was further stated that the State's policy is that the broadest possible use be made of the public waters, and hence the junior appropriator should be permitted to appropriate these ground waters if possible without virtually destroying the senior right. The supreme court approved the trial court's action in suspending judgment pending defendant public carrier's acceptance of a plan to deliver plaintiff his water at rates fixed by the court.

THE UNDERFLOW IS A PART OF THE STREAM, BUT WATERS DEPARTING THEREFROM AND NO LONGER AFFECTING THE STREAM BECOME PERCOLATING WATER

In the *Maricopa case*, the court stated:

The underflow, subflow or undercurrent, as it is variously called, of a surface stream may be defined as those waters which slowly find their way through the sand and gravel constituting the bed of the stream, or the lands under or immediately adjacent to the stream, and are themselves a part of the surface stream.

The test stated by the court as to whether ground water is physically a part of the stream is: Does drawing off the subsurface water tend to diminish appreciably and directly the flow of the surface stream? If it does, it is subflow and subject to the same rules of appropriation as the surface stream; if it does not, then it is subject to the law of percolating waters, even though the water may have come originally from the surface stream itself.

### 4. Percolating Waters

PERCOLATING WATERS ARE NOT SUBJECT TO APPROPRIATION

The Arizona statutes have never subjected ground waters, other than those flowing in definite underground channels, to appropriation. The decision of the United States Supreme Court in *Howard* v. *Perrin*,[41] pointed out that the statute did not cover percolating

[40] *Pima Farms Co.* v. *Proctor* (30 Ariz. 96, 245 Pac. 369 (1926)).
[41] 200 U. S. 71 (1906).

waters. In the recent *Maricopa case*[42] the Arizona Supreme Court stated that the legislature, in its various statutory enactments on the right to appropriate water, had never specifically made percolating waters subject to appropriation, but on the contrary, "if we apply the usual rule of '*expressio unius*', has very carefully excluded them therefrom."

### PERCOLATING WATERS HAVE BEEN HELD TO BELONG TO THE LANDOWNER

This has been held consistently by the Arizona courts. The rule was stated in *Howard* v. *Perrin*[43] that waters percolating generally through the soil in undefined and unknown channels and therefore a component part of the earth, having no characteristic of ownership distinct from the land itself, were not the subject of appropriation but belonged to the owner of the soil.

The rule was reaffirmed in the case of a spring in *McKenzie* v. *Moore*.[44] Later, in *Brewster* v. *Salt River Valley Water Users' Association*,[45] it was stated that percolating water belongs to the landowner,

> especially where the water gets into the soil by natural processes, and perhaps also where the process is artificial as by irrigation or seepage from canals or ditches.

Nevertheless, a landowner in the association, on account of his contractual relation arising by virtue of membership, "is or ought to be" bound to surrender such ownership when the association's right to drain is established and drainage is for the best interest of the project. As to the objection that lowering the ground-water level would prevent crops from receiving moisture by capillary attraction, the depth of drainage was stated to be a matter largely of detail, and unless clearly shown to invade some right of the landowner, should be left to the determination of the association. The principle of the *Brewster case* was applied in 1939 to another case involving the Water Users' Association.[46] Where a contract between the association and its landowners had given the association, in its sound discretion, the right to pump ground water for irrigation and drainage purposes, it was held that the right to pump water from the land of the shareholders was not limited to the quantity necessary for drainage, so long as no more water was pumped than was necessary for irrigation purposes. This was in answer to a claim that inasmuch as the water in the ground is the property of the landowner, the association should be required to limit any drainage or pumping to the quantity necessary for drainage.

The rule of ownership of percolating water by the landowner has been stated still more recently in *Fourzan* v. *Curtis*[47] and in *Campbell* v. *Willard*.[48] It was stated in the *Campbell case* that artesian water brought to the surface by purely artificial means does not thereby become subject to appropriation, even by the person who develops the well on Government land and develops the flow; that in deter-

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[42] *Maricopa County M. W. C. Dist.* v. *Southwest Cotton Co.* (39 Ariz. 65, 4 Pac. (2d) 369 (1931)).
[43] 8 Ariz. 347, 76 Pac. 460 (1904).
[44] 20 Ariz. 1, 176 Pac. 568 (1918).
[45] 27 Ariz. 23, 229 Pac. 929 (1924).
[46] *Adams* v. *Salt River Valley Water Users' Assn.* (53 Ariz. 374, 89 Pac. (2d) 1060 (1939)).
[47] 43 Ariz. 140, 29 Pac. (2d) 722 (1934).
[48] 45 Ariz. 221, 42 Pac. (2d) 403 (1935).

mining whether percolating waters are subject to appropriation, they must be considered in their natural state and not as developed artificially, hence the fact that the water flowed in a stream in a natural channel after coming to the surface in the artificial well would not make it a stream subject to appropriation. The landowner is entitled to the use of such water, not as an appropriator, but as a landowner. A modification of the rule of absolute ownership was suggested by dictum in *Fourzan* v. *Curtis*, as noted below.

One of the earlier cases noted above (*McKenzie* v. *Moore*) involved the right to appropriate water from a spring, which at the time was not covered by statute. (The appropriation statute now includes "springs on the surface." The subject of rights to spring waters is discussed more fully in ch. 5.) The decision apparently was concerned with the source of the springs, as well as the fact that it was not an appropriable source of water. In any event, the language of the recent cases is positive on the matter of private ownership, by the owner of overlying land, of percolating water collected by artificial means, that is, by wells.

#### GROUND WATERS ARE PRESUMED TO BE PERCOLATING

The decision in the *Maricopa case* specified the rule that ground waters are presumed to be percolating, and outlined the nature of proof which must be made to overcome this presumption. This has been discussed above in connection with Waters in Definite Underground Channels.

#### THE DECISIONS HAVE NOT SQUARELY REJECTED THE ENGLISH OR COMMON-LAW RULE OF ABSOLUTE OWNERSHIP, ALTHOUGH A RECENT DECISION CONTAINS A DICTUM IN FAVOR OF THE RULE OF REASONABLE USE

The earlier decisions stated the rule of ownership of percolating water in its English common-law form, that is, ownership of the water on the part of the landowner, without imposing any limitations upon his exercise of the ownership. In the *Maricopa case*, however, judgment was reserved as to whether the English rule in its strictest form, or "the American modification known as the rule of correlative rights," should apply, as the matter was not properly before the court.

Later, in *Fourzan* v. *Curtis*, the same Justice who wrote the *Maricopa* opinion wrote the opinion of the court, which held that the waters in litigation were percolating waters, and since the landowners owned the waters they might convey them to other premises than those on which originally found, provided no other rights were injured thereby. The plaintiffs were claiming as landowners and defendants as appropriators; hence the rights of owners of other overlying lands were not involved, and this statement of reasonable use was therefore dictum.

In none of the Arizona cases have the rights of rival owners of land overlying a common supply of percolating water been directly in issue. In each instance, excepting in the case of a spring subject to appropriation under the statute, the owner of overlying land was held to own the percolating waters, as against the claim of an attempted appropriator. Therefore, the court has not yet declared absolutely that as between landowners, either the doctrine of absolute ownership or that of reasonable use should be adopted to the exclusion of the other; but in the one decision (a very recent one) in which a choice was stated, there is a dictum favoring the rule of reasonable use.

## California

### 1. Summary

1. A constitutional amendment approved in 1928 limits the right to water from any natural stream to reasonable methods of diversion and reasonable, beneficial uses.

2. The appropriation statute applies to waters in subterranean streams flowing through known and definite channels. There are no other statutes relating to the ownership or appropriation of ground waters, other than with respect to the right to withdraw water stored in the ground.

3. A statute regulating artesian wells and use of artesian water in the interest of conservation has been upheld under the State police power. A county ordinance regulating pumping from all wells has been similarly upheld.

4. The laws applying to surface streams have been consistently applied to defined underground streams. The underflow of a surface stream is a part of the stream, and holders of riparian and appropriative rights are protected from interference with so much of the subflow as is necessary to support the surface stream and maintain its volume.

5. Percolating waters, including artesian waters, are subject to the doctrine of correlative rights, an adaptation of the American doctrine of reasonable use. This rule has superseded the earlier rule of absolute ownership of percolating waters by owners of overlying lands.

6. The correlative doctrine recognizes equal rights on the part of owners of overlying lands, to waters in the common subterranean strata, for use on such lands; and equal rights as between such owners and owners of land riparian to a stream, the waters of which are part of a common supply. When the supply is insufficient for all, each is entitled to a fair and just proportion, which the court has power to determine from the evidence and to regulate. No case has been found in which an apportionment as between all landowners or water users claiming rights in a common supply has actually been made by the court, although a comprehensive determination in one area is now in progress. As between such landowners, priority of use on overlying lands is not a factor.

7. The right of an owner of overlying land to the use of percolating waters on his land is paramount to that of one who takes from the same underground stratum for distant use. However, an appropriator may take any surplus above the reasonable, beneficial needs of such overlying lands. Pending use on overlying lands, an appropriator may take the "regular" supply to which these lands would be entitled; the owner of the overlying land being entitled to a declaratory decree to protect his right against loss and to prevent destruction of the source of supply. Rights to percolating waters may be acquired by prescription against the rights of owners of overlying lands who fail to protect such rights.

8. The constitutional amendment of 1928 has been upheld as a new State policy bringing all water uses under the rule of reasonableness. This applies to all water rights, whether grounded on the riparian right, or the analogous right of the owner of overlying land, or the percolating water right, or the appropriative right.

9. Rights to all waters, surface and subterranean, which form part of a common supply, are correlated under the modified common-law doctrines of ownership and use, upon which the doctrine of appropriation is superimposed; all subject to the test of reasonable, beneficial use.

### 2. Constitutional and Statutory Provisions

Tho following constitutional amendment was adopted November 6, 1928:[49]

It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and 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. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; *provided, however,* that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

There are no statutory provisions on the ownership or appropriability of ground waters other than waters in subterranean streams, excepting those noted below concerning storage of water underground. The great body of California law relating to ground waters has been made almost entirely by the courts. The Civil Code provides that:[50]

All water or the use of water within the state of California is the property of the people of the state of California, but the right to the use of running water flowing in a river or stream or down a canyon or ravine may be acquired by appropriation in the manner provided by law; * * *.

The foregoing language appears in the 1911 amendment.[51] As originally enacted March 1, 1872, this section read:

The right to the use of running water flowing in a river or stream or down a cañon or ravine may be acquired by appropriation.

The "water commission act" of 1913 provides, in section 11:[52]

* * * And all waters flowing in any river, stream, canyon, ravine or other natural channel, excepting so far as such waters have been or are being applied to useful and beneficial purposes upon, or in so far as such waters are or may be reasonably needed for useful, and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is and are hereby declared to be public waters of the state of California and subject to appropriation in accordance with the provisions of this act. * * *

Section 11 has been amended, but without altering the foregoing language.

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[49] Cal. Const., art. XIV, sec. 3.
[50] Calif. Civil Code, sec. 1410.
[51] Calif. Stats. 1911, ch. 407, p. 821.
[52] Calif. Stats. 1913, ch. 586, sec. 11, as amended by Stats. 1923, ch. 62, p 124; Deering's Gen. Laws of Calif., 1937, vol. II, act 9091, sec. 11.

In section 42 of the 1913 water commission act, as amended, it is stated that the terms "stream, stream system, lake or other body of water or water," occurring in sections relating to appropriation procedure and determination of rights, shall be interpreted to refer only to "surface water, and to subterranean streams flowing through known and definite channels." The original section 42 contained the quoted language, but applied the terms when they occurred "in this act."[53] The effect of the amendment is to apply the procedure for appropriating water and determining rights, exclusively to surface waters and defined underground streams.

The storing of water underground by those entitled to its use, and the damming of streams and flowage of land to accomplish it, for later withdrawal from the ground for beneficial purposes within the territory served by the owners of the water rights, are declared by statute to be reasonable, beneficial, and economic methods of taking and applying such water if subsequently put to the beneficial uses for which it was appropriated.[54] The water commission act refers to applications to appropriate water for storage underground, as well as for other purposes.[55]

### REGULATION OF ARTESIAN WELLS

Since early in the State's history, California has had statutes regulating artesian wells, formerly applicable to portions of the State and now of State-wide application. The first comprehensive act, applying to all portions of the State except San Bernardino County, was enacted in 1878.[56] The act now in force was passed in 1907 and amended in 1909, and repealed all prior legislation in conflict therewith.[57] The present act declares that:

> Any artesian well which is not capped, equipped or furnished with such mechanical appliance as will readily and effectively arrest and prevent the flow of any water from such well, is hereby declared to be a public nuisance.

The owner, tenant, or occupant of the land responsible for the nuisance or its continuance is guilty of a misdemeanor, and waste of the water is a misdemeanor. Further—

> For the purposes of this act, an artesian well is defined to be any artificial hole made in the ground through which water naturally flows from subterranean sources to the surface of the ground for any length of time.

Waste is defined, in substance, as the flow from an artesian well into a watercourse or upon a highway or public land unless used for beneficial purposes of irrigation, domestic use, or propagation of fish. Escape from land of more than 5 percent of artesian water used thereon is waste. Artesian water may be stored for later beneficial use; such beneficial use not to exceed one-tenth miner's inch per acre, perpetual flow, which may be cumulated to that amount within any period of the year. Penalties for violating the act are prescribed.

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[53] Calif. Stats. 1913, ch. 586, sec. 42, as amended by Stats. 1933, ch. 357, p. 955; Deering's Gen. Laws of Calif., 1937, vol. II, act 9091, sec. 42.

[54] Calif. Stats. 1919, ch. 423, p. 826; Deering's Gen. Laws of Calif., 1937, vol. II, act 9154.

[55] Calif. Stats. 1913, ch. 586, sec. 16, as amended by Stats. 1925, ch. 339; Deering's Gen. Laws of Calif., 1937, vol. II, act 9091, sec. 16.

[56] Calif. Stats. 1877–1878, ch. CLIII, p. 195.

[57] Calif. Stats. 1907, ch. 101, p. 122, amended by Stats. 1909, ch. 427, p. 749; Deering's Gen. Laws of Calif., 1937, vol. I, act 528.

### 3. Defined Underground Streams

#### THE LAWS RELATING TO DEFINED UNDERGROUND STREAMS ARE THE SAME AS THOSE APPLYING TO SURFACE STREAMS

This has been the consistent rule. It was stated in 1871 in *Hanson* v. *McCue*,[58] and has been reaffirmed in *Hale* v. *McLea*,[59] *Los Angeles* v. *Pomeroy*,[60] *Vineland Irrigation District* v. *Azusa Irrigating Co.*[61]

#### THE UNDERFLOW OF A SURFACE STREAM IS A PART OF THE STREAM

The existence of a single stream, comprising the surface flow and underflow, has been recognized in a number of cases. Rights to the surface flow attach to so much of the underflow as is necessary for support of the surface stream and for maintaining its volume.[62] One who has no legal right to the surface flow of a stream may not, by indirection, acquire that right by a subterranean diversion as against the rights of either riparian proprietors or appropriators.[63]

It was held in one decision that a surplus in the subflow should be separately considered under the law of riparian rights, as a theretofore unappropriated part of the stream.[64] The court recognized that the riparian owners had as clear a right to have a sufficient quantity of water remain underground to supply and support the surface stream as they had to the surface stream itself, and that the trial court should make a definite finding of this quantity and apportion the surplus, if any.

### 4. Percolating Waters

#### EARLY ADOPTION OF THE ENGLISH RULE OF ABSOLUTE OWNERSHIP

*The Early California Decisions Adopted the Rule of Absolute Ownership of Percolating Waters by the Owner of Overlying Land*

Decisions to this effect are *Hanson* v. *McCue*,[65] and *Huston* v. *Leach*.[66]

The doctrine was applied in *Southern Pacific R. R.* v. *Dufour*[67] to percolating water feeding an appropriated spring, and in *Gould* v. *Eaton*[68] to percolations supplying a watercourse.

It was held in a Federal case that this rule did not apply to waters drawn into a tunnel by percolation from a stream, the waters of which had been put to beneficial use; this being a different matter from stopping the flow from one's land to a stream.[69]

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[58] 42 Calif. 303, 10 Am. Rep. 299 (1871).
[59] 53 Calif. 578 (1879).
[60] 124 Calif. 597, 57 Pac. 585 (1899).
[61] 126 Calif. 486, 58 Pac. 1057 (1899).
[62] *Los Angeles* v. *Pomeroy* (124 Calif. 597, 57 Pac. 585 (1899)); *Vineland Irr. Dist.* v. *Azusa Irr. Co.* (126 Calif. 486, 58 Pac. 1057 (1899)); *Santa Barbara* v. *Gould* (143 Calif. 421, 77 Pac. 151 (1904)); *Huffner* v. *Sawday* (153 Calif. 86, 94 Pac. 424 (1908)); *Mentone Irr. Co.* v. *Redlands Elec. L. & P. Co.* (155 Calif. 323, 100 Pac. 1082 (1909)); *Barton Land & Water Co.* v. *Crafton Water Co.* (171 Calif. 89, 152 Pac. 48 (1915)).
[63] *Montecito Valley Water Co.* v. *Santa Barbara* (144 Calif. 578, 77 Pac. 1113 (1904)).
[64] *Verdugo Canyon Water Co.* v. *Verdugo* (152 Calif. 655, 93 Pac. 1021 (1908)).
[65] 42 Calif. 303, 10 Am. Rep. 299 (1871).
[66] 53 Calif. 262 (1878).
[67] 95 Calif. 615, 30 Pac. 783 (1892).
[68] 111 Calif. 639, 44 Pac. 319 (1896).
[69] *Copper King* v. *Wabash Min. Co.* (114 Fed. 991 (C. C. S. D. Calif. 1902)).

*It Was Held, However, That the Use Must Be Made Without Malice*

The decision in *Hanson* v. *McCue*, stated that control by the landowner was complete in the absence of negligence, wantonness, or malice; and in *Bartlett* v. *O'Connor* [70] a diversion of percolating waters on one's land with intent to injure others, and not to use the water beneficially, was held enjoinable.

*Ground Waters Are Presumed To Be Percolating*

It was further held that the presumption that ground waters are percolating must be overcome by evidence.[71]

*Reservation by Grant Upheld*

One of the early decisions held, as a point incidental to other issues, that the landowner's right to percolating waters under the land might be reserved by grant and subsequently transferred.[72]

SUBSEQUENT ADOPTION OF THE PRESENT DOCTRINE OF CORRELATIVE RIGHTS

*The Doctrine of Correlative Rights of Owners of Overlying Land, an Adaptation of the American Rule of Reasonable Use, was Adopted in 1903 and Has Since Been the Law in California*

*Adoption.*—The well-known decision in *Katz* v. *Walkinshaw* [73] in 1902–3 departed from the rule of absolute ownership of percolating waters, and adopted an adaptation of the American rule of reasonable use which has come to be known as the California doctrine of correlative rights. The case went up on appeal from a judgment of nonsuit. The controversy involved the relative rights of owners of land overlying a common artesian basin, the water of which was held to be percolating water, and not that of a defined underground stream subject to the law of riparian rights. Plaintiff had used the water on overlying land for domestic and irrigation purposes for 20 years prior to defendant's use. Defendant transported the water for sale at distant points, resulting in depletion of plaintiff's supply.

The new rule adopted in this case recognized the correlative rights of owners of overlying land to the common supply, to which they have equal rights for use on or in connection with the overlying land, each to have a fair and just proportion in cases in which the supply is insufficient for all. As between an appropriator for use on distant land, and those who own land overlying the water-bearing strata, the rights of those who have used the water before the attempt to appropriate are paramount to that of one who takes the water to distant land; but the landowner's right extends only to the quantity of water that is necessary for use on his land and the appropriator may take the surplus. The question of the rights of landowners who begin the use after the appropriation, was reserved for later decision. The relations between landowners and appropriators are discussed below.

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[70] 102 Calif. XVII, 4 Calif. U. 610, 36 Pac. 513 (1894).
[71] *Los Angeles* v. *Pomeroy* (124 Calif. 597, 57 Pac. 585 (1899)); *Arroyo Ditch & Water Co.* v. *Baldwin* (155 Calif. 280, 100 Pac. 874 (1909)).
[72] *Painter* v. *Pasadena Land & Water Co.* (91 Calif. 74, 27 Pac. 539 (1891)).
[73] 141 Calif. 116, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

There were two hearings in *Katz* v. *Walkinshaw*, the first decision being in 1902 and the second a year later. The second hearing was granted to afford parties affected by the change in policy, although not parties to the original action, an opportunity to present arguments against it. The second opinion, by Justice Shaw, adopted the first opinion by Justice Temple. However, Justice Temple did not feel that the English rule was being reversed, but simply modified, this being—

only a holding that in certain cases there should be added the element of reasonable use, having reference both to the land belonging to the party who has disturbed the movement of percolating water and to adjoining land, and to land sensibly affected by such acts.

Justice Shaw, however, after reviewing the previous California cases on percolating water, felt that—

In view of this conflicting and uncertain condition of the authorities, it cannot be successfully claimed that the doctrine of absolute ownership is well established in this state.

The doctrine of absolute ownership he considered unsuited to the natural circumstances of California; an entirely new rule was required. Thus:

The doctrine of reasonable use, on the other hand, affords some measure of protection to property now existing, and greater justification for the attempt to make new developments. It limits the right of others to such amount of water as may be necessary for some useful purpose in connection with the land from which it is taken. If, as is claimed in the argument, such water-bearing land is generally worthless except for the water which it contains, then the quantity that could be used on the land would be nominal, and injunctions could not be obtained, or substantial damages awarded, against those who carry it to distant lands.

*Continued Application as between Landowners.*—The rule of *Katz* v. *Walkinshaw* has been consistently applied to controversies between owners of overlying land.[74]

With two exceptions, the cases cited concerned protection of the landowner from export of water out of the basin by other landowners. The two exceptions are: *Lemm* v. *Rutherford*, in which it was held that a landowner has no right to sink a well or sump so near an irrigation ditch belonging to another that it is reasonably apparent that practically all water will be derived from the flow in the ditch; and *Revis* v. *Chapman & Co.*, in which damages were awarded because an owner of adjoining land diverted a quantity of water greatly in excess of its share and did not make beneficial use of the water on the land.

In *San Bernardino* v. *Riverside*[75] the court held that the water under a city is private property, owned by the individual property owners (until condemned) and not by the city, which therefore cannot enforce the property owners' rights. On the other hand, where a special statute prevailed, a public organization was given the right to represent the interests of individuals in *Coachella Valley*

[74] *Newport* v. *Temescal Water Co.* (149 Calif. 531, 87 Pac. 372 (1906)); *Burr* v. *Maclay Rancho Water Co.* (154 Calif. 428, 98 Pac. 260 (1908); second appeal: 160 Calif. 268, 116 Pac. 715 (1911)); *Barton* v. *Riverside Water Co.* (155 Calif. 509, 101 Pac. 790 (1909)); *Lemm* v. *Rutherford* (76 Calif. App. 455, 245 Pac. 225 (1926)); *Revis* v. *Chapman & Co.* (130 Calif. App. 109, 19 Pac. (2d) 511 (1933)); *Corona Foothill Lemon Co.* v. *Lillibridge* (8 Calif. (2d) 522, 66 Pac. (2d) 443 (1937)).

[75] 186 Calif. 7, 198 Pac. 784 (1921).

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*County Water District* v. *Stevens*,[76] on an appeal from an order sustaining a demurrer to the complaint. The water district, under its statutory power to engage in litigation over waters of common benefit within the district, was held to have the legal capacity to bring an action to restrain a landowner from interfering with the natural flow of a stream (surface and subterranean) other than as necessary for reasonable use on his land. Such action affected the rights of all within the district using the surface and ground waters; and the fact that the district did not assert title in itself to any of the rights, was held to be of no consequence in view of its statutory right to proceed in a representative capacity to protect the rights of all the landowners and other users of water in the district. (The district court of appeal had held in this case that a demurrer was proper, the statutory authority not being considered sufficient, and under *San Bernardino* v. *Riverside*, the district having no interest in the waters percolating under the defendant's land.)

It was stated by the district court of appeal in *De Wolfskill* v. *Smith*,[77] several years after the *Katz* decision, that water percolating through the soil, not in a stream, is not distinctive from the soil itself but is one of its component parts, but that when it gathers in sufficient volume, by percolation or otherwise, it becomes separate from the soil and is subject to appropriation. The controversy was not between owners of lands overlying the same basin, but was between an appropriator of water at abandoned wells on the public domain and a subsequent entryman.

In *San Bernardino* v. *Riverside* it was stated that the provision of the civil code declaring all water or the use of water within the State to be the property of the people of the State, could have no effect on lands in private ownership when the provision was adopted in 1911.

*Under the Correlative Doctrine, Priority of Use on the Overlying Lands Is Not a Factor*

The decision in *Burr* v. *Maclay Rancho Water Co.*,[78] indicated definitely that priority of use of common percolating water supplies in connection with the overlying lands, is not a factor as between owners of such lands. Each can begin his reasonable use at pleasure. Exclusive or paramount rights can be obtained by none, whether because of nonuse by others or because of any other reason than grant, condemnation, or prescription.[79] This does not apply to appropriations by landowners for distant use, discussed hereinafter.

*The Doctrine of Reasonable Use Applies as Between Owners of Land Overlying Percolating Waters Supplying a Surface Stream and Owners of Land Riparian to the Stream; the Doctrine Also Applies to the Needs of Owners of Such Overlying Land as Against Appropriators From the Stream*

A decision rendered prior to the adoption of the correlative doctrine upheld the exclusive right of the owner of overlying land to percolating water supplying a stream, as against the right of the owner of land

[76] 206 Calif. 400, 274 Pac. 538 (1929); superseding decision by the district court of appeal, 55 Calif. App. 1270, 266 Pac. 341 (1928).
[77] 5 Calif. App. 175, 89 Pac. 1001 (1907).
[78] 154 Calif. 428, 98 Pac. 260 (1908); second appeal: 160 Calif. 268, 116 Pac. 715 (1911).
[79] *Hudson* v. *Dailey* (156 Calif. 617, 105 Pac. 748 (1909)).

through which the stream flowed.[80] However, following the decision in *Katz* v. *Walkinshaw* the rights of owners of land adjacent to a stream, and overlying percolating waters which later found their way into the creek and enhanced its flow, were correlated with the rights of owners of land riparian to the creek.[81] The same rule of reasonable use as against owners of other overlying lands, was held to apply. The principle was applied likewise in *Cohen* v. *La Canada Land & Water Co.* (first appeal),[82] where plaintiff was actually both a riparian owner and an appropriator, although claiming only under an appropriation of water from springs supplying the stream running through his land; the owner of land overlying percolating water feeding the springs being entitled, as against the appropriator of the springs, to only a reasonable use in connection with his land. It was more recently applied as between owners of riparian and overlying lands in *Eckel* v. *Springfield Tunnel & Development Co.*[83]

In *Hudson* v. *Dailey*,[84] the doctrine was extended to include owners of nonriparian lands overlying percolating waters feeding a stream and necessary to its continued flow. After stating the principle of the riparian doctrine, that each owner has the right to use the stream waters upon his riparian land, limited to a reasonable share of the water as against other riparian owners:

> We think the same application of the principle should be made to the case of percolating waters feeding the stream and necessary to its continued flow. There is no rational ground for any distinction between such percolating waters and the waters in the gravels immediately beneath and directly supporting the surface flow, and no reason for applying a different rule to the two classes, with respect to such rights, if, indeed, the two classes can be distinguished at all. Such waters, together with the surface stream supplied by them, should be considered a common supply, in which all who by their natural situation have access to it have a common right, and of which they may each make a reasonable use upon the land so situated, taking it either from the surface flow, or directly from the percolations beneath their lands.

An exceptional situation was presented in *Los Angeles* v. *Hunter*.[85] There the city of Los Angeles, by virtue of its Mexican pueblo right, which extended to all the waters of Los Angeles River,[86] was held entitled to the ground waters in San Fernando Valley as against the rights of owners of overlying lands. These waters were held to constitute an underground lake, the source of the river. Hence the landowners had no correlative rights with the city when the city demanded the entire subterranean flow. This decision, however, did not affect the general rule.

#### *The Right of an Owner of Overlying Land To Make Present or Future Use of Percolating Water Is Paramount to the Right of an Appropriator for Distant Use, but the Appropriator May Take Any Surplus that May Exist*

The rules applicable to the use of percolating waters, both as between owners of overlying land and as against such owners and appropriators for distant use, are summarized in the syllabus of *Burr* v. *Maclay Rancho Water Co.*[87] on the first appeal, as follows:

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[80] *Gould* v. *Eaton* (111 Calif. 639, 44 Pac. 319 (1896)).
[81] *McClintock* v. *Hudson* (141 Calif. 275, 74 Pac. 849 (1903)).
[82] 142 Calif. 437, 76 Pac. 47 (1904); second appeal, 151 Calif. 680, 91 Pac. 584 (1907).
[83] 87 Calif. App. 617, 262 Pac. 425 (1927).
[84] 156 Calif. 617, 105 Pac. 748 (1909).
[85] 156 Calif. 603, 105 Pac. 755 (1909).
[86] *Los Angeles* v. *Pomeroy* (124 Calif. 597, 57 Pac. 585 (1899)).
[87] 154 Calif. 428, 98 Pac. 260 (1908); second appeal, 160 Calif. 268, 116 Pac. 715 (1911).

Different owners of separate tracts of land, situated over common strata of percolating water, may, each upon his own lands, take by means of wells and pumps from the common strata, such quantity of water as may be reasonably necessary for beneficial use upon his land, or his reasonable proportion of such water, if there is not enough for all; but one cannot, to the injury of the other, take such waters from the strata and conduct it to distant lands not situated over the same water-bearing strata.

As between an appropriator of percolating water for use on distant land, and an owner of land overlying the water-bearing strata, who was using the water on his land before the attempt to appropriate, the rights of the overlying landowner are paramount. Such rights, however, extend only to the quantity of water that is necessary for use on his land, and the appropriator may take the surplus.

After an appropriator of water from a common water-bearing strata has begun to take water therefrom to distant lands not situated over the strata, for use on such distant lands, the owner of other overlying land upon which he has never used the water, may invoke the aid of a court of equity to protect him in his right to thereafter use such water on his land, and thus prevent the appropriator from defeating his right, or acquiring a paramount right by adverse use, or by lapse of time. Such an appropriation for distant lands is subject to the reasonable use of the water on lands overlying the supply, particularly in the case of persons who have acquired the lands because of these natural advantages.

As against the owners of such overlying lands, either those who have used the water on their lands before the attempt to appropriate, or those who have not previously used it, but who claim the right afterwards to do so, the appropriator for use on distant land has the right to any surplus that may exist. If the adjoining overlying owner does not use the water, the appropriator may take all the regular supply to distant land until such landowner is prepared to use it and begins to do so.

In controversies between the owners of such overlying lands, and an appropriator of the water for use on distant lands, the court has the power to make reasonable regulations for the use of the water by the respective parties, fixing the times when each may take it and the quantity to be taken, provided they be adequate to protect the person having the paramount right in the substantial enjoyment of that right and to prevent its ultimate destruction.

On the second appeal in the *Burr case*, it was held that the rule with respect to the appropriation of a fixed quantity of percolating water is substantially like that regarding the appropriation from a surface stream. One who acquires adjoining property after the appropriation has begun, takes subject to the right of the appropriator; but the appropriator does not, because of his first taking, have any right to take an additional quantity thereafter.

The declaration in this case, holding the appropriation for distant use subject to reasonable use on overlying lands, and concerning the right to appropriate any surplus as against owners of overlying land and to take the "regular" supply until the landowner is ready to use it, was stated recently to be in harmony with the present constitutional policy with reference to use of the waters of the State.[88]

Two years following the decision in *Burr* v. *Maclay Rancho Water Co.* came the decision in *Miller* v. *Bay Cities Water Co.*,[89] to the effect that, while the rule of reasonable use applied as between owners of land overlying a common ground-water supply, there was no question of reasonableness as against a taker for distant use. In this instance owners of land in a valley, overlying strata supplied with water from a surface stream, to which their lands were not adjacent, were able to enjoin an appropriation, for distant use, of the regular and annually recurring flood flows of the stream. It was

[88] *Peabody* v. *Vallejo* (2 Calif. (2d) 351, 40 Pac. (2d) 486 (1935)).
[89] 157 Calif. 256, 107 Pac. 115 (1910).

recognized that there might be a surplus over the quantity of stream water necessary to replenish the supply under the valley lands, but the court held that the burden of proof was on the appropriator who asserted that there was a surplus which could serve no useful purpose to the owners of overlying lands.

The decision in the *Miller* case, disregarding reasonableness as against appropriators, has been held recently to have yielded to the new constitutional policy imposing reasonable use upon water claimants.[90] According to this recent decision, the burden of proof is still upon the party asserting that there is a surplus over "all reasonable beneficial uses by those who have the prior and preferential right." However, the latter must first prove what their reasonable needs are.[91]

The amount of the surplus of ground water, obviously, must be determined before relative rights to the surplus can be determined. Furthermore, if there is a surplus at the time of bringing suit, appropriations are effective as of the time they were made and become established by passage of time, notwithstanding the fact that other users have not been injured; and in a case in which all parties are appropriators, it has been held that the court should not attempt to provide for a future apportionment but should confine itself to an adjudication of existing rights and priorities.[92] On the other hand, where there is no surplus to be divided, attempted appropriators are held to be entitled to no water and cannot insist on a determination of individual rights.[93]

*The Point of Diversion May Be Changed if Others Are Not Injured*

In *Barton* v. *Riverside Water Co.*,[94] the drilling of new wells to replace wells which had begun to fail, where there was no question as to the right to the water and no greater quantity was being pumped than before, was held to be a mere change in the place of diversion, to which the rule applying to running streams would be applied.

A change that would result in lowering the water level in other wells, however, would not be within the terms of the appropriation. In *Lodi* v. *East Bay Municipal Utility District*,[95] the city had substantiated a prior right to pump from ground waters percolating away from a stream to the use of the waters of which the district had acquired later rights. One of the suggestions for a solution was that new wells be installed closer to the river, at the district's expense, in order to avoid releasing excessive quantities of water to replenish the ground water. This was not acceptable to the court, for the reason that other users might be injuriously affected by the pumping at the new location. The supreme court stated:

While it is undoubtedly the law that an appropriator may change the place of his diversion when the rights of others are not adversely affected thereby (*Barton* v. *Riverside Water Co.*, 155 Cal. 509 (101 Pac. 790, 23 L. R. A. (N. S.) 331); *City of San Bernardino* v. *City of Riverside*, 186 Cal. 7 (198 Pac. 784)),

[90] *Peabody* v. *Vallejo* (2 Calif. (2d) 351, 40 Pac. (2d) 486 (1935)).
[91] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.* (3 Calif. (2d) 489, 45 Pac. (2d) 972 (1935)).
[92] *San Bernardino* v. *Riverside* (186 Calif. 7, 198 Pac. 784 (1921)).
[93] *Corona Foothill Lemon Co.* v. *Lillibridge* (8 Calif. (2d) 522, 66 Pac. (2d) 443 (1937)).
[94] 155 Calif. 509, 101 Pac. 790 (1909).
[95] 7 Calif. (2d) 316, 60 Pac. (2d) 439 (1936).

the law is equally clear that the place of diversion cannot be changed to an entirely different tract when to do so will adversely affect the rights of intervening owners. The cases cited that establish the right to change the place of diversion equally establish the limitations on that right.

*There is No Statutory Provision for Appropriation of, or Determination of Rights to Percolating Waters, but the Courts Have Sanctioned Such Appropriations*

As stated heretofore, there are no statutory provisions on ownership or appropriability of ground waters other than waters in subterranean streams, and concerning the right to withdraw water stored in the ground. The water commission act specifically limits the application of the sections relating to appropriation procedure and determination of rights, to "surface water, and to subterranean streams flowing through known and definite channels", and provides that no right to appropriate or use water which is subject to the provisions of the act shall be initiated or acquired by any person, firm, association, or corporation except upon compliance with the provisions of the act. In a recent decision involving only surface waters—principally so-called "foreign waters"—the supreme court held that since the effective date of the water commission act, an intending appropriator has been required to file his application with the State administrative body; and to sustain his claim of appropriation otherwise, it must have been actually complete prior to passage of the statute, and kept in force subsequently by beneficial use.[96]

Although no State administrative officer has jurisdiction over the appropriation of percolating waters, and there is no statutory procedure for so acquiring a right to such waters, the court decisions leave no doubt that an appropriation of percolating waters is just as valid, and as fully a property right, as though made pursuant to a statute if one had then been in force. The decisions on correlative rights speak repeatedly of appropriations of the surplus; decisions have been rendered in controversies solely between appropriators of percolating water; and the surface-water rule governing changes in point of diversion has been applied to appropriations of percolating water. In the very recent case of *Lodi* v. *East Bay Municipal Utility District*,[97] the trial court's findings upheld the "appropriation and prescriptive right" of plaintiff city; but the supreme court decision refers to the city's right as an appropriation, throughout. Furthermore, this decision differentiates between the city's nonstatutory appropriation of percolating waters, and the district's statutory appropriation of surface-stream waters, only in the matter of relative priorities; the city's nonstatutory appropriation being prior in point of time and therefore prior in right.

An appropriative right, under doctrines such as those of California, may be completely effective under certain circumstances, only if it contains the elements of prescription or adverse use. That is, as between appropriations, for distant use, from the same ground-water supply, priorities would govern, under the principle of *San Bernardino* v. *Riverside*,[98] but as between an appropriation for distant use,

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[96] *Crane* v. *Stevinson* (5 Calif. (2d) 387, 54 Pac. (2d) 1100 (1936)).
[97] 7 Calif. (2d) 316, 60 Pac. (2d) 439 (1936).
[98] 186 Calif. 7, 198 Pac. 784 (1921).

and use on overlying land, the appropriation applies only to the surplus if the landowner is vigilant in protecting his rights; and if not vigilant, it may ripen into a prescriptive right against him. In *San Bernardino* v. *Riverside* it was stated that appropriation under the civil code is but another form of prescription; that is, appropriation of water flowing through private lands. Necessarily this principle has never applied to appropriations on public lands of the United States on which the right to make appropriations has been sanctioned and authorized by the congressional legislation discussed in chapter 2; such appropriations therefore need not rest upon adverse use as against individuals. Nor does it now apply to appropriations of excess waters above the quantities to which lawful rights (riparian and otherwise) attach under the rule of reasonable beneficial use promulgated by the constitutional amendment of 1928, above quoted; for such excess waters are now held to be the public waters of the State the use of which is subject to State regulation.[99]

*Rights to the Use of Percolating Water May Be Acquired by Prescription as Against the Owners of Overlying Lands*

The possibility of acquiring a right to percolating water by adverse use was intimated in *Burr* v. *Maclay Rancho Water Co.*,[1] as shown in the syllabus quoted above. In *Hudson* v. *Dailey*[2] such a right in the common supply was held to have vested.

A right to ground waters acquired by prescription extends only to the quantity theretofore taken, and does not include the taking of an additional quantity in the future.[3]

The literal reading of a recent decision is to the effect that the measure of a prescriptive right to pump percolating water from an underground basin is limited to the maximum quantity of water previously actually diverted and beneficially used during a given period of time, and that this is to be measured by the greatest amount diverted and used in any one calendar year of the prescriptive period.[4] The maximum quantity to be withdrawn per day was also prescribed.

*Protection of the Correlative Right*

The landowner's right to a reasonable use, on his lands, of the waters percolating thereunder may be protected by injunction against an unreasonable use by another landowner that is causing damage to the use of the plaintiff's land. However, a strong case must be made to support an injunction. As stated in *Katz* v. *Walkinshaw*:[5]

> In cases involving any class of rights in such waters, preliminary injunctions must be granted, if at all, only upon the clearest showing that there is imminent danger of irreparable and substantial injury, and that the diversion complained of is the real cause.

To be entitled to an injunction, the landowner therefore must prove injury; for if there is no injury to adjoining lands, the owner of the latter cannot require imposition of any limitations upon the neigh-

[99] *Meridian* v. *San Francisco* (13 Calif.. (2d) 424, 90 Pac. (2d) 537 (1939)).
[1] 154 Calif. 428, 98 Pac. 260 (1908); second appeal, 160 Calif. 268, 116 Pac. 715 (1911).
[2] 156 Calif. 617, 105 Pac. 748 (1909).
[3] *San Bernardino* v. *Riverside* (186 Calif. 7, 198 Pac. 784 (1921)).
[4] *Eden Township Water Dist.* v. *Hayward* (218 Calif. 634, 24 Pac. (2d) 492 (1933)).
[5] 141 Calif. 116, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

bor's use.[6] It is the taking of more than one's share, to the injury of other overlying lands, that is subject to injunction.[7]

Whether a use, resulting in damage to another's reasonable use, is unreasonable and therefore enjoinable, is a question of fact in each case. In *Katz* v. *Walkinshaw*, it was alleged, and admitted, that the plaintiffs' trees, vines, and other vegetation of value would perish, and that the plaintiffs would be greatly and irreparably injured, if the defendant was allowed to divert the water to distant lands. In *Newport* v. *Temescal Water Co.*,[8] where the lands of the owner complaining of a diversion by others to distant points, were shown to be of little agricultural value, and the drop in water table was due substantially to periods of drought and pumping by plaintiffs, defendant, and third parties, it was held that plaintiffs had failed to establish any ground for relief under the principles of the *Katz* decision. Damages might have been awarded, but plaintiffs asked only for a permanent injunction, which was denied. If there is sufficient water for all claimants at the time of the action, injunctive relief will not be granted against a taker to distant lands, in favor of another appropriator of ground waters; the situation being substantially the same as that of several appropriators from a surface stream having more than enough water for all.[9] A gradual material lowering of the water level, in spite of the bringing in of additional supplies from outside, thus seriously interfering with reasonable, beneficial use by owners of overlying lands, was ground for issuing an injunction against pumping water out of the basin, in *Corona Foothill Lemon Co.* v. *Lillibridge*, supra.[10]

Where development is made for public use at great expense, and without objection by owners of overlying land, the latter are estopped to obtain an injunction and are relegated to an action for such damages as they can prove.[11]

The measure of damages for unreasonable diversion of ground water has been held to be the difference in value of the land before diversion and the value if permanently deprived of the water so diverted.[12] The value of crops taken from the land is merely evidence of the reasonable value of the land.[13]

Where the landowner is not making present use of the water, and therefore can show only prospective damage, he is not entitled to a permanent injunction until he begins to make use of the water. But he has a right to the quantity of water necessary for his land, whether he uses it or not; therefore he is entitled to immediate relief to prevent destruction of or danger to the source of supply and to prevent the acquisition of rights by adverse use. In the *Burr* case an injunction was issued against a taking to distant lands which interfered with plaintiff's actual present use, and plaintiff's right to begin use on his other lands was protected by a declaratory judgment. In the meantime defendant was permitted to export the surplus above present needs plus the quantity required for annual recharge.

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[6] *Cohen* v. *La Canada Land & Water Co.* (second appeal) (151 Calif. 680, 91 Pac. 584 (1907)).
[7] *Anaheim Union Water Co.* v. *Fuller* (150 Calif. 327, 88 Pac. 978 (1907)).
[8] 149 Calif. 531, 87 Pac. 372 (1906).
[9] *San Bernardino* v. *Riverside* (186 Calif. 7, 198 Pac. 784 (1921)).
[10] 8 Calif. (2d) 522, 66 Pac. (2d) 443 (1937).
[11] *Katz* v. *Walkinshaw* (141 Calif. 116, 70 Pac. 663 (1902), 74 Pac. 766 (1903)); *Barton* v. *Riverside Water Co.* (155 Calif. 509, 101 Pac. 790 (1909)).
[12] *De Freitas* v. *Suisun* (170 Calif. 263, 149 Pac. 553 (1915)).
[13] *Revis* v. *Chapman & Co.* (130 Calif. App. 109, 19 Pac. (2d) 511 (1933)).

The fact that the owner of overlying lands may secure protection by a declaratory decree pending his making eventual use, and that the court may regulate and apportion uses of percolating water in accordance with relative rights, has been consistently recognized.[14]

### APPLICATION OF THE RULE OF REASONABLENESS TO ALL USES OF WATER

*The Constitutional Amendment of 1928, as Upheld by the Court, Brings All Water Uses Under the Rule of Reasonableness*

The principle was stated in *Miller* v. *Bay Cities Water Co.*,[15] that as against a taker of ground water for use off his own land, there is no question of reasonableness on the part of owners who make use on their overlying lands. Hence the owners of lands away from a surface stream, but overlying strata fed by the stream flow, were held entitled to enjoin the diversion of any part of the stream waters—whether ordinary flow or annual flood flow—so long as the flow was necessary to bring the strata to their water-bearing capacity. This was held to serve a useful purpose in keeping the ground water under pressure and maintaining the subterranean water level.

The foregoing rule no longer obtains in California, in view of the constitutional amendment of 1928, declaring that the right to water from any natural watercourse "shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water." In *Peabody* v. *Vallejo*,[16] the court stated:

> Notwithstanding the common-law rule to the contrary, this court, in the cases referred to, accorded to the underlying and percolating water right a status analogous to the riparian right. The attitude of some of the plaintiffs herein in effect is that, possessing that status, they are entitled to have the underground waters flow and percolate as in a state of nature regardless of the quantity of the supply or the reasonableness of use. But since the riparian right as against an appropriator has by the new state policy been subjected to the doctrine of reasonable use, no good reason has been advanced why the asserted underground and percolating water right should not be subjected to the same regulation as against an appropriator. In whatever respects the Miller case, or any other case, may be said to hold otherwise, they must be deemed to yield to the new constitutional policy with reference to the use of the waters of the state.

Reversing the spirit of the *Miller* decision, it was further stated:

> Some of the plaintiffs assert the right to the full flood and freshet flow of the stream to press water into their riparian lands as an aid in maintaining the level of the underground water supply. This is not strictly a riparian right at common law, but it cannot be said that under some circumstances such right is not a substantial right conferred by nature, to be enjoyed subject to the test of reasonable use. It would seem to be obvious that the use of an entire flood and freshet flow of a stream to press a small amount of water into adjoining lands would be an unreasonable use of the waters of the stream, especially when otherwise there is no appreciable lowering of the water table due to nature's processes or to artificial regulation of the stream flow. * * * There is now no room for a distinction between the so-called pressure right and the overlying land owner's right, whether the latter be founded on a strictly percolating water right or a right in an underground stream. Each, however, is a paramount right subject to the test of reasonable use.

[14] *Burr* v. *Maclay Rancho Water Co.* (154 Calif. 428, 98 Pac. 260 (1908); second appeal, 160 Calif. 268, 116 Pac. 715 (1911)); *San Bernardino* v. *Riverside* (186 Calif. 7, 198 Pac. 784 (1921)); *Peabody* v. *Vallejo* (2 Calif. (2d) 351, 40 Pac. (2d) 486 (1935)); *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.* (3 Calif. (2d) 489, 45 Pac. (2d) 972 (1935)).

[15] 157 Calif. 256, 107 Pac. 115 (1910).

[16] 2 Calif. (2d) 351, 40 Pac. (2d) 486 (1935).

One of the conclusions was:

> We therefore conclude: 1. That the rule of reasonable use as enjoined by section 3 of article XIV of the Constitution applies to all water rights enjoyed or asserted in this state, whether the same be grounded on the riparian right or the right, analogous to the riparian right, of the overlying land owner, or the percolating water right, or the appropriative right.

The principle was affirmed in *Tulare Irrigation District* v. *Lindsay-Strathmore Irrigation District*,[17] where an extensive area of delta land was supplied by percolation from a surface stream. The exact amount of reasonable use by riparian and overlying landowners must be specified. While the burden of proving that there is a surplus is upon the party seeking to pump water for use outside the watershed, such burden does not arise until after the opposing parties have proved the amount necessary for their beneficial use. In the foregoing cases, the court undertook to protect the future needs of owners of overlying and riparian land by declaratory decrees.

The very recent *Lodi case*[18] applies the principle as between appropriators, for municipal use, of ground water in an area supplied solely by percolation from a surface stream, and appropriators on the stream, where the ground-water appropriators had been making reasonable, beneficial use.

In a decision rendered in 1938[19] it was stated that the owners of overlying land have the right to the use of the ground waters as a supporting subterranean supply available to and for the benefit of their farming operations, such as would result from minimizing the requirements for surface irrigation, and that "it may not be rightly said that such use is not a beneficial use of the underground waters." However, an injunctive order requiring the maintenance of the ground-water table in its natural state and in effect preventing the beneficial utilization of water underlying 98 percent of the area in order that the water table be maintained in natural condition underneath 2 percent of the area, was reversed to conform to the new State policy. A physical solution was approved as to certain holdings; as to the others, as public use had attached, reverse condemnation proceedings were invoked and applied as the only appropriate course to pursue.

The most recent decision rendered on the subject (July 1938)[20] holds that whether the use of underground basins simply to support a surface stream, thereby making it possible for a riparian owner to water his cattle without extracting ground waters artificially, is or is not a reasonable, beneficial use, is a question of fact that must be passed upon in each case.

### *All Rights to Waters, Surface and Subterranean, Which Form Part of a Common Supply, Are Correlated, Subject to the Rule of Reasonable Use*

The effect of the decisions, beginning at least with *Hudson* v. *Dailey*,[21] and continuing to the present time, is to correlate the rights to all waters which form a common source of supply. Thus the waters of a surface stream, the ground waters which constitute the underflow, and the ground waters which feed the stream and those which flow

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[17] 3 Calif. (2d) 489, 45 Pac. (2d) 972 (1935).
[18] *Lodi* v. *East Bay Municipal Utility Dist.* (7 Calif. (2d) 316, 60 Pac. (2d) 439 (1936)).
[19] *Hillside Water Co.* v. *Los Angeles* (10 Calif. (2d) 677, 76 Pac. (2d) 681 (1938)).
[20] *Rancho Santa Margarita* v. *Vail* (11 Calif. (2d) 501, 81 Pac. (2d) 533 (1938)).
[21] 156 Calif. 617, 105 Pac. 748 (1909).

from it, so far as they can be identified by competent evidence, are treated as one source of supply for all users who have access to it.

The common-law doctrines of ownership by owners of riparian and overlying lands, as modified by court decisions, form the basis of titles to such waters. Superimposed upon this basis is the doctrine of prior appropriation, which applies to any surplus above the needs of the landowners, whose rights are paramount; the statutory procedure for acquisition of appropriative rights, however, being confined to waters in definite streams, surface and subterranean. Modifying the basis also are the rules governing acquisition of rights by prescription. And governing the exercise of all water rights, of whatever character, is the new constitutional policy of reasonable use.

*The Court Has Power To Adopt and Enforce a Physical Solution, Regardless of whether the Parties Agree, and thus To Protect the Rights of a Senior Appropriator of Ground Waters without at the Same Time Nullifying Development by a Junior Appropriator; any Major Expense Involved in the Solution To Be Borne by the Junior Appropriator*

While existing rights are entitled to full protection, it is necessary that such protection be so extended as to afford real conservation of water. The physical situations in cases involving interconnected surface and ground waters are usually, of necessity, very complicated. In a given case, conservation may be achieved by some method other than simply requiring the water to reach, by natural means, the parties entitled to use it. According to the recent *Lodi* case,[22] the court has power to adopt and enforce a physical solution even if the parties cannot agree upon one. It was stated:

Other suggestions as to possible physical solutions were made during the trial. The trial court apparently took the view that none of them could be enforced by it unless the interested parties both agreed thereto. That is not the law. Since the adoption of the 1928 constitutional amendment, it is not only within the power but it is also the duty of the trial court to admit evidence relating to possible phyical solutions, and if none is satisfactory to it to suggest on its own motion such physical solution. (*Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist., supra,* p. 574.) The court possesses the power to enforce such solution regardless of whether the parties agree. If the trial court desires competent expert evidence on this or any other problem connected with the case, it possesses the power to refer the matter to the division of water rights of the board of public works, or to appoint it as an expert.

However, if the physical solution to be adopted should require the city to change its method of appropriation, any major expense should be borne by the district. The city, being the prior appropriator, should not be subjected to any substantial expense to accommodate the junior appropriator. It was stated:

Although the prior appropriator may be required to make minor changes in its method of appropriation in order to render available water for subsequent appropriators, it cannot be compelled to make major changes or to incur substantial expense.

Thus while the solution should be aimed at the greatest possible utilization of the State's water resources, the prior appropriator is protected in a reasonable, beneficial use of water and a reasonable method of diversion.

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[22] *Lodi* v. *East Bay Municipal Utility Dist.* (7 Calif. 2d) 316, 60 Pac. (2d) 439 (1936)).

*The Question of Apportionment between Landowners in Event of Insufficiency of Water Supply*

The decisions establishing and developing the doctrine of correlative rights have involved, in most cases, the protection of an owner of overlying land against export of water which resulted or threatened to result in injury to his ground-water supply. In a recent article by Thompson and Fiedler, of the United States Geological Survey, the following statement appears:[23]

> The present writers know of no instance in any state following the doctrine of correlative rights where the doctrine has been applied to adjudicate and divide the water of any ground-water basin among numerous land owners. This belief is supported by Everett N. Bryan, acting deputy in charge of water rights, Division of Water Resources, California Department of Public Works, who, in reply to our inquiry, has recently stated: "Attorneys for the Division advise me that from a reasonable search, no case in any state following the correlative rights doctrine is to be found involving the entire adjudication of the various rights of overlying lands within a basin."

None of the decisions reviewed in the course of the present study have involved adjudications of rights of all landowners in a ground-water basin; but a comprehensive determination of rights within the Raymond Basin area, in southern California, is now in progress, upon reference to the State division of water resources by the superior court for Los Angeles County in the case of *Pasadena* v. *Alhambra*.

Unquestionably the California courts have adequate power to make and enforce a complete adjudication of rights within a ground-water basin, should it be sought in a proper proceeding in which all landowners and other users of water are made parties. The foregoing discussion has shown that the supreme court has repeatedly emphasized the power to regulate and apportion uses of such water, and to protect, by declaratory decrees and continuing jurisdiction, the right of landowners to exercise their correlative prerogatives when they should see fit to do so. The only limitations upon this regulatory power that are apparent, are that it shall result in equity to all holders of rights to the common water supply, and that it shall conform to the constitutional mandate that the State's water resources be put to the greatest possible beneficial use.

### 5. Artesian Waters

#### IN DETERMINING WATER TITLES, ARTESIAN WATERS ARE NOT CLASSIFIED SEPARATELY FROM OTHER GROUND WATERS

Whether waters are artesian or not, makes no difference so far as the title of the claimant to their use is concerned. In some of the cases the waters were under artesian head and in others they were not. The principles have developed without regard to this feature.

#### THE STATUTORY REGULATION OF ARTESIAN WELLS HAS BEEN UPHELD AS A VALID EXERCISE OF THE STATE POLICE POWER

Statutory regulation of artesian wells is designed to prevent waste and thus serve the public welfare. It has no bearing upon the relative rights of individual owners of wells, except to prevent each one from

[23] Thompson, David G., and Fiedler, Albert G., Some Problems Relating to Legal Control of Use of Ground Waters, Journal American Water Works Association, Vol. 30, No. 7, July 1938, p. 1066.

wasting or making unreasonable use of the artesian waters. It operates as between the individual and the public, acting through the State, and its restrictions apply to the well owner whether his well is the only one in the area or is one of many. California has had such statutes since early in the State's history, the present act being summarized above. (See p. 190.)

The present regulatory act, prior to amendment in 1909, was upheld by the district court of appeal under the State police power, as not violative of either the Federal or the State constitution.[24] It was held that artesian water, until reduced to possession, is owned by the public, or at least that portion of the public owning the overlying land, and is subject to reasonable use in connection with such land. The right to the use of the waters is common to a large portion of the community. Hence,

> Legislation in relation thereto affects the public welfare, and the right to legislate in regard to its use and conservation is referable to the police power of the state, * * *

One who takes more than the amount so measured is obstructing the free use of public property, which it is reasonable to declare a public nuisance. Furthermore, as to the constitutional prohibition against passing a special law where a general law can be made applicable, it was held that the distinction between wells having a natural flow, and those not so constituted, is sufficient to permit of a general law applying to the former class alone.

Based upon the above decision, a recent decision by the supreme court has upheld the validity of a county ordinance making it a misdemeanor to pump water from any well except for stated beneficial uses. This regulatory power may be exercised by counties when not in conflict with general laws.[25]

## Colorado

### 1. Summary

1. The constitution contains no specific reference to ground waters, but states that the waters of natural streams are subject to appropriation.
2. The statutory references to ground waters relate to waste, seepage, and spring waters; to seepage, waste and percolating waters in irrigation districts; to water raised from mines; and to regulation of artesian wells.
3. Waters of definite underground streams are held subject to the same rules as waters of surface streams.
4. Most of the decisions on ground waters have involved seepage and waste waters.
5. Notwithstanding the statute giving the prior right to spring waters to the owner of the land on which they arise, the court has held that such waters, if tributary to a stream system, belong to the stream.
6. Ground waters physically tributary to a stream system, whether originating from seepage and waste from irrigation or coming from natural sources, have been held to be a part of the stream and subject

[24] *Ex Parte Elam* (6 Calif. App. 233, 91 Pac. 811 (1907)).
[25] *In re Maas* (219 Calif. 422, 27 Pac. (2d) 373 (1933)).

to appropriation to the same extent as waters of surface tributaries. An appropriator is entitled to a continuance of the conditions existing at the time he made his appropriation; consequently an appropriator of ground waters tributary to a stream system has been held entitled to protection against the action of a senior appropriator from the same source in changing his method of diversion and thereby so lowering the ground-water levels as to alter substantially the conditions under which the junior appropriation was made, with the result of enlarging the senior appropriation to the material prejudice of the junior.

7. Percolating ground waters not naturally tributary to a stream system, but drained into it artificially, have been held not to be a part of the stream as against an appropriation of such waters out of the drainage ditch.

8. There may yet be a question as to the right of a landowner to utilize percolating waters found under his land and which are not tributary to a stream system, without making a prior appropriation, where such right conflicts with prior appropriations for distant use, inasmuch as the statutes do not specifically apply and the courts have not yet passed squarely upon this point. The more reasonable assumption would seem to be that rights to the use of such waters are impliedly subject to prior appropriation. On this basis, the tentative conclusion seems justified that the doctrine of appropriation applies generally to percolating waters in Colorado.

9. The statute prohibiting pumping of artesian wells for other than domestic and manufacturing purposes, unless irrigation use does not deplete the supply for domestic purposes, applies to only certain areas of the State. It has not yet been construed by the supreme court.

### 2. Constitutional and Statutory Provisions

The State constitution provides that—

> The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.[26]
>
> The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. * * *[27]

These constitutional provisions place no limitation upon the character or location of the stream—that is, whether surface or subterranean—and make no reference to other waters.

The statutes contain no reference to the ownership or appropriability of ground waters, except as follows:

> All ditches now constructed or hereafter to be constructed for the purpose of utilizing the waste, seepage or spring waters of the state, shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing the water of running streams; provided, that the person upon whose lands the seepage or spring waters first arise, shall have the prior right to such waters if capable of being used upon his lands.[28]

An act relating to and authorizing drainage by irrigation districts includes the following proviso:

> * * * provided, however, that any irrigation district shall have a first and preferred right to the beneficial use of all seepage, waste and percolating waters

[26] Colo. Const., Art. XVI, sec. 5.
[27] Colo. Const., Art. XVI, sec. 6.
[28] Colo. Stats. Ann., 1935, Ch. 90, sec. 20.

flowing within said district or collected and conveyed by drainage works constructed in any portion of the lands of the district; * * * [29]

The mining law contains the following:

Hereafter when any person or persons, or corporation, shall be engaged in mining or milling, and in the prosecution of such business shall hoist or raise water from mines or natural channels, and the same shall flow away from the premises of such persons or corporations to any natural channel or gulch, the same shall be considered beyond the control of the party so hoisting or raising the same, and may be taken and used by other parties the same as that of natural water courses.[30]

The statutes [31] applicable to artesian wells were originally enacted in 1887,[32] amended in 1889,[33] and added to in 1935.[34] The earlier enactments defined an artesian well as "any artificial well, the water of which, if properly cased, will flow continuously over the natural surface of the ground adjacent to such well at any season of the year"; declared an artesian well not under control to be a public nuisance, and made the owner or occupant of the land or any person permitting unnecessary flow or waste guilty of a misdemeanor; and defined waste comprehensively, the essential elements being flow other than for a lawful use on the land of the well owner or for other defined useful purposes. Records of borings were required to be filed with the county clerk and recorder and copies sent to the State engineer. It was provided that the act should not apply to water flowing from mining shafts.

The 1935 legislation made it a misdemeanor to pump water from an artesian well except for domestic or manufacturing purposes. However—

* * * where geological surveys show that the flow of waters is in such volume that irrigation from such well or wells will not impair domestic water supplies the provisions of this section do not apply.

Nor does the 1935 act apply to waters obtained from certain named geological formations or strata overlying them—

* * * nor to any territory drained by the Arkansas river, the Platte river, the Poudre river, and the Thompson or tributaries of said rivers, nor to any territory lying at an altitude lower than 7,200 feet.

### 3. Underground Streams

WATERS OF DEFINITE UNDERGROUND STREAMS HAVE BEEN HELD CONSISTENTLY TO BE SUBJECT TO THE SAME RULES APPLICABLE TO SURFACE STREAMS

The underflow is as much a part of a watercourse as is the surface flow; and a party who seeks to divert water which reaches a stream and then disappears in the sands of the stream bed has the burden of proof of establishing that such water does not become a part of the main stream.[35] Water intercepted by ditches located close to natural channels is as much a part of the stream, and the rights of

[29] Colo. Stats. Ann., 1935, Ch. 90, sec. 499.
[30] Colo. Stats. Ann., 1935, Ch. 110, sec. 212.
[31] Colo. Stats. Ann., 1935, Ch. 11, secs. 1 to 8.
[32] Colo. Laws, 1887, p. 52.
[33] Colo. Laws, 1889, p. 23.
[34] Colo. Laws, 1935, Ch. 80, p. 242; entire statute is in Stats. Ann., 1935, Ch. 11, secs. 1 to 8.
[35] *Platte Valley Irr. Co.* v. *Buckers Irr., Mill. & Impr. Co.* (25 Colo. 77, 53 Pac. 334 (1898)).

prior appropriators of water in the stream are as much entitled to protection against interference with it, as in case of the surface flow itself.[36]

Waters flowing in definite underground channels do not present a case of percolating waters, within the meaning of the law. The surface bed of such a stream may or may not be visible. The decision in *Medano Ditch Co.* v. *Adams*,[37] states further:

> Underground currents of water which flow in well-defined and known channels, the course of which can be distinctly traced, are governed by the same rules of law as streams flowing upon the surface. The channels and existence of such streams, though not visible, are "defined" and "known," within the meaning of the law when their course and flow are determinable by reasonable inference.

There has been no departure from this principle in subsequent cases.

The doctrine of appropriation applies in Colorado to surface streams, to the exclusion of the common-law doctrine of riparian rights.[38] Underground streams therefore are governed by the appropriation doctrine, to the same extent as are surface streams.

#### 4. Percolating Waters Tributary to a Surface Watercourse

MOST OF THE COURT DECISIONS ON GROUND WATERS HAVE INVOLVED SEEPAGE AND WASTE WATERS, WHICH ARE HELD TO BELONG TO THE STREAM TO WHICH THEY WOULD FLOW NATURALLY, BUT HAVE APPLIED THE SAME LANGUAGE TO WATERS FROM NATURAL SOURCES

Most of the cases relating to ground waters which have reached the Colorado Supreme Court have involved seepage and waste waters from irrigation, the so-called "return waters."

The controversies usually have arisen because of attempts to divert these waters while flowing to a stream out of which appropriative rights had been established. The courts have held that such seepage and waste waters belong to the stream into which they would flow if not intercepted by artificial devices. As stated in one of the leading decisions, *Comstock* v. *Ramsey:*[39]

> The moment they are released by a user under an appropriation from the river, which has been duly decreed, and start back in their course to the stream, they become and are as much a part thereof as when they actually reach the stream.

Such waters were held not to be new or added water, and not subject to independent appropriation on that basis. There has been no departure from this rule in cases in which the waters would have reached the stream if left alone.

Not all the waters involved in these return-water cases were return flow from irrigation.[40] In arriving at their conclusions as to the rights of use of return waters, the courts have considered percolation from natural sources as well as that from artificial sources, as shown below.

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[36] *Buckers Irr., Mill. & Impr. Co.* v. *Farmers' Independent Ditch Co.* (31 Colo. 62, 72 Pac. 49 (1903)).
[37] 29 Colo. 317, 68 Pac. 431 (1902).
[38] *Coffin* v. *Left Hand Ditch Co.* (6 Colo. 443 (1882)).
[39] 55 Colo. 244, 133 Pac. 1107 (1913).
[40] *Faden* v. *Hubbell* (93 Colo. 358, 28 Pac. (2d) 247 (1933)).

### THE LANDOWNER'S STATUTORY PRIOR RIGHT TO SEEPAGE OR SPRING WATERS DOES NOT APPLY TO SUCH WATERS IF PHYSICALLY TRIBUTARY TO A STREAM

Where waters of a spring form no part of a natural stream, and their ordinary flow never could reach the channel of a stream either by surface flow or percolation except where carried along as part of a flood, the owner of the land on which the spring is located and who has made use of the spring waters, even though not continuously, may not be divested of his prior right by others who seek to initiate an appropriation of such waters.[41]

On the other hand, the prior right to the use of percolating or seepage waters tributary to a stream (or which, if not diverted but left to themselves, would reach the stream), does not belong to the owner of the land on which such waters arise, notwithstanding the statute; and any appropriation of such waters arising on one's own land is subject to all prior appropriations from the stream into which the waters would naturally flow or percolate.[42]

### EARLY CASES SUGGESTED A DISTINCTION BETWEEN RIGHTS TO PERCOLATING WATERS AND RIGHTS TO UNDERGROUND STREAMS, BUT THE INTERCEPTION OF WATERS WHILE PERCOLATING WAS NOT INVOLVED

The opinion in *Bruening* v. *Dorr* (1896)[43] referred to "the well recognized doctrine that percolating water, existing in the earth, belongs to the soil, is a part of the realty, and may be used and controlled to the same extent by the owner of the land," but held that the water of a spring which was one of the sources of supply of a stream could not be diverted to the prejudice of prior appropriators from that stream. In 1902 in the *Medano Ditch Co.* case the court distinguished the waters in litigation from percolating waters and held them to be underground streams, implying that different rules of law should govern. In neither of these cases was there involved an interception of waters held to be percolating waters while actually percolating through the soil.

### NOTWITHSTANDING THESE EARLY CASES, THE COURTS HAVE ANNOUNCED AND ADHERED TO THE PRINCIPLE THAT PERCOLATING WATERS WHICH CONSTITUTE A SOURCE OF SUPPLY OF A SURFACE STREAM BELONG TO THAT STREAM, TO THE SAME EXTENT AS WATERS OF A SURFACE TRIBUTARY

In 1893 the Colorado Court of Appeals, in *McClellan* v. *Hurdle*,[44] made the following much-quoted statement, which was not necessary to a decision in this case because the plaintiff failed to prove injury, but which nevertheless states a rule that has become well settled in Colorado:

> It is probably safe to say that it is a matter of no moment whether water reaches a certain point by percolation through the soil, by a subterranean channel, or by an obvious surface channel. If by any of these natural methods

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[41] *Haver* v. *Matonock* (79 Colo. 194, 244 Pac. 914 (1926)). The statute which accords the landowner a prior right is quoted above; see p. 206 and footnote 28.
[42] *Nevius* v. *Smith* (86 Colo. 178, 279 Pac. 44 (1928, 1929)).
[43] 23 Colo. 195, 47 Pac. 290 (1896).
[44] 3 Colo. App. 430, 33 Pac. 280 (1893).

it reaches the point, and is there appropriated in accordance with law, the appropriator has a property in it which cannot be divested by the wrongful diversion by another, nor can there be any substantial diminution. To hold otherwise would be to concede to superior owners of land the right to all sources of supply that go to create a stream, regardless of the rights of those who previously acquired the right to the use of the water from the stream below.

Subsequent cases in the development of the doctrine have been concerned largely with return flow, as above indicated. It was stated in *La Jara Creamery & Live Stock Association* v. *Hansen*[45] that waste waters added to a stream and first appearing in its channel become a part of the stream, in the absence of the owner's intention to reclaim them, and inure to the benefit of prior appropriators on the stream; further, that there is no difference in principle between waste water thus added to a natural stream and water which, by natural law, so finds its way into such channel by percolation, surface or subterranean flow. The question of percolating waters was not directly in issue.

The term "natural stream" as used in the section of the State constitution above quoted was given a broad interpretation in *In re German Ditch & Reservoir Co.*[46] The stream in litigation originally had only an intermittent flow in times of rain or heavy snowfall, but developed a substantial flow as the result of waste and seepage from irrigated lands. This the court held to be a natural stream. Natural percolating water finding its way to a stream is a tributary of the stream, and the word "tributaries" includes all sources of supply which go to make up the natural stream and which properly belong to it. It was further stated:

The volume of these streams is made up of rains and snowfall on the surface, the springs which issue from the earth, and the water percolating under the surface, which finds its way to the streams running through the watersheds in which it is found.

In the recent decision in *Faden* v. *Hubbell*,[47] ground waters originating from rain and snow, as well as from waste and seepage from irrigation, and which were physically tributary to a stream, were held open to appropriation, subject to prior appropriations on the stream, because such waters belonged to the stream.

It may be suggested that no supreme court decision has yet been rendered in a controversy in which many owners of pumping plants were arrayed against many stream appropriators who claimed that the pumping interfered with their prior rights. However, it must be repeated that the language of the many decisions is to the effect that percolating water physically tributary to a stream, whether originating from natural or artificial causes, belongs as a principle of law to the stream.

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[45] 35 Colo. 105, 83 Pac. 644 (1905).
[46] 56 Colo. 252, 139 Pac. 2 (1913).
[47] 93 Colo. 358, 28 Pac. (2d) 247 (1933).

PERCOLATING WATERS PHYSICALLY TRIBUTARY TO A SURFACE STREAM THEREFORE HAVE BEEN HELD SUBJECT TO APPROPRIATION TO THE SAME EXTENT AS WATERS OF A SURFACE TRIBUTARY

A fairly recent decision held that "percolating, seepage and spring waters," which according to the trial court's finding would and did reach the Arkansas River, were subject to appropriation as against the right of the owner of land on which they arose to use them, even though the latter claimed ownership of the waters by virtue of a statute.[48] It was stated that the argument that percolating water belongs to the owner of the soil is unsound in Colorado; that beginning with *Comstock* v. *Ramsey*,[49] it has been the rule that seepage and percolating waters belong to the watercourse to which they would flow if not intercepted artificially.

The result of the decisions unquestionably is that rights to the use of percolating waters tributary to a watercourse are correlated with the rights to the use of waters flowing in the watercourse itself. The doctrine of prior appropriation governs these several rights. This means that the first appropriator, whether he diverts from the stream itself or whether he intercepts tributary percolating water on its way to the stream, has the first right, and subsequent appropriators, whether they intercept the percolating water or divert water from the surface stream, are junior in order of priority. In other words, in the logical application of this rule, the location of the point of diversion has no more bearing upon the priority attaching to tributary percolating waters than it has in the case of priorities among appropriators who divert directly from the watercourse.

AN APPROPRIATOR OF TRIBUTARY PERCOLATING WATERS IS ENTITLED TO PROTECTION AGAINST THE ACT OF A SENIOR APPROPRIATOR IN SO CHANGING HIS DIVERSION AND THEREBY LOWERING THE GROUND-WATER LEVELS AS TO ALTER SUBSTANTIALLY THE CONDITIONS EXISTING AT THE TIME THE JUNIOR APPROPRIATION WAS MADE, WITH THE RESULT OF ENLARGING THE SENIOR APPROPRIATION TO THE MATERIAL PREJUDICE OF THE JUNIOR

The recent decision in *Faden* v. *Hubbell*,[50] not only applies the principles of the appropriation doctrine to such waters, but protects the appropriator of tributary percolating waters from a substantial alteration of the conditions surrounding the senior and junior appropriations at the time the junior appropriation was made, to the advantage of the senior and the material physical prejudice of the junior.

The waters in controversy came from rain, snow, and irrigation upon higher-lying lands and flowed underneath a wide area to the South Platte River. The supply was limited, there being scarcely enough for all claimants. Several landowners had appropriated these waters; and certain appropriators were engaged in deepening their diversions, the effect of which would be to change the lines of underground flow and reduce the water levels to the injury of a junior appropriator. The court held that a landowner does not have the

[48] *Nevius* v. *Smith* (86 Colo. 178, 279 Pac. 44 (1928, 1929)).
[49] 55 Colo. 244, 133 Pac. 1107 (1913).
[50] 93 Colo. 358, 28 Pac. (2d) 247 (1933).

prior right to waters arising on his lands, solely by virtue of land ownership, if such waters supply a natural stream, as in this case; that such waters are open to appropriation like surface waters; and that the prior appropriator of such ground waters had no right to interfere in this manner with the flow and thus improve his own appropriation to the injury of a junior appropriator, for the latter had a vested right, as against the senior, in a continuation of the conditions existing at the time he made his appropriation. This decision goes a long way toward protecting an appropriator of percolating waters in his method of diversion.

#### 5. Percolating Waters Not Tributary to a Surface Watercourse

RIGHTS TO SUCH WATERS HAVE NOT BEEN THE SUBJECT OF LEGISLATION, AND THE COURTS HAVE NOT HAD OCCASION TO PASS SPECIFICALLY UPON THE POINT AS TO WHETHER SUCH RIGHTS ARE COVERED BY THE CONSTITUTIONAL DEDICATION OF WATERS OF A NATURAL STREAM

The constitutional dedication of waters to the public specifies the "water of every natural stream." The court decisions have interpreted this to include percolating waters tributary to the stream, as above shown. Neither the constitution nor the statutes refer specifically to percolating ground waters which are not physically tributary to a natural stream. The question then arises as to rights to percolating waters which the evidence shows to be not physically connected with any stream system, or which could not reach a stream system by natural means. An example would be waters in an underground basin, definitely impounded by subterranean dikes.

The courts have not squarely decided that the constitutional provision extends to waters of such character. The closest approach appears to be through the cases on developed waters and waters brought into a watershed from sources foreign to or independent of the stream system, and there mingled with ground waters resulting directly from rain and snow. Such waters have been held subject to appropriation as against and independently of the claims of appropriators on a stream into which they are artificially drained but with which they have no connection otherwise; but the rights of owners of overlying land were not involved in the controversy.

DEVELOPED AND FOREIGN WATERS, IN GENERAL, ARE SUBJECT TO INDEPENDENT APPROPRIATION

The statute which provides that waters raised from mines, and thereafter reaching a natural channel away from the premises of those who raised them, are beyond the control of such parties and subject to taking by others, has been held to have made such waters the subject of appropriation.[51] The evidence showed that the water in litigation, except for 4 second-feet, would not have reached the stream if the mines had not been drained. The court said:

> We have held that such contributions to a natural stream belong to the one who made them.—*P. V. Irr. Co.* v. *Buckers, etc., Co.*, 25 Colo. 77. Certainly the fact that petitioner has contributed this water to the stream does not tend to weaken its right thereto as a first appropriator.

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[51] *Ripley* v. *Park Center Land & Water Co.* (40 Colo. 129, 90 Pac. 75 (1907)). The statute is quoted above; see p. 207 and footnote 30.

In another case [52] it was held that waters diverted from the Rio Grande, applied in an area from which they could not naturally return to the river because of topographic and subsoil formations, and thereafter artificially drained into the river, were not a source of supply for appropriators on that river, and never could have constituted a source of supply unless they had reached the river through the underground flow, which was not the case. These waters constituted a substantial portion of the ground waters of the drained area, which, however, also included waters resulting directly from precipitation in the watershed and which had not theretofore contributed to the flow of the river. The court decision did not discuss the artificial or natural status of these ground waters. An irrigation company which had appropriated these drainage waters from the drainage ditch leading from the drainage district to the river, was decreed a first priority to the quantity appropriated, and this right was upheld as against the claims of prior appropriators on the river. The rights of owners of lands in the drained area to the use of the ground waters were not determined in the decision, but it was stated by the court that the appropriated waters flowing in the drainage outlet ditch were not susceptible of use on the drainage district lands from which they were recovered.

In neither of the foregoing cases was the right to appropriate the developed or drainage water based upon the fact that the appropriator had developed the water. In the *Ripley case* the appropriator had taken the water away from the mines by agreement with the mine owners, but the court stated that it was not necessary to rest the judgment solely, or at all, on the appropriator's right by virtue of contract with the mine owners, for it had conducted the water into the stream with the intention of appropriating the water and had actually made the first appropriation. In the *San Luis Valley case* the water was appropriated out of the drainage ditch, but the decision does not state what arrangement, if any, the appropriator had made with the drainage district to place its diversion on the ditch, or whether the right had been acquired by condemnation. The drainage district's right to the water was not discussed in the opinion, other than to say that the water flowing in the drainage outlet was not susceptible of use on the district lands, and apparently it was not a factor in the decision. Granted that the *Ripley* decision involved a special statute relating to water raised from mines, the *San Luis Valley* decision was not based upon any statute authorizing the appropriation of the waters in question, but upon the general appropriation doctrine.

### ONE CLAIMING THE USE OF DEVELOPED WATERS MUST PROVE, BY CLEAR AND SATISFACTORY EVIDENCE, THAT HE HAS PRODUCED SUCH WATERS

A fairly recent decision involved the priority of appropriation of waters claimed to have been added to a stream by the construction of a tunnel.[53] The court did not refer to the statute concerning water raised from mines. The decision affirmed the right of a person,

[52] *San Luis Valley Irr. Dist.* v. *Prairie Ditch Co. and Rio Grande Drainage Dist.* (84 Colo. 99, 268 Pac. 533 (1928)).
[53] *Leadville Mine Dev. Co.* v. *Anderson* (91 Colo. 536, 17 Pac. (2d) 303 (1932)).

who by his own efforts has increased the flow of a natural stream, to use the water to the extent of the increase—

> But to entitle him to such use, he must prove that the water thus added to the stream was produced and contributed by him, and that, if not interfered with, but left to flow in accordance with natural laws, it would not have reached the stream; and he must prove this by clear and satisfactory evidence.

THERE MAY BE, STRICTLY SPEAKING, A QUESTION AS TO THE RIGHTS OF OWNERS OF OVERLYING LANDS TO THE USE OF PERCOLATING WATERS NOT TRIBUTARY TO A STREAM, WHERE SUCH RIGHTS ARE ASSERTED BY VIRTUE OF LAND OWNERSHIP ONLY AND CONFLICT WITH CLAIMS OF APPROPRIATORS FOR DISTANT USE, BUT THE MORE REASONABLE ASSUMPTION APPEARS TO BE THAT SUCH RIGHTS ARE SUBJECT TO PRIOR APPROPRIATION. ON THAT BASIS, THE TENTATIVE CONCLUSION APPEARS JUSTIFIED THAT THE APPROPRIATION DOCTRINE GOVERNS RIGHTS TO PERCOLATING WATERS GENERALLY IN COLORADO

From the foregoing it appears that the Colorado Supreme Court has recognized the right to appropriate percolating ground waters not naturally tributary to a surface stream as well as those that are naturally tributary to streams, although the rights of owners of overlying lands were not involved in the controlling decision. This last-named circumstance indicates that there may yet be, strictly speaking, some question as to what view the courts would take with respect to the rights, if any, of the owners of overlying lands to the use of percolating waters not tributary to a stream, as against an attempted appropriation of such waters by others, particularly in view of the statement in the early case of *Bruening* v. *Dorr*,[54] that percolating water is part of the realty. However, the statement in *Bruening* v. *Dorr* was not necessary to the decision in that case, for the spring traceable to the waters in question was the source of a stream and therefore appropriable as against the landowner. Later, in *Smith Canal or Ditch Co.* v. *Colorado Ice & Storage Co.*,[55] the court apparently did not feel that the State had yet been committed to any doctrine governing rights to percolating waters, and in that decision definitely refused to state whether the qualified doctrine adopted in California decisions should be accepted in Colorado, for the decision in the instant controversy did not require any such statement. The court said:

> The law regulating ownership of percolating waters in the arid states is now of great, as time passes will be of still greater, importance, and until a proper case is presented calling for it we decline to announce the rule applicable to our local conditions.

Whether or not the Colorado courts, by implication, have since recognized any rule of rights to the use of percolating waters not tributary to a stream as between owners of overlying lands and appropriators, it is undeniable that the courts of this State have completely rejected the English doctrine of absolute ownership by landowners of percolating waters under their lands as applicable to such waters where tributary to a stream. In view of the decisions, (1) placing tributary surface and tributary ground waters on the same basis, bringing them all under the same constitutional provision; (2) applying the appropriation doctrine to ground waters not tributary

[54] 23 Colo. 195, 47 Pac. 290 (1896).
[55] 34 Colo. 485, 82 Pac. 940 (1905).

to a stream in favor of an appropriator of such waters out of a drainage ditch as against the claims of appropriators on the stream, and upholding a decreed priority to such waters, without mentioning any limitations in favor of owners of overlying lands, even though the constitution and statutes contained no reference to such waters; and (3) definitely leaning toward the appropriation doctrine wherever the application of that doctrine was in question, and actually applying the doctrine to all percolating waters specifically in litigation—the assumption that nontributary percolating waters are subject to prior appropriation for distant use, as against owners of overlying lands who do not make a prior appropriation thereof but who rest their claims solely upon land ownership, appears to be more reasonable than the assumption that landowners either own or have the prior right to use the percolating waters under their lands.

There has been considerable discussion in Colorado in recent years concerning legislation on ground waters. The outcome of this matter, and of court decisions on the applicability of the appropriation doctrine to nontributary percolating waters in a clear-cut controversy between landowners and appropriators, is of course for the future to decide. In the meantime, the tentative conclusion appears justified that the doctrine of appropriation applies to percolating waters generally in Colorado.

#### 6. Artesian Waters

No decisions of the Colorado Supreme Court construing the statutes regulating artesian wells have been found. The earlier legislation was aimed at the prevention of waste. Similar legislation has been upheld by the courts in at least two Western States (California and New Mexico) as a proper exercise of the police power of the State, as noted in the discussions for those States in this chapter.

The 1935 amendment to the Colorado statute goes farther than prevention of waste and makes it a misdemeanor to pump water from an artesian well except for domestic or manufacturing purposes unless geological surveys show that the flow is in such volume that irrigation from the wells will not impair domestic water supplies. However, this 1935 amendment prohibiting the pumping of artesian waters under conditions inimical to domestic water supplies does not apply where certain specific geological conditions are found, nor in several important watersheds, nor in any territory lying below an altitude of 7,200 feet. While the preference given domestic water supplies by this statute, where wells are pumped and not flowing, introduces an element that may require interpretation by the courts, nevertheless the areas excluded from the operation of the 1935 amendment cover such a large part of the State, and particularly such a large proportion of the agricultural area, that it is possible that conflicts between irrigation and domestic uses may not arise.

## Idaho

#### 1. Summary

1. By statute, it is provided that rights to the use of subterranean waters may be acquired by appropriation.

2. Artesian wells are subjected to control by statute, control devices to be approved by the commissioner of reclamation.

3. The courts have developed the doctrine of appropriation of percolating ground waters, both generally and as applied to waters of artesian basins, though the development has not been uniform.

4. An appropriation of ground water may be made either by the statutory permit method, or by diversion and application to beneficial use.

5. An appropriator of water from an artesian basin is protected as against junior appropriators, where the effect of withdrawals of water by later users is to so lower the water level at the earlier user's well as to involve substantial cost for a new diversion.

### 2. Constitutional and Statutory Provisions

The State constitution refers only to waters of a "natural stream," as follows: [56]

> The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. * * *

The statutes provide:

> * * * All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed; * * *.[57]
>
> The right to the use of the waters of rivers, streams, lakes, springs, and of subterranean waters, may be acquired by appropriation.[58]
>
> All ditches now constructed or which may hereafter be constructed for the purpose of utilizing seepage, waste or spring water of the state, shall be governed by the same laws relating to priority of right as those ditches, canals and conduits constructed for the purpose of utilizing the waters of running streams.[59]

"Artesian well" is defined by the statute as any artificial hole made in the ground through which water naturally flows from subterranean sources to the surface for any length of time. Such an artesian well not provided with control devices approved by the commissioner of reclamation is declared a common nuisance; but the commissioner may authorize control devices to be dispensed with where the waters are controlled by reservoirs. Water may be taken at any time for household, stock, or domestic purposes through a specified stop and waste cock. Violation of the act is a misdemeanor.[60]

### 3. Discussion

GROUND WATERS ARE SUBJECT TO APPROPRIATION, ACCORDING TO RECENT DECISIONS, ALTHOUGH THE DEVELOPMENT OF THE DOCTRINE HAS NOT BEEN CONSISTENT

The most recent decisions adhere squarely to the doctrine of appropriation of ground waters. However, there have been some marked inconsistencies in reaching this point. The earliest case, *Le Quime* v.

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[56] Idaho Const., art. XV, sec. 3.
[57] Idaho Code Ann., 1932, sec. 41–101.
[58] Idaho Code Ann., 1932, sec. 41–103.
[59] Idaho Code Ann., 1932, sec. 41–107.
[60] Idaho Code Ann., 1932, secs. 41–1401 to 41–1405.

*Chambers*,[61] involved a spring, the waters of which were held subject to appropriation as they appeared on the surface, regardless of their origin. This, then, was not truly a case of diversion of ground waters; but the court indicated that the contention that percolating and seepage waters were the absolute property of the landowner was not well founded.

A subsequent decision, *Bower* v. *Moorman*,[62] involving artesian waters, likewise rejected the doctrine of absolute ownership and apparently leaned toward the appropriation doctrine; but the evidence was not deemed sufficiently clear to warrant a permanent injunction. It was indicated that *Le Quime* v. *Chambers* had construed the statute relating to appropriation of subterranean waters as applying to percolating waters. However, Justice Budge, who wrote the opinion in *Bower* v. *Moorman*, stated in a dissenting opinion in a later case[63] that adoption of the doctrine of correlative rights was intended in *Bower* v. *Moorman*. In any event, an actual permanent loss of water in one's well resulting from the later installation of a well on adjoining land, was held actionable. In the following year a decision[64] involved a controversy between owners of artesian wells, plaintiffs claiming prior use; but it was held that the evidence failed to prove a connection between the wells, and that in view of the difficulty of determining the origin and course of subterranean water, satisfactory and convincing evidence should be adduced before a court of equity would be justified in permanently enjoining defendants from operating their wells.

Then in 1922 came a decision distinguishing percolating ground water from water flowing in a defined underground stream, holding that the constitutional and statutory provisions applied only to appropriation of water flowing in defined streams, and concluding that percolating waters are not public waters and therefore a company serving consumers with such waters is not a public utility.[65] The water was taken from wells in swampy or boggy ground, resulting from seepage or percolation. The majority opinion was written by Justice Budge, and a concurring opinion stated that percolating water on private land belongs to the landowner. Two justices dissented.

A few months later a decision was rendered concerning the levying of an assessment by an irrigation district, which landowners claimed did not allow for their rights to ground water, or for the waste water right resulting from the district drainage system. The benefit was held to justify the assessment. The court stated that in any event the landowners had no right to insist that the water level be maintained in order to permit them to use the ground waters, which the evidence showed to result from percolation and seepage rather than from a natural subterranean stream; that any other holding would absolutely defeat drainage in any case.[66]

Ground waters seeping from gravel underlying a large area and naturally tributary to a surface stream were held subject to appro-

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[61] 15 Idaho 405, 98 Pac. 415 (1908).
[62] 27 Idaho 162, 147 Pac. 496 (1915).
[63] *Hinton* v. *Little* (50 Idaho 371, 296 Pac. 582 (1931)).
[64] *Jones* v. *Vanausdeln* (28 Idaho 743, 156 Pac. 615 (1916)).
[65] *Public Utilities Commission* v. *Natatorium Co.* (36 Idaho 287, 211 Pac. 533 (1922)).
[66] *Nampa & Meridian Irr. Dist.* v. *Petrie* (37 Idaho 45, 223 Pac. 531 (1923)).

priation in 1930,[67] notwithstanding the fact that the waters had been gathered into an artificial drain, being considered part of the supply of the stream and included in the adjudication of its waters. The *Public Utilities Commission* decision was distinguished, on the ground that in the instant case the waters came from the subsoil of a large area and not solely from that of one individual ownership.

In the following year, in the case of *Hinton* v. *Little*,[68] the court took a view exactly contrary to that expressed in the *Public Utilities Commission* decision, and adopted the doctrine of appropriation in relation to a common body of artesian water underlying the lands of litigants. The doctrine of absolute ownership was rejected. It was held to be fairly well settled that all ground waters are percolating waters, and that it was impossible to establish one rule for ground water in relatively stable condition and another rule for ground water in decided motion. Prior decisions were examined and the conflicting ones distinguished. There have been no later decisions to the contrary.

PERCOLATING GROUND WATERS MAY BE APPROPRIATED EITHER BY THE STATUTORY PERMIT METHOD OR BY DIVERSION AND APPLICATION TO BENEFICIAL USE

*Silkey* v. *Tiegs*[69] held to this effect in the case of artesian water, after accepting, without discussion, the appropriation rule laid down in *Hinton* v. *Little.* The appropriation, by whichever method, has priority over subsequent appropriations, however made.

AN APPROPRIATOR OF ARTESIAN GROUND WATER IS PROTECTED FROM A LOWERING OF THE WATER TABLE BY A LATER APPROPRIATOR WHICH WOULD NECESSITATE A NEW DIVERSION BY THE EARLIER APPROPRIATOR AT SUBSTANTIAL EXPENSE

The most recent ground-water decision holds that an appropriator of water pumped from an artesian basin may enjoin a later appropriator from pumping water from that basin, if the effect is to so lower the water level at the senior appropriator's pump as to cut off the flow he receives by means of his present equipment and to cause him to incur substantial expense in lowering his well and increasing his power.[70] Both parties accepted and relied upon application of the appropriation doctrine to ground waters of this nature. Substantial expense required for a new diversion by the senior must be borne by the junior appropriator. Furthermore, a new diversion by the senior would in turn damage the junior appropriator and hence not solve the problem. This decision amounts to guaranty of protection to a prior appropriator of artesian ground water, as against junior appropriators, in his method of diversion.

[67] *Union Central Life Ins. Co.* v. *Albrethsen* (50 Idaho 196, 294 Pac. 842 (1930)).
[68] 50 Idaho 371, 296 Pac. 582 (1931).
[69] 51 Idaho 344, 5 Pac. (2d) 1049 (1931).
[70] *Noh* v. *Stoner* (53 Idaho 651, 26 Pac. (2d) 1112 (1933)).

## Kansas

### 1. Summary

1. The statutes provide that all natural waters, surface or subterranean in the portion of Kansas west of the 99th meridian may be diverted for certain beneficial uses; and that waters in subterranean channels, courses, sheets, or lakes west of the 99th meridian and south of township 18 shall belong and be appurtenant to the overlying lands and subjected to certain beneficial uses.

2. The statutes also provide that no taking or appropriation of subterranean waters which naturally discharge into any surface stream may be made to the prejudice of prior appropriators from such stream.

3. Another section provides that waters obtained by means of artesian wells may be appropriated.

4. Regulation of artesian wells is provided by statute.

5. Very few court decisions involve ground waters.

6. The underflow of a stream is a part of the stream. Waters percolating from the underflow of a stream do not belong to the owners of overlying lands.

7. Otherwise the principles applying to percolating waters are not well defined. The language of the few decisions rendered recognizes the doctrine of absolute ownership, but indicates a tendency toward modification. Absolute ownership is not applicable to cases of pollution of underground supplies. The statute authorizing diversions of ground water, applying to the northwestern part of the State, has not been construed by the court; nor have the other sections relating to ground waters yet been passed upon.

### 2. Statutes

In all that portion of the state of Kansas situated west of the ninety-ninth meridian, all natural waters, whether standing or running, and whether surface or subterranean, shall be devoted, first, to purposes of irrigation in aid of agriculture, subject to ordinary domestic uses; and secondly, to other industrial purposes; and may be diverted from natural beds, basins or channels for such purposes and uses: *Provided*, That no such diversion shall interfere with, diminish or divest any prior vested right of appropriation for the same or a higher purpose than that for which such diversion is sought to be made, without the due legal condemnation of and compensation for the same; and natural lakes and ponds of surface water, having no outlet, shall be deemed parcel of the lands whereon the same may be situate, and only the proprietors of such lands shall be entitled to draw off or appropriate the same.[71]

All waters flowing in subterranean channels and courses, or flowing or standing in subterranean sheets or lakes, south of township 18 and west of the 99th meridian, shall belong and be appurtenant to the lands under which they flow or stand, and shall be devoted, *first*, to the irrigating of such lands in aid of agriculture, subject to ordinary domestic use, *second*, subject to such use, may be devoted to other industrial purposes: Provided, however, That nothing herein contained shall, in any way, affect appropriations heretofore made.[72]

No person shall be permitted to take or appropriate the waters of any subterranean supply which naturally discharge into any superficial stream, to the prejudice of any prior appropriator of the water of such superficial channel.[73]

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[71] Kans. Gen. Stats. Ann., 1935, sec. 42–301.
[72] Kans. Gen. Stats. Ann., 1935, sec. 42–305.
[73] Kans. Gen. Stats. Ann., 1935, sec. 42–306.

Every person complying with the provisions of this act, and applying the waters obtained by means of any artesian well to beneficial uses, shall be deemed to have appropriated such waters to the extent to which the same shall be so applied within a reasonable time after commencement of the works, and such appropriation shall have effect as of the day of commencement of such works, provided the same is prosecuted with reasonable diligence; otherwise from the time of the application of the waters thereof to beneficial uses.[74]

The above sections were part of a statute passed in 1891,[75] with the exception that the second above section making ground waters of certain classes appurtenant to the overlying lands and thereby restricting the application of the preceding section, so far as those classes are concerned, to the northwest part of the State, was amended to read as it now stands in 1911.[76] Prior to amendment, the section provided that waters flowing in well-defined subterranean channels and courses, or flowing or standing in subterranean sheets or lakes, should be subject to appropriation with the same effect as the waters of surface channels. It also prohibited the interception of percolating waters naturally supplying such subterranean supplies, to the prejudice of a prior appropriator, with certain named exceptions. A diversion which simply lowered the water level of another's well, without exhausting or seriously diminishing the needed supply, was not to be construed an unlawful appropriation.

The statute which provides that appropriations of water may be made under the authority granted to the division of water resources of the State board of agriculture, states that surface or ground water may be appropriated upon application to the division; but also states that in acting upon applications to appropriate water the decisions of the division are to be guided by the principle (among others) that waters appropriated for irrigation are to become appurtenant to the lands to which they are applied, and that underground waters for all purposes are to become appurtenant to the lands under which they flow.[76a]

In addition to the section above quoted, concerning the appropriation of water by means of artesian wells, the 1891 statute contained sections providing for the recording of data on the installation of artesian wells and penalties for wasting artesian water.[77] In 1911 an elaborate act was passed for the regulation of artesian wells.[78] An artesian well, for the purposes of the act, was defined as "an artificial well which is sunk to the artesian stratum or basin, over 400 feet deep, and from which water is raised to or above the surface by natural pressure, or from which water is raised to or above the surface of the earth by artificial means," exclusive of water flowing from mineral shafts. Waste of artesian water was prohibited. Other provisions concerned the distance which water might be conducted from an artesian well, lawful uses of the water, maximum use per acre, and the drilling of wells. County artesian-well boards and supervisors were provided for. License fees were imposed. In case of the waste of water from faulty wells, the supervisor was authorized to repair the wells, the cost to be a lien on the land. No decision involving this statute has been found.

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[74] Kans. Gen. Stats. Ann., 1935, sec. 42–307.
[75] Kans. Laws, 1891, ch. 133.
[76] Kans. Laws, 1911, ch. 212.
[76a] Kans. Gen. Stats. Ann., 1935, secs. 24–903 and 74–506b.
[77] Kans. Gen. Stats. Ann., 1935, secs. 42–330 to 42–332 and 42–339.
[78] Kans. Gen. Stats. Ann., 1935, secs. 42–401 to 42–429 (Laws, 1911, ch. 210).

### 3. Underground Streams

THE SUBFLOW OF A STREAM IS A PART OF THE STREAM, AND MAY NOT BE TAPPED BY A WELL CLOSE TO THE BANKS OF THE STREAM TO THE INJURY OF HOLDERS OF RIPARIAN RIGHTS

Waters percolating from a surface stream, and intercepted by a well close to the stream, do not belong to the owner of overlying land, and withdrawal for use on distant lands was held actionable by riparian owners injured by the withdrawal.[79]

Subsurface water flowing directly below a surface stream and in contact with it does not constitute a second and separate stream, but the surface and subterranean flow constitute one stream.[80]

### 4. Percolating Waters

SUBTERRANEAN WATERS IN THE NORTHWESTERN PART OF THE STATE ARE MADE SUBJECT TO DIVERSION FROM NATURAL BEDS, BASINS, OR CHANNELS, BY STATUTE; WATERS IN THE SOUTHWESTERN PART OF THE STATE FLOWING IN SUBTERRANEAN CHANNELS OR STANDING IN SUBTERRANEAN SHEETS OR LAKES ARE MADE APPURTENANT BY STATUTE TO THE OVERLYING LANDS; ARTESIAN WATERS ARE SUBJECT TO PRIOR APPROPRIATION, BY STATUTE. THE FEW COURT DECISIONS INDICATE AN EARLY ADOPTION OF THE RULE OF ABSOLUTE OWNERSHIP AND A DEVELOPMENT AWAY FROM THAT RULE; BUT THE PRINCIPLES ARE NOT WELL DEFINED

There have been few supreme court decisions in Kansas on the subject of ownership of percolating ground waters, and the principles are not well defined.

*Emporia* v. *Soden*[81] involved the right of a city to abstract water from a large well 75 to 100 feet from a surface watercourse, and to convey the water away from the tract on which the well was located in order to supply the city inhabitants. According to the evidence, the well was connected with the watercourse by a gravel stratum and drew its water supply by percolation from the watercourse. The court admitted and apparently accepted the doctrine of absolute ownership of percolating ground waters, but held that the facts furnished an exception or limitation upon the doctrine. The city's riparian right by virtue of its ownership of this tract of land did not give it the right to divert water for the domestic use of all its inhabitants. Generally, one cannot do indirectly what he has no right to do directly. The fact of abstraction from the watercourse being proved, the city was denied the right to do this without condemnation or compensation to injured holders of riparian rights on the watercourse.

A later case involved the right of a landowner to deposit waste salt on its own lands, the effect of which was to injure the lands of another through the action of rain water in dissolving the salt and carrying it by percolation to the latter lands.[82] The court stated that there had been a development away from the doctrine of absolute ownership of percolating ground water; that in *Emporia* v. *Soden* it had been held that the principal reason for not recognizing percolating waters was

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[79] *Emporia* v. *Soden* (25 Kans. 588, 37 Am. Rep. 265 (1881)).
[80] *Kansas* v. *Colorado* (206 U. S. 46 (1907)).
[81] 25 Kans. 588, 37 Am. Rep. 265 (1881).
[82] *Gilmore* v. *Royal Salt Co.* (84 Kans. 729, 115 Pac. 541 (1911)).

the difficulty of proving their source; and that that case provided an exception to or limitation on the previous rule. The court held that the decisions recognizing the strict rule of absolute ownership did not go to the extent of sanctioning the act of a landowner in polluting his neighbor's water supply, but did not commit itself further as to the status of the common-law doctrine in Kansas inasmuch as the matter in litigation did not involve the right to abstract water. This *Gilmore case* originated in the district court of Ellsworth County, which lies east of the 99th meridian. The court made no reference to the statute authorizing "diversions," which, of course, applies only to a part of the State west of the 99th meridian; and the court's comments on ground-water law have apparently no bearing upon the operation of that statute in the northwestern part of the State.

Recent cases involve the application of an antipollution statute,[83] and destruction of one's ground-water supply by negligent drilling.[84]

Thus the one Kansas Supreme Court decision which has been found on the right to abstract ground water wanted by others involved waters taken from a watercourse by tapping a gravel stratum, directly connected with the watercourse, at a point very close to the surface banks of the stream. This is essentially a matter of tapping the underflow of a watercourse.

The language in the decisions indicates a recognition of the doctrine of absolute ownership of percolating waters not proved to be directly connected with a watercourse, but a tendency toward modification of the doctrine; and a definite departure from that doctrine where injury results to owners of other overlying land by reason of pollution of the ground waters. Recent cases on abstraction of water, in which the rules might have become more definite, are lacking; but in view of the statements in the early decisions, as well as the trend elsewhere, it appears to be a reasonable assumption that the rigorous doctrine of absolute ownership will be found inapplicable in controversies involving numerous users of water from a common ground-water supply. In other words, a liberal modification in favor of reasonable use seems not at all unlikely.

The statute authorizing "diversions" of subterranean waters from natural beds, basins, or channels, applying to the northwestern part of the State, does not say that such waters may be "appropriated"; and in view of the fact that another section of the same act originally provided that waters in well-defined subterranean channels or in subterranean sheets or lakes should be subject to appropriation with the same effect as waters of surface channels—amended in 1911 to make such waters appurtenant to overlying lands—there is a serious question as to what construction should now be placed upon the word "diversion" as applied to ground waters in northwestern Kansas. The statute does not make ground waters in that area appurtenant to overlying lands; in fact, the section making certain ground waters appurtenant specifically refers to the southwestern part of the State. Furthermore, another section of the statute specifically provides that artesian waters are subject to prior appropriation. Standing alone, the language of the section authorizing "diversions" might be construed as contemplating a form of appropriation, for the section

[83] *Martin* v. *Shell Petroleum Corpn.* (133 Kans. 124, 299 Pac. 261 (1931)).
[84] *Daly* v. *Gypsy Oil Co.* (133 Kans. 551, 300 Pac. 1099 (1931)).

places no restriction upon the place of use of ground waters diverted from natural beds, basins, or channels, nor upon the persons or organizations entitled to make such diversions. However, read in connection with the other sections, the construction of this section as authorizing appropriations is questionable.

In view of these various early statutory enactments and the relatively few court decisions, it is evident that the principles governing rights to the use of ground waters in Kansas are not well defined.

## Montana

### 1. Summary

1. The statutes do not refer to ground water, other than to subject "flood, seepage, and waste" waters to appropriation by impounding in a reservoir.
2. Waters flowing in a defined underground stream are subject to the same rules of appropriation as waters in a surface stream. There is no presumption of the existence of an underground stream; it must be shown by evidence.
3. Percolating waters belong to the landowner.
4. When percolating waters come under another's control, the title of the former owner is gone.
5. Percolating water loses its character as such upon entering a natural stream, and then becomes subject to appropriation.

### 2. Constitutional and Statutory Provisions

The State constitution does not refer to ground waters. The only provision concerning water is:

> The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution, or other benficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals, and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use. * * * [85]

The only statutory reference to the right to use ground water is:

> The right to the use of the unappropriated water of any river, stream, ravine, coulee, spring, lake, or other natural source of supply may be acquired by appropriation, and an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same.[86]

### 3. Defined Underground Streams

WATER IN A DEFINED UNDERGROUND STREAM IS SUBJECT TO THE SAME RULES OF APPROPRIATION AS WATER IN A SURFACE STREAM, AND THE SUBFLOW IS A PART OF THE SURFACE STREAM

In *Ryan* v. *Quinlan*,[87] a case in which the water of a surface stream disappeared in the bed of a canyon 1,500 feet from the outlet of a lake, and did not reappear on the surface within the next 3,600 feet traversed by the canyon before reaching another surface stream toward which it sloped, the court held that a prima facie case had been made that the disappearing water did not reach the lower stream. To over-

[85] Mont. Const., art. III, sec. 15.
[86] Mont. Rev. Codes, 1935, sec. 7093.
[87] 45 Mont. 521, 124 Pac. 512 (1912).

come this, evidence should show the existence of an underground stream. Subsurface water flowing in a defined underground stream is subject to the same rules of appropriation as the water of a surface stream, but there is no presumption that subsurface water is tributary to any surface stream. This case is discussed further below.

The subsurface supply of a stream, whether coming from tributary swamps or running in the sand and gravel forming the bed of the stream, is as much a part of the stream as is the surface flow and is governed by the same rules.[88]

#### 4. Percolating Waters

PERCOLATING GROUND WATER IS NOT GOVERNED BY THE RULES APPLIED TO RUNNING STREAMS. MONTANA HAS APPARENTLY ADOPTED THE RULE OF ABSOLUTE OWNERSHIP BY THE OWNER OF OVERLYING LAND, PROVIDED THE RIGHT OF USE IS EXERCISED WITHOUT MALICE OR NEGLIGENCE

There have been very few Montana decisions on the ownership of ground waters. The only comprehensive statement concerning natural percolating waters is in *Ryan* v. *Quinlan*,[89] where it is stated:

> It has been settled by a long line of decisions that percolating water is not governed by the same rules that are applied to running streams. "The secret, changeable, and uncontrollable character of underground water in its operations is so diverse and uncertain that we cannot well subject it to the regulations of law, nor build upon it a system of rules, as is done in the case of surface streams. * * * We think the practical uncertainties which must ever attend subterranean waters is reason enough why it should not be attempted to subject them to certain and fixed rules of law, and that it is better to leave them to be enjoyed absolutely by the owner of the land as one of its natural advantages, and in the eye of the law a part of it; and we think we are warranted in this view by well-considered cases." (*Chatfield* v. *Wilson*, 28 Vt. 49.) The rule, though variously stated, is recognized by the courts both of England and in this country.

Then followed a long list of cases, which, however, included the California case of *Katz* v. *Walkinshaw* [90] abrogating the common-law rule of absolute ownership and adopting the doctrine of correlative rights. Continuing:

> The result of it is that the proprietor of the soil, where such water is found, has the right to control and use it as he pleases for the purpose of improving his own land, though his use or control may incidentally injure an adjoining proprietor. The general rule thus stated is subject, however, to the same limitation as the use of the land itself, *viz.*, that embodied in the maxim, "*Sic utere tuo ut alienum non laedas*," or, as is said in some of the cases, the use must be without malice or negligence. This seems to be in accord with the current of decisions in the United States.

The foregoing statement in *Ryan* v. *Quinlan* was made in order to demonstrate that percolating waters were not subject to the law of watercourses. The controversy was not between owners of adjoining land under which water was percolating. It arose over the conflicting claims of appropriators of surface waters; plaintiff claiming that the stream which he had appropriated was not tributary to another stream on which defendants held rights superior to his. The only bearing percolating waters had on the case was the question as

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[88] *Smith* v. *Duff* (39 Mont. 382, 102 Pac. 984 (1909)).
[89] 45 Mont. 521, 124 Pac. 512 (1912).
[90] 141 Calif. 116, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

to whether the upper stream, on disappearing from the surface, constituted a defined underground stream thence to the lower surface stream, or on the other hand became in legal contemplation percolating waters. It was held that if the evidence, on retrial, should fail to sustain a finding as to the existence of a defined underground stream, the waters necessarily became percolating waters, not subject to the law of watercourses, and therefore not subject to the defendants' prior appropriative rights.

The rule as to ownership of percolating waters stated in *Ryan* v. *Quinlan*, whether dictum or not, apparently is accepted by the Montana court as the rule in that State, to judge by the recent statement in *Rock Creek Ditch & Flume Co.* v. *Miller*[91] conceding that percolating waters belong to the owner of the soil and citing the *Ryan case*. Here, again, the controversy was not between adjoining landowners, but was over the right to the increase in flow from a spring occasioned by irrigation of higher lands, the spring being the principal source of supply of a stream on which defendants held prior appropriative rights. Plaintiff was the irrigation company furnishing the water which, by underground percolation from the irrigated land, caused the flow of the spring to increase. Plaintiff was held to have lost control of the water when it escaped from the irrigated lands.

THE TITLE OF THE OWNER IS GONE WHEN PERCOLATING WATERS PASS UNDER ANOTHER'S CONTROL; AND PERCOLATING WATERS ENTERING A NATURAL STREAM BECOME A PART OF THE STREAM, SUBJECT TO APPROPRIATION

The court stated, in *Rock Creek Ditch & Flume Co.* v. *Miller. supra*:

> Conceding that percolating waters are owned by and are subject to the control of the owner of the land (*Ryan* v. *Quinlan*, supra; *Spaulding* v. *Stone*, 46 Mont. 483, 129 Pac. 327, 329), when they escape and go into other land, or come into another's control, the title of the former owner thereto is gone.

Such water, on joining a natural stream, was held to become a part of the stream and to be publici juris, subject to appropriation. Previously, in a case involving waste and seepage water which reached and formed a stream flowing in a natural channel, the court had held that such stream constituted a watercourse, subject to appropriation.[92]

The several Montana decisions concerning rights to the use of seepage water are discussed from the standpoint of waste water appropriations in chapter 6 (p. 363 et seq.), and from that of their relation to the question of diffused surface waters in chapter 3 (p. 132 et seq.).

## Nebraska

### 1. Summary

1. The constitution and statutes subject the unappropriated waters of natural streams to appropriation. Ground waters are not specifically mentioned in relation to appropriation.

[91] 93 Mont. 248, 17 Pac. (2d) 1074 (1933).
[92] *Popham* v. *Holloron* (84 Mont. 442, 275 Pac. 1099 (1929)).

2. A statute prohibits waste of artesian water, but does not place any limitation upon beneficial use.

3. Very few court decisions on ground waters have been found. The court stated in a recent decision that different rules apply to defined underground streams and to percolating waters, and that the American rule of reasonable use, with reasonable apportionment in event of shortage, is supported by the better reasoning. In this case it was not necessary, in making the decision, that either the English rule or the American rule be adopted; but the language of the decision leans strongly toward the American rule. Subsequently, in holding that riparian owners had a right to appear in a proceeding because of the valuable subirrigation of their lands, the court stated that it was committed to the American rule of reasonable use of subterranean waters.

### 2. Constitutional and Statutory Provisions

Ground waters are not specifically mentioned in the constitution or statutes, other than the statute prohibiting waste of artesian waters.

The constitution provides:

The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want.[93]

The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section.[94]

The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. * * *[95]

The statutes provide:

Water for the purposes of irrigation in the state of Nebraska, is hereby declared to be a natural want.[96]

The water of every natural stream not heretofore appropriated within the State of Nebraska is hereby declared to be the property of the public, and is dedicated to the use of the people of the state, subject to appropriation as herein provided.[97]

The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied. * * *[98]

Nothing in this article contained shall be so construed as to interfere with or impair the rights to water appropriated and acquired prior to the fourth day of April, 1895.[99]

The right to the use of running water flowing in any river or stream or down any canyon or ravine may be acquired by appropriation by any person.[1]

A statute passed in 1897 made it unlawful, where artesian water had been found or might thereafter be found, to allow water from wells or borings or drillings "to flow out and run to waste in any manner to exceed what will flow or run through a pipe one-half of one inch in diameter, except where the water is first used for irrigation, or to create power for milling or other mechanical purposes." Violation of this provision after 48 hours following notification in writing "by any person having the benefit of said mutual artesian water supply" makes one subject to arrest and fine.[2]

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[93] Nebr. Const., art. XV, sec. 4.
[94] Nebr. Const., art. XV, sec. 5.
[95] Nebr. Const., art. XV, sec. 6.
[96] Nebr. Comp. Stats., 1929, sec. 46–501.
[97] Nebr. Comp. Stats., 1929, sec. 46–502.
[98] Nebr. Comp. Stats., 1929, sec. 46–504.
[99] Nebr. Comp. Stats. 1929, sec. 46–506.
[1] Nebr. Comp. Stats., 1929, sec. 46–613.
[2] Nebr. Comp. Stats., 1929, secs. 46–172, 46–173.

### 3. Discussion

THERE HAVE BEEN VERY FEW COURT DECISIONS, BUT THE STATE IS COMMITTED TO THE AMERICAN RULE OF REASONABLE USE OF PERCOLATING WATERS, ALLOWING EXPORT TO DISTANT LANDS IF OTHERS ARE NOT INJURED, WITH APPORTIONMENT IN EVENT OF SHORTAGE

Only three cases bearing directly upon the law of ground waters have been found. A fairly early case involved pollution. The court stated that according to the weight of authority the proprietor of land owned all ground water found therein; but held that this did not give him the right to collect offensive matter on his premises and pollute his neighbor's well, whether the pollution was transmitted by percolation, subterranean stream, or otherwise.[3]

Recently a case arose between owners of land in a basin—plaintiff, an individual who had an excavation in a gravel bed, and defendant, a city which pumped water for domestic use, and had been doing so prior to plaintiff's purchase of land.[4] In the dry year 1930 the city replaced its pumps with a large one; in that year plaintiff's water level dropped, and to reach water then would require excavation through a clay stratum at a cost exceeding $1,000. Evidence was conflicting as to whether defendant's pumping affected plaintiff's gravel pit. The trial court felt that the evidence in favor of defendant was the more convincing, and so gave judgment for the city. The supreme court stated that there is a distinction between the rules affecting defined underground streams and pure percolating waters; that in this case it was doubtful if the water flowed in a defined underground stream. Neither the English rule nor the American rule of percolating waters had yet been adopted in Nebraska. The court said:

> The American rule is that the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole, and while a lesser number of states have adopted this rule, it is, in our opinion, supported by the better reasoning.

Inasmuch as the plaintiff had failed to show to the court's satisfaction that the loss of water in his gravel pit was due to the defendant's pumping, but might have resulted from other causes, judgment for the defendant was sustained.

It will be noted that in the foregoing case the court approved and apparently adopted the American rule of reasonable use, with the factor of proportional distribution in event of shortage; yet judgment for the defendant city could have been sustained under either rule—absolute ownership regardless of injury to others, or ownership subject to the qualification of not inflicting injury on owners of other overlying lands. It does not seem necessary, in rendering this decision, that the court should have adopted either rule at that time.

However, whether or not it was necessary to adopt one rule or the other in the *Olson case*, the Nebraska court considers that it has adopted the American rule. A very recent case involved, among other

[3] *Beatrice Gas Co.* v. *Thomas* (41 Nebr. 662, 59 N. W. 925 (1894)).
[4] *Olson* v. *Wahoo* (124 Nebr. 802, 248 N. W. 304 (1933)).

points, the right of certain riparian owners in the Platte River Valley to appear in a water-right proceeding, concerning the right to divert water from Platte River to another watershed.[5] After stating that subirrigation was peculiarly valuable to the riparian lands, the court said:

> While subterranean channels may not exist or be completely identified, these subterranean waters come to and flow under their lands from definite sources and en route to definite termini. The lateral boundaries of this body of water may not be certainly located, but its existence as a body of water finding its way through the soil of the riparian land is completely established. We are committed to the rule: "The owner of land is entitled to appropriate subterranean waters found under his land, but his use thereof must be reasonable, and not injurious to others who have substantial rights in such waters." *Olson v. City of Wahoo*, 124 Neb. 802, 248 N. W. 304.

In line with the rule of reasonable use, to which the State is apparently committed, is the statute prohibiting waste of artesian water, and providing a penalty if waste is not stopped upon notification by anyone else who depends upon the common artesian supply.

## Nevada

### 1. Summary

1. By statute, all ground waters are declared to belong to the public, and subject to existing rights to their use, are made subject to appropriation. Small domestic uses of nonartesian water are exempted from the statute. Regulation of the installation of wells in proven artesian basins is provided for.

2. Percolating water was declared in two early court decisions to be the absolute property of the landowner. There have been no decisions on this point for many years. This rule of absolute ownership, however, was held not to apply to percolating waters after they have appeared on the surface in the form of springs which constitute the source of a definite stream; nor to waters percolating to a creek from springs which constitute its source.

3. The court stated, by dictum, that the rules governing underground streams are not the same as those governing percolating waters.

4. The former appropriation statute, applying to all ground water except percolating water the course and boundaries of which are incapable of determination (and reenacted in 1939 to apply to ground waters of all sources without exception), was first enacted in 1915, but has not been construed by the courts. The 1913 water code had subjected all waters above or beneath the ground to appropriation. Notwithstanding the early decisions on absolute ownership of percolating water, there appears to be little question now that the appropriative principle applies to all ground waters to which it could have practical application.

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[5] *Osterman* v. *Central Nebraska Public Power & Irr. Dist.* (131 Nebr. 356, 268 N. W. 334 (1936)).

### 2. Statutes

The ground-water law as reenacted in 1939 [6] provides, in the first section:

> All underground waters within the boundaries of the state belong to the public, and subject to all existing rights to the use thereof, are subject to appropriation for beneficial use only under the laws of the state relating to the appropriation and use of water and not otherwise, therefore it is the intention of the legislature, by this act. to prevent the waste of underground waters and pollution and contamination thereof and provide for the administration of the provisions hereof by the state engineer, who is hereby empowered to make such rules and regulations within the terms of this act as may be necessary for the proper execution of the provisions of this act.

Section 3 provides:

> This act shall not apply to the developing and use of underground water for domestic purposes where the draught does not exceed two gallons per minute and where the water developed is not from an artesian well.

The original ground-water act, as passed in 1915 [7] and amended in 1935 [8] and 1937,[9] had provided for the appropriation of all ground waters "save and except percolating water, the course and boundaries of which are incapable of determination." The 1939 statute repeals and replaces this earlier statute. Even prior to the enactment of this early ground-water law, the general water code, as reenacted March 22, 1913, declared that the water of all sources of water supply, "whether above or beneath the surface of the ground," belonged to the public and might be appropriated, subject to existing rights.[10]

The present law defines waste as causing or allowing artesian water to reach an upper pervious stratum, or to discharge upon the surface with a resulting loss for beneficial use of more than 20 percent of the quantity discharged from a well.

Administration of the law is vested in the State engineer, who, upon receipt of a petition signed by not less than 10 percent of the owners of wells holding appropriative rights in a ground-water basin, is required to designate the area involved and to administer the act with reference to wells to which it applies, if drilled subsequently to March 22, 1913 (the date on which the statutes first declared all ground waters to be subject to appropriation). Jurisdiction with reference to the distribution of water from wells drilled prior to that date, as against rights acquired after such date, is not vested in the State engineer until the existing rights have been adjudicated in court, unless the water is being flagrantly wasted. Artesian well supervisors and assistants may be employed by the county commissioners, with approval of the State engineer, upon the initiation of administrative control in an artesian basin, for the purpose of administering the act under the direction of the State engineer.

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[6] Nev. Sess. Laws 1939, ch. 178.
[7] Nev. Comp. Laws 1929, secs. 7987 to 7993 (Sess. Laws 1915, ch. 210).
[8] Nev. Sess. Laws 1935, ch. 184, p. 389.
[9] Nev. Sess. Laws 1937, ch. 149, p. 325.
[10] Nev. Comp. Laws, 1929, secs. 7890 and 7891 (Sess. Laws 1913, ch. 140, secs. 1 and 2).

In a proven artesian basin, or in any area designated for administration by the State engineer, an application to appropriate water under the general water code must be made before performing any work in connection with the installation of a well. In areas not so designated, where the water is not under artesian pressure, the water need not be appropriated until it has been developed, but it cannot be diverted until appropriated under the water code. The right to appropriate ground water by means of a well or tunnel constructed after March 22, 1913, can be acquired only by complying with the provisions of the water code. In an area in which the ground-water law is being administered, the State engineer may notify the owner of a well who is using water without a lawful permit to cease such illegal use pending the making of a lawful appropriation; and the user is deemed guilty of a misdemeanor if he fails within 30 days to initiate proceedings to secure a permit. The State engineer is required to determine if there is unappropriated water, and to issue permits only if such determination is affirmative. He may hold hearings on his own motion, or on petition of ground-water users, to determine whether the supply is adequate for local needs; and if found inadequate, he must order that withdrawals be restricted to conform to priority rights during the period of shortage.

Regulation over the installation of wells in proven artesian basins is provided for. Unnecessary waste of water from an artesian well is a misdemeanor, and the cost of abatement, if performed by the State, in default of action by the well owner, is a lien on the land. Violation of any provision of the act is a misdemeanor.

### 3. Waters in Defined Underground Channels

#### WATERS IN DEFINED UNDERGROUND CHANNELS WERE STATED, BY DICTUM IN AN EARLY DECISION, TO BE NOT GOVERNED BY THE SAME RULES AS THOSE PERTAINING TO PERCOLATING WATERS

In an early case involving the right to use water flowing from a spring, which constituted the source of a creek, the court stated, by dictum, that waters percolating through the soil were not governed by the rules pertaining to running streams.[11] It was held that no distinction existed between waters running under the surface in defined channels and those running in distinct channels upon the surface. The distinction was stated to lie between all waters running in distinct channels, whether upon the surface or subterranean, and those oozing or percolating through the soil in varying quantities and uncertain directions.

#### THE APPROPRIATION STATUTE APPLIES TO UNDERGROUND STREAMS

The appropriation statute, in its present form as well as prior to reenactment in 1939, applies to water in underground channels. The only exception, so far as appropriation was concerned, contained in the 1915 law, related to percolating water the course and boundaries of which were incapable of determination, and that exception has now been removed.

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[11] *Strait* v. *Brown* (16 Nev. 317, 40 Am. Rep. 497 (1881)).

### 4. Percolating Waters

EARLY COURT DECISIONS HELD THAT PERCOLATING WATER BELONGED TO THE LANDOWNER

It was held in an early case that water flowing underground in an undefined or unknown course belonged to the owner of the land, and that such owner was not responsible for injury caused to others by reason of his diversion of this water—for example, where it was the source of a spring on another's land.[12]

Subsequently, in 1881, the rule of absolute ownership of percolating waters was affirmed.[13] However, the right of an owner of land to divert water from springs on his land, which constituted the source of a creek, was denied, for the reason that he was not diverting the water from underground sources. He was diverting from springs after the water appeared on the surface—from the source of the stream, and hence with the same effect as though the diversion were made from the stream itself—rather than from percolating waters feeding the spring.

No later cases have been found in which the rights of owners of overlying lands to percolating waters have been specifically stated. In a case decided in 1901,[14] plaintiff claimed to have appropriated water flowing from a tunnel which had been constructed for the purpose of draining the Comstock lode, the water having come from (1) drainage of the land adjacent to the tunnel, (2) pumping from mines into the tunnel, and (3) discharge into the tunnel after use in machinery. Most of the water resulted from the pumping. It was held that this was an artificial and temporary stream, the origin of which was not material, and as such was not subject to appropriation but became the property of those responsible for developing the waters. There was no question as between claimants to the use of the water and the United States as owner of the lands, the owners of the mines, and the owners of the machinery. While the decision, therefore, did not pass upon the rights of owners of overlying lands to such percolating waters as drained into the tunnel, the authorities cited included those on nonappropriability of percolating waters as well as those concerning artificial streams.

AN EXCEPTION WAS MADE IN CASE OF WATER PERCOLATING TO A CREEK FROM A SPRING WHICH CONSTITUTED THE SOURCE OF THE CREEK

In the 1881 decision cited above, the court refused to apply the absolute-ownership rule of percolating waters to waters which passed from the springs to the creek by means "subterranean and not well understood." It was stated:[15]

> But because in passing from the springs to the creek the waters either percolate through the earth or are conveyed by unknown subterranean channels, it is urged that the law relating to percolating waters should be applied.
>
> It seems clear that none of the reasons upon which the law of percolating water is based exist in this case. Here there is no uncertainty, either as to

[12] *Mosier* v. *Caldwell* (7 Nev. 363 (1872)).
[13] *Strait* v. *Brown* (16 Nev. 317, 40 Am. Rep. 497 (1881)).
[14] *Cardelli* v. *Comstock Tunnel Co.* (26 Nev. 284, 66 Pac. 950 (1901)).
[15] *Strait* v. *Brown* (16 Nev. 317, 40 Am. Rep. 497 (1881)).

the existence of the water or the amount of water which defendants have taken from plaintiffs.

Such waters, even though percolating, were held to belong to appropriators on the creek.

ALL GROUND WATERS, WITH MINOR EXCEPTIONS, ARE NOW SUBJECTED BY STATUTE TO APPROPRIATION. THIS LEGISLATION, AND THE EARLIER APPROPRIATION STATUTE, HAVE NOT BEEN CONSTRUED BY THE COURTS. HOWEVER, THERE APPEARS TO BE LITTLE QUESTION THAT THE APPROPRIATIVE PRINCIPLE GOVERNS RIGHTS TO THE USE OF GROUND WATERS OF CLASSES TO WHICH IT COULD HAVE PRACTICAL APPLICATION

Nevada is preeminently an appropriation-doctrine State, the riparian doctrine being not in force as to surface waters. Riparian rights were recognized to a certain extent for a period of 13 years, but that doctrine was abrogated by the court in 1885.[16] So far as percolating waters are concerned, the trend of decisions in various other States which have had much experience with ground-water development has been away from the rule of absolute ownership and toward the doctrine of reasonable use or the appropriation doctrine. While there have been apparently no court decisions as to ground waters in Nevada for many years, and none since long before the enactment of the first act on appropriation of ground waters, the trend of legislation has been toward the exclusive doctrine of appropriation; for all ground waters were made appropriable in 1913, and although the 1915 ground-water statute subjected to appropriation percolating waters, unless the course and boundaries were incapable of determination, even that exception was removed in 1939. Furthermore, the advances in ground-water hydrology in recent years have made it possible to eliminate much of the uncertainty as to the movements of percolating waters that seems to have influenced various State courts in their early decisions on the ownership of percolating waters.

The legislation on ground waters has not been before the Nevada Supreme Court, but the legislative intent to subject to appropriation all ground waters capable of administrative control has been evident for substantially a quarter of a century. The exercise of early rights to ground waters is safeguarded by the statute. Therefore, notwithstanding the very early decisions purporting to adopt the rule of absolute ownership of percolating waters, and in consideration of both the judicial and the legislative backgrounds, there appears to be little question now that the appropriative principle applies to the use of ground waters of such character as to be susceptible to practical public control.[16a]

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[16] *Jones* v. *Adams* (19 Nev. 78, 6 Pac. 442 (1885)).

[16a] In a very recent decision dealing with the determination of rights to certain springs, but not involving the ground-water appropriation statute, *In re Manse Spring and Its Tributaries* (60 Nev. 280, 108 Pac. (2d) 311 (1940), the supreme court stated: "We find ourselves in agreement with the argument of appellant that the Legislature has declared all water within this state, whether above or beneath the surface of the ground, to belong to the state; that the use of water is authorized by law; and this Court has, since the overruling of the riparian doctrine in the case of Jones v. Adams, 19 Nev. 78, held that there is no ownership in the corpus of the water, but that the use thereof may be acquired, and the basis of such acquisition is beneficial use. * * * So we find the doctrine of appropriation the settled law of this state. * * * Water being state property, the state has a right to prescribe how it may be used, and the Legislature has stated that the right of use may be obtained in a certain way."

#### 5. Artesian Waters

Regulation of the installation and operation of artesian wells was first provided for in the 1915 act, and has been subsequently extended by amendments in 1935 and 1937 and by the reenactment in 1939. Permits to drill wells are not required, but permits to appropriate water must be applied for before the commencement of drilling in any proven artesian basin or in any area designated for administrative purposes by the State engineer; furthermore, the statute provides conditions which must govern the installation of artesian wells, and data which afford the basis for administrative control of withdrawals of water and prevention of waste must be filed with the State engineer. As noted elsewhere in this chapter, artesian-control statutes have been upheld in California and New Mexico.

## New Mexico

#### 1. Summary

1. The statutes provide that underground waters in streams, channels, artesian basins, reservoirs, or lakes "having reasonably ascertainable boundaries" are public waters and subject to appropriation.

2. The statutes subject artesian waters and wells to public control under the State engineer, who in certain instances has concurrent authority with artesian conservancy districts. They also provide for the appropriation of seepage from constructed works.

3. The courts have approved the principle of appropriation of waters in underground streams and basins.

4. As to percolating waters not specifically covered by the statute, there may be a question as to their exact ownership status. However, there appears to be little basis for assuming that there has yet been a change from the rule of absolute ownership of small diffused flows, *the boundaries of which are not ascertainable*, as stated or implied in decisions prior to enactment of the statute.

5. The statutory regulation of artesian wells has been held to be a valid exercise of the police power of the State.

#### 2. Constitutional and Statutory Provisions

The constitution provides:

All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed.[17]

The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.[18]

Beneficial use shall be the basis, the measure and the limit of the right to the use of water.[19]

The statutes provide:

All natural waters flowing in streams and water courses, whether such be perennial, or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use.[20]

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[17] N. Mex. Const., art. XVI, sec. 1.
[18] N. Mex. Const., art. XVI, sec. 2.
[19] N. Mex. Const., art. XVI, sec. 3.
[20] N. Mex. Stats. Ann., 1929 Comp., sec. 151–101.

The waters of underground streams, channels, artesian basins, reservoirs, or lakes, having reasonably ascertainable boundaries, are hereby declared to be public waters and to belong to the public and to be subject to appropriation for beneficial use.[21]

### ACT RELATING TO GROUND WATERS

A statute authorizing the appropriation of ground waters was passed in 1927,[22] but was declared unconstitutional as violating the provision that no law shall be revised or amended, or the provisions extended, by reference to its title only.[23] A new act was passed in 1931, with the features which the court held objectionable eliminated; this has been subsequently amended in some particulars.[24]

The first section of the present act is quoted above, declaring certain ground waters public and subject to appropriation. Beneficial use is the basis, the measure, and the limit of the right. Intending appropriators for irrigation or industrial uses of water are required to make application to the State engineer, to which objections may be filed. If no objections are filed, and the State engineer finds that there are unappropriated waters in the designated source, he issues a permit subject to the rights of prior appropriators from that source. If protests are filed, the State engineer holds a hearing before granting or denying the application. The act recognizes existing rights based upon application to beneficial use and their priorities. Claimants of vested ground-water rights may file declarations of their claims, which are prima facie evidence of the truth of their contents. Changes in location of wells or use of water may be made with consent of the State engineer, after hearings. Water rights not exercised for 4 years are forfeited. Appeals from decisions of the State engineer may be taken to the courts. The State engineer formulates rules and regulations for administering the act.

### ARTESIAN WATERS AND REGULATION OF WELLS

A statute provides that artesian waters declared public waters are under the supervision of the State engineer, who in certain instances has concurrent authority with artesian conservancy districts. The act regulates the installation and use of artesian wells, and is designed to prevent waste. It is not to be construed to affect the provisions of the act relating to appropriation of ground waters.[25]

The act provides that "An artesian well for the purposes of this act is hereby defined to be an artificial well which derives its water supply from any artesian stratum or basin."

The existing statute was passed in 1935 and amended in 1937. It superseded and repealed an earlier act passed in 1909, which provided, among other things, for the repair, by the county artesian well supervisor, of artesian wells which were wasting water, the cost of repair to become a lien on the land.[26]

A statute providing for the organization of artesian convervancy districts was enacted in 1931.[27]

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[21] N. Mex. 1938 Supp. to Stats Ann., sec. 151–201.
[22] N. Mex. Laws, 1927, ch. 182.
[23] *Yeo* v. *Tweedy* (34 N. Mex. 611, 286 Pac. 970 (1930)).
[24] N. Mex. 1938 Supp. to Stats. Ann., secs. 151–201 to 151–212.
[25] N. Mex. 1938 Supp. to Stats. Ann., secs. 6–101 to 6–115.
[26] N. Mex. Stats. Ann., 1929 Comp., ch. 6 (Laws 1909, p. 177), repealed by Laws 1935, ch. 43.
[27] N. Mex. 1938 Supp. to Stats. Ann., secs. 6–201 to 6–222.

#### SEEPAGE FROM CONSTRUCTED WORKS

The owner of constructed works from which seepage appears has the first right to appropriate the seepage water by filing an application with the State engineer. If he does not do so within 1 year after completion of the works, or appearance of the seepage on the surface, any other party may make a similar appropriation and shall pay the owner of the works a reasonable charge for the storage or carriage of the water in such works.[28]

### 3. Ground Waters

#### BODIES OF GROUND WATER WITH REASONABLY ASCERTAINABLE BOUNDARIES BELONG TO THE PUBLIC AND ARE SUBJECT TO APPROPRIATION

This is provided by the 1931 statute, as stated above, and the principle has been approved by the supreme court.

Although the decision in *Yeo* v. *Tweedy* [29] held the 1927 act void on technical grounds, it laid the basis for passage of an act free from the objectionable features. The court stated that the appropriation doctrine is best adapted to the condition and circumstances of the State; that as applied to bodies of artesian water it is the preventive of the unfortunate and economic results of the correlative-rights doctrine, protects invested capital and improvements, and results in utilization and conservation of a great natural public resource. New Mexico had long since adopted the appropriation doctrine with reference to surface waters, and the logical consequence was that the same doctrine applied to definite bodies of artesian waters. It was concluded "that the waters of an artesian basin whose boundaries have been ascertained are subject to appropriation." It was further concluded that the 1927 law, while objectionable in form, was declaratory of existing law, was not subversive of vested rights of owners of lands overlying such artesian waters, and was fundamentally sound.

There was one dissenting opinion, in which it was considered that the English common-law rule, as modified, was the law in New Mexico prior to passage of the 1927 act and that therefore legislation could not take away the vested right of the owner of overlying land to abstract percolating water without license from the State.

The most recent case was an original proceeding for a writ of prohibition, growing out of the fact that a general adjudication suit over the waters of the Rio Bonito had been commenced in the district court of Lincoln County, and subsequently a suit had been brought in the district court of Chaves County by artesian-basin appropriators, attacking a proposed change in point of diversion of an appropriator on the Rio Bonito, on the ground that the change would injure the ground-water appropriators.[30] The court held that in a suit to adjudicate water rights of a stream system, the rights of appropriators of water from artesian basins within the stream system must be heard and decided, the suit being all-embracing. Hence the jurisdiction of the district court in which the adjudication suit was pending was exclusive of the jurisdiction of another district court over a suit in

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[28] N. Mex. Stats. Ann., 1929 Comp., sec. 151–165.
[29] 34 N. Mex. 611, 286 Pac. 970 (1930)
[30] *El Paso & R. I. Ry.* v. *District Court* (36 N. Mex. 94, 8 Pac. (2d) 1064 (1931)).

volving a proposed change in point of diversion. The new 1931 law was referred to, but its validity was not in issue.

There have been no other decisions on appropriation of ground waters since enactment of the 1931 statute. The approval of the court of the appropriation doctrine appears well established.

### THE STATUS OF OWNERSHIP OF OTHER PERCOLATING WATERS AT THIS TIME MAY BE OPEN TO SOME QUESTION; BUT THERE APPEARS TO BE LITTLE BASIS FOR ASSUMING THAT THE RULE OF ABSOLUTE OWNERSHIP OF SUCH OTHER PERCOLATING WATERS HAS BEEN CHANGED

An early decision held that waters reaching the surface in a marsh in a canyon were part of a defined underground stream, subject to appropriation. This was held to be not a case of percolating waters within the meaning of the law.[31]

In a later case involving waters which the present author believes would have been classified more properly as diffused surface waters (see ch. 1, p. 6), the court held the waters not subject to statutory appropriation.[32] The water was called "seepage water or spring water, from some unknown source." An outsider had endeavored to appropriate this water through the State statutory procedure. It was held that the Territorial engineer's jurisdiction was limited to the public, unappropriated waters named in the statute and did not relate to waters held in private ownership. Nor was this seepage from constructed works, which was made appropriable by statute. The intending appropriator, however, claimed that, conceding the appropriation to be invalid, the landowner had a right to only a reasonable use of the percolating water on his land and the surplus was subject to appropriation. The court held that the doctrine of reasonable use, as defined in the California case of *Katz* v. *Walkinshaw*,[33] involved water from large artesian basins and did not apply to a small quantity of water coming from an unknown source, which was a part of the land and which the landowner could do with as he pleased. The decision closes with a question as to whether the surplus above the landowner's needs, although not held appropriable under the statute, would be open to appropriation without his consent under the general western doctrine of appropriation.

The court decisions prior to enactment of the ground-water appropriation statute, therefore, indicated (1) that the rules governing rights to underground streams and those relating to percolating waters were not the same, and (2) that diffused percolating waters belonged to the landowner. In fact, the decision in *Vanderwork* v. *Hewes* appears to have practically adopted the strict English or common-law rule for small flows from unknown sources, although it indicated a question in the mind of the court as to whether a surplus over the landowner's needs might be subject to appropriation.

The statute, by implication, excludes from appropriation percolating waters the boundaries of which are not reasonably ascertainable. In both *Vanderwork* v. *Hewes* and *Yeo* v. *Tweedy*, the court discussed the appropriation statutes; and in the latter case the con-

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[31] *Keeney* v. *Carillo* (2 N. Mex. 480 (1883)).
[32] *Vanderwork* v. *Hewes* (15 N. Mex. 439, 110 Pac. 567 (1910)).
[33] 141 Calif. 116, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

clusion is that the law of appropriation applies to artesian waters in basins the boundaries of which have been ascertained. The court did not hold that all percolating waters are appropriable.

The status of rights to the use of percolating waters not covered by the present statute, therefore, may conceivably be open to some question. It is possible that, in the further development of the law, percolating waters tributary to a surface stream, even though the boundaries are not ascertainable, will be held to be a part of the stream and therefore subject to appropriation, as they have been held in Colorado. On the other hand, as to other percolating waters which do not conform to the statutory definition—that is, particularly where the boundaries are not ascertainable—there appears to be little basis for asserting that the rule of absolute ownership on the part of the landowner as stated or implied in the earlier decisions has been changed. Certainly the ground-water statute, with its specific statement of waters that are appropriable, has not changed the rule as to percolating ground waters not referred to therein; nor has any court decision specifically done so. Yet if the boundaries of shallow-water areas are reasonably ascertainable, it may well be that their administration may be brought within the statute.

#### 4. Regulation of Artesian Wells

##### REGULATION OF ARTESIAN WELLS HAS BEEN HELD TO BE A VALID EXERCISE OF THE POLICE POWER

The provision of the 1909 statute (repealed by the present act) providing for the repair, by the well supervisor, of artesian wells which were wasting water, the cost of repair to become a lien on the land, was upheld as a valid exercise of the police power of the State, not violative of either the Federal or the State Constitution. The ownership of the water was not in issue, or discussed. The detriment to the public of wasting water and contributing to the waterlogging of lands was the justification for the legislative act regulating the construction and use of such wells.[34]

### North Dakota

#### 1. Summary

1. The constitution provides that all flowing streams and natural watercourses are and shall remain the property of the State.

2. The statutes provide (*a*) that the landowner owns water flowing over or under the surface, not forming a definite stream, and that the latter may be used by him as long as it remains there; (*b*) that all waters from all sources of supply belong to the public, and are subject to appropriation; and (*c*) that owners of land upon which are located artesian or flowing wells shall so control them as to permit the escape of only enough water needed for ordinary use in the conduct of their business, administration of the act being under the State geologist or his deputy, with appeal to a board of arbitration.

[34] *Eccles* v. *Ditto* (23 N. Mex. 235, 167 Pac. 726 (1917)).

3. There appear to be no supreme court decisions on the ownership or use of ground waters. In the absence of decisions interpreting the statutes, the rule of absolute ownership as laid down in the statute applies to percolating waters, and artesian or flowing wells are subject to public control to the extent required to prevent waste.

### 2. Constitutional and Statutory Provisions

The constitution provides:[35]

All flowing streams and natural water courses shall forever remain the property of the state for mining, irrigating and manufacturing purposes.

The statutes provide:

All waters within the limits of the State from all sources of water supply belong to the public and are subject to appropriation for beneficial use.[36]

The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream formed by nature over or under the surface may be used by him as long as it remains there; but he may not prevent the natural flow of the stream or of the natural spring from which it commences its definite course, nor pursue nor pollute the same.[37]

Provision is also made for acquiring the right to use seepage water from constructed works.[38]

A statute enacted in 1921 and amended in 1927 governs the drilling and control of artesian wells.[39] It provides that the owner of real estate upon which is located "an artesian or flowing well" shall provide control valves and keep them so adjusted as to permit only enough water to escape as needed for ordinary use in conducting his business. Sufficient flow to prevent freezing and clogging is permissible. Water must not be allowed to overflow other lands or flow away except in established drainage ditches. Rules are laid down for drilling and clearing new wells, controlling wells out of repair, and requiring the repair of old wells which might be damaged by shutting them off. Interference with a well properly adjusted or with an officer inspecting or measuring the well is a misdemeanor. Data on wells must be transmitted to the State geologist or his deputy, who has supervision and must give advice as to measures affecting ground waters and control and use of wells, make investigations and reports, and secure enforcement of laws pertaining to artesian and phreatic waters. The State geologist, State engineer, and county superintendent of schools where wells are located may make additional rules and regulations. Appeals from the State geologist's ruling may be taken to a board of arbitration consisting of the State engineer, assistant State geologist, and a third person named by them. In view of the fact that the water conservation commission act [40] gives the commission full control over all unappropriated public waters, whether above or under the ground, to the extent necessary to carry out the purposes of the act, and makes it the duty of every State agency concerned with the use of water or water rights to submit its plans to the commission before taking

[35] N. Dak. Const., sec. 210.
[36] N. Dak. Comp. Laws, 1913, sec. 8235, amended by Laws 1939, ch. 255.
[37] N. Dak. Comp. Laws, 1913, sec. 5341.
[38] N. Dak. Comp. Laws, 1913, sec. 8297.
[39] N. Dak. Supp., 1913–1925, secs. 2790b 1 to 2790b 8 (Laws 1921, ch. 17); sec. 2790b 7 amended by Laws 1927, ch. 88, p. 80.
[40] N. Dak. Laws, 1939, ch. 256, secs. 13 and 16.

action, the State water conservation commission by a regulation adopted July 18, 1939, adopted the sections of the 1921 statute and 1927 amendment pertaining to artesian wells as part of the rules and regulations of the commission. The effect of this is to continue in force the character of supervision contemplated by those sections.

### 3. Percolating Waters

PERCOLATING WATERS, ACCORDING TO THE STATUTE, BELONG TO THE OWNER OF THE LAND UNDER WHICH THEY FLOW. THERE ARE NO COURT DECISIONS ON THIS MATTER

No decisions of the Supreme Court of North Dakota defining or relating to rights to ground waters have been found. The statute providing, among other things, that the owner of the land owns water flowing under the surface but not forming a definite stream was originally a part of the Civil Code of the Territory of Dakota, approved January 12, 1866. In its original form it was carried over into the statutes of each of the States of North Dakota and South Dakota. The language of the North Dakota statute has never been changed; that of the South Dakota statute has been changed by prefacing with the clause "Subject to the provisions of this Code relating to artesian wells and water," and by adding material at the end affecting primarily the use of surface streams.

The South Dakota Supreme Court has held that subterranean water, not flowing in a defined channel, but percolating and seeping through the earth, is a part of the realty, this being a statutory matter.[41] None of the South Dakota decisions have qualified this common-law rule of absolute ownership of percolating water. The North Dakota statute, originating from the same source, specific in its language, is presumably as valid as that of South Dakota and has been cited in North Dakota decisions relating to riparian rights on surface streams, as noted in ch. 2 (p. 52); but it does not necessarily follow that the courts of North Dakota, in a proper case, would not adopt some modification of the strict rule so far as percolating ground waters are concerned. However, in the absence of court decisions, there appears to be no doubt that unqualified ownership by the landowner of the percolating waters under his land, as stated in the statute, is the present law in North Dakota.

### 4. Artesian Waters

The statute relating to artesian or flowing wells, providing that landowners shall so control the flow as to permit only enough water to escape as needed for ordinary use, and providing for enforcement of the act by administrative officers, has apparently not been before the supreme court. The statute obviously is designed to prevent waste of artesian water. Waste apparently is the escape of more water than needed for ordinary use by the landowner in conducting his business.

[41] *Metcalf* v. *Nelson* (8 S. Dak. 87, 65 N. W. 911 (1895)).

## Oklahoma

### 1. Summary

1. The statutes provide that the landowner owns the waters upon or under his lands, not forming a definite stream; and that the latter may be used by him as long as it remains there.

2. The one decision holds that different rules apply to percolating waters and to underground streams.

3. Notwithstanding the statute on "ownership," the landowner is limited to a reasonable use of the percolating water under his land, in relation to reasonable uses by owners of other overlying lands. This does not mean that there must be an apportionment of such waters.

### 2. Statutes

The statutes of Oklahoma provide:[42]

> The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same.

### 3. Discussion

PERCOLATING WATERS BELONG TO THE LANDOWNER UNDER THE AMERICAN RULE OF REASONABLE USE, WHICH DOES NOT NECESSARILY MEAN THAT THERE MUST BE AN ACTUAL APPORTIONMENT OF SUCH WATERS

The one Oklahoma case which has been found on the ownership of ground waters interpreted the foregoing statute and adopted the American rule of reasonable use of percolating waters.[43] This was a clear-cut case between owners of land overlying a common ground-water supply, one attempting to withdraw such waters for distant use to the injury of other owners who had been making beneficial use of the common supply. The court stated the applicable principles in substance as follows: Different rules apply to percolating waters and to underground streams; the waters in question were held to be percolating waters. The statutory declaration that the landowner owns the water under his land, not forming a definite stream, was not intended to convey such an absolute ownership as to result in unreasonable injury to one's neighbor, who has a similar ownership. The rule of reasonable use, applied here, means that each landowner is restricted to a reasonable exercise of his own rights in view of the similar rights of others. Exhaustion of a neighbor's ground-water supply, for transport to distant lands, is not such a reasonable use. But this does not mean that there must be, in actual practice,

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[42] Okla. Stats. 1931, sec. 11785; Stats. Ann. (1936), title 60, sec. 60.

[43] *Canada* v. *Shawnee* (179 Okla. 53, 64 Pac. (2d) 694 (1936)). A decision rendered in 1940 did not discuss the matter of title to ground waters, but held that an owner of land has the right to pump water from under such land: *Cities Service Gas Co.* v. *Eggers* (186 Okla. 466, 98 Pac. (2d) 1114 (1940)). This was an action to recover damages arising from the pollution of ground waters allegedly caused by the pollution of a creek. Defendants contended that the proximate cause of injury, if any, was the continual pumping which had the effect of drawing water from the creek into the well; but the supreme court held that plaintiff had the right to drill one or many wells on her land and to take water therefrom, this being the exercise of a private right and in no sense the proximate cause of the injury.

an apportionment of such waters between owners of overlying lands. The virtue of the rule of reasonable use lies in its application to concrete cases.

## Oregon

### 1. Summary

1. The statutes provide that in the counties lying east of the summit of the Cascades, waters in underground streams, channels, artesian basins, reservoirs or lakes, "the boundaries of which may reasonably be ascertained," are public waters and subject to appropriation. Uses for domestic and stock purposes and for small lawns and gardens are exempted. Vested rights to ground waters economically and beneficially used are protected.

2. The statutes provide that artesian wells must have control devices, and that artesian-well districts may be created.

3. The rules applying to surface streams apply to defined underground streams.

4. The few court decisions on percolating waters have held that they belong to the landowner, without stating any definite modification of the English or common-law rule.

5. The ground-water appropriation statute has not yet been construed by the courts. As a result of the court decisions preceding enactment of the statute, the English or common-law rule apparently still applies to percolating waters in bodies without reasonably ascertainable boundaries in eastern Oregon, and to all percolating waters in the western portion of the State.

### 2. Statutes

The statutes provide, in general:

> All water within the state from all sources of water supply belongs to the public.[44]
>
> Subject to existing rights, all waters within the state may be appropriated for beneficial use, as herein provided, and not otherwise; but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, corporation, or association to any water; * * * [45]

The foregoing section provides that the act does not apply to Multnomah Creek or to a designated section of Columbia River. Other streams are exempted in other legislative acts.

#### GROUND WATERS

A statute authorizing the appropriation of all underground waters in the eastern part of the State, except for small domestic and stock uses and watering of lawns and gardens, was passed in 1927.[46] This was amended in 1933 to apply only to the waters of underground streams, channels, artesian basins, reservoirs or lakes, "the boundaries of which may reasonably be ascertained," in line with the New Mexico law.[47] Following are a statement of the provisions defining appro-

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[44] Oreg. Code Ann., 1930, sec. 47–401.
[45] Oreg. Code Ann., 1930, sec. 47–402.
[46] Oreg. Laws, 1927, ch. 410.
[47] Oreg. Laws, 1933, ch. 263.

priable waters and a summary of important features of the balance of the statute:

> Subject to existing rights, all underground waters of the state of Oregon in counties lying east of the summit of the Cascade mountains may be appropriated for beneficial use, as herein provided, and not otherwise, but nothing herein contained shall be construed so as to take away or impair the vested right of any person, firm, corporation or association to use the water from any existing well or source of underground supply where such water is economically and beneficially used.[48]
>
> Any person, firm, association or corporation hereafter intending to acquire the right to the beneficial use of any waters in counties lying east of the summit of the Cascade Mountains found in underground streams, channels, artesian basins, reservoirs or lakes, the boundaries of which may reasonably be ascertained, hereby are declared to be public waters and to belong to the public and subject to appropriation for any purpose other than for domestic and culinary use, for stock or for the watering of lawns and gardens not exceeding one-half acre in area, before commencing the construction of any well, pit, gallery, tunnel, pumping plant or other means of developing and securing such water, or performing any work in connection with such construction, or in any manner utilizing said waters for such purpose shall make an application to the state engineer for a permit to make such appropriation.[49]

Applications for permits are not required for the small uses exempted in the foregoing section. For the other uses, applications are to be accepted, recorded, and approved by the State engineer under the same procedure adopted for applications for diversions of surface waters. Owners of approved applications or permits are required to furnish the State engineer with an annual report of work done, log of wells drilled, characteristics of the underground supply, elevation of water, amount and time of use of water, and manner of utilization. Permits are not to be granted for development of underground or artesian waters beyond the safe yield of the basin, contingent upon a reasonable or feasible pumping lift in case of pumping developments or a reasonable or feasible reduction of pressure in case of artesian developments. The State engineer has power to decide whether the granting of any permit will infringe upon any vested or existing rights under prior permits; and to fix the maximum quantity of water which may be used per unit each season. Artesian wells are to be provided with control devices. Permits may be canceled for nonperformance, as in case of permits; and to fix the maximum quantity of water which may be used investigations to determine the amount, depth, volume, and flow of ground waters east of the Cascades.[50] It may be noted that the general water code provides for appeals to the circuit court from orders or regulations of the State engineer.[51]

### REGULATION OF ARTESIAN WELLS

The ground-water statute contains the following provision:[52]

> Artesian wells shall be provided with suitable means for closing and conserving the flow when not actually needed or put to beneficial use.

An act provides for the creation of artesian well districts for levying taxes to pay for the installation of such wells; an artesian well being

[48] Oreg. Code Ann., 1930, sec. 47-1301.
[49] Oreg. Code Ann. Supp. 1935, sec. 47-1302.
[50] Oreg. Code Ann. 1930 secs. 47-1303, 47-1307, 47-1309 to 47-1311; Code Ann., Supp. 1935 secs. 47-1304 to 47-1306, 47-1308.
[51] Oreg. Code Ann. 1930, sec. 47-307.
[52] Oreg. Code Ann. Supp. 1935, sec. 47-1308.

defined as any artificial hole made in the ground not less than 6 inches in diameter at the bottom, through which water naturally flows from subterranean sources to the surface for any length of time. The county court is required to reserve for the benefit of the public the right to appropriate sufficient water from the well for the purpose of watering livestock and other uses, and to adopt rules and regulations governing distribution of the water.[53]

WASTE, SPRING, OR SEEPAGE WATERS

All ditches now constructed, or hereafter to be constructed, for the purpose of utilizing the waste, spring, or seepage waters of the state, shall be governed by the same rules relating to priority of right as those ditches constructed for the purpose of utilizing the waters of running streams; provided, that the person upon whose lands the seepage or spring waters first arise, shall have the right to the use of such waters.[54]

### 3. Defined Underground Streams

THE RULES APPLYING TO SURFACE STREAMS APPLY TO DEFINED UNDERGROUND STREAMS

The early decision in *Taylor* v. *Welch*,[55] concerning alleged interruption of the source of a spring, stated that every proprietor of land through which a stream of water flows has a right to the use of such flow in its natural channel without diminution, and that the same rule applies to water flowing in a well-defined and constant stream below the surface; but that this does not apply to ground water in an unknown and undefined channel. In this case plaintiff failed to prove that the waters supplying the spring were not percolating waters, and so was not entitled to an injunction.

More recently, in *Hayes* v. *Adams*,[56] a controversy arose over the right of owners of land in a canyon to abstract ground water by means of a trench and thus injure other parties to whom they had conveyed the rights to a spring at the mouth of the canyon. All the elements of an underground stream were present—the bed and banks were clearly marked by the bed and walls of the canyon; the bed was porous soil underlain by impervious bedrock; and the flow of the spring was constant and of sufficient volume to indicate that it came from a considerable distance. This was therefore an underground stream and the law of percolating waters did not apply. The Oregon court, however, placed a limitation upon proof that does not, it is believed, accord with the weight of authority. Holding that a constant stream of water, however small, flowing in a defined channel with bed and banks, is a watercourse, whether above or under the surface, it was stated:

But, to render a subsurface stream subject to the rules of law applicable to surface watercourses, the existence and location of such stream must be reasonably ascertainable from the surface of the earth without excavation.

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[53] Oreg. Code Ann., 1930, secs. 47–2001 to 47–2013.
[54] Oreg. Code Ann. 1930, sec. 47–1401.
[55] 6 Oreg. 198 (1876).
[56] 109 Oreg. 51, 218 Pac. 933 (1923).

Among the cases cited in support of this statement was one Western case, *Crescent Mining Co.* v. *Silver King Mining Co.*,[57] from Utah. The statement in that decision was:

> The rule is, that whenever the stream is so hidden in the earth that its course is not discoverable from the surface, there can be no such thing as a prescription in favor of an adjacent proprietor to have an uninterrupted flow of such stream through the land of his neighbor.

On the other hand, the Colorado court, in *Medano Ditch Co.* v. *Adams*,[58] stated:

> That the surface bed of such a stream may not be visible does not change the rule with respect to this class of flowing waters. * * * The channels and existence of such streams, though not visible, are "defined" and "known" within the meaning of the law when their course and flow are determinable by reasonable inference.

Furthermore, the Arizona court, in *Maricopa County Water Conservation District* v. *Southwest Cotton Co.*,[59] recently stated that surface indications are not exclusive and that other kinds of evidence are important. Kinney [60] cites cases to support the statement that there are a number of methods, including wells, borings, and tunnels, by which the flow in well-defined underground channels may be proven and thus become known.

### WATERS IN UNDERGROUND BODIES WITH REASONABLY ASCERTAINABLE BOUNDARIES IN THE EASTERN PART OF THE STATE ARE MADE APPROPRIABLE BY STATUTE EXCEPT FOR SMALL DOMESTIC, STOCK, AND LAWN AND GARDEN USES; THE STATUTE NOT HAVING BEEN CONSTRUED BY THE COURT

The statute covering this has been summarized above. The supreme court has not yet construed the statute. If upheld, this may be looked upon as an enlargement of the law of underground streams, and a consequent narrowing of the law of percolating waters. The court decisions involving percolating waters have said very little about their characteristics. Probably the statute can be upheld without doing violence to the past statements in the decisions, particularly (1) as the decisions (very few in number) which have discussed the private-ownership rule have been pointed at percolating waters with "unknown and unascertainable" characteristics (see "Percolating waters," below); and (2) as the Oregon court has upheld the validity of sections of the water code, enacted as late as 1909, defining the vested right of a riparian proprietor.[61] It may be noted that the statute

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[57] 17 Utah 444, 54 Pac. 244 (1898).

[58] 29 Colo. 317, 68 Pac. 431 (1902).

[59] 39 Ariz. 65, 4 Pac. (2d) 369 (1931).

[60] Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, sec. 1165, p. 2117–2118.

[61] *In re Hood River* (114 Oreg. 112, 227 Pac. 1065 (1924)). The Court stated, at 227 Pac. 1087:

"The common law having been partially adopted by statute, it is plain that the common-law rule as to the 'continuous flow' of a stream, or riparian doctrine, may be changed by statute, except as such change may affect some vested right. * * * It was within the province of the legislature, by the act of 1909, to define a vested right of a riparian owner, or to establish a rule as to when and under what condition and to what extent a vested right should be deemed to be created in a riparian proprietor."

These provisions appear in Oreg. Code Ann. 1930, sec. 47–403.

The Federal Circuit Court of Appeals, Ninth Circuit, concluded that the riparian owner's right to the natural flow of a stream, substantially undiminished, had been validly abrogated by the code as construed in the *Hood River case* (*California-Oregon Power Co.* v. *Beaver Portland Cement Co.*, 73 Fed. (2d) 555 (C. C. A. 9th, 1934)). Judge Wilbur, dissenting in part, was inclined to agree with the Oregon court that the right of a riparian to the use of the entire flow of the stream for power purposes was subordinate to the right of the

safeguards the pre-existing vested right of one who has been using ground water economically and beneficially.

Rights to percolating waters which would probably come within the qualification of "reasonably ascertainable boundaries" were involved in *Washington* v. *Oregon*,[62] an interstate suit in the United States Supreme Court, over Walla Walla River, decided in 1936. It appeared that farmers in Oregon had been pumping, from under their lands, water percolating from the river. The State of Washington claimed that this diversion interfered with prior rights in Washington. The parties stipulated application of the doctrine of prior appropriation. The bill was dismissed, it being held that there was no satisfactory proof that the pumping materially lessened the river supply. It was stated:

> Here the water level is on such a slope that, without any pumping, gravity would take the water away from the channel of any stream, either above the surface or below it. In such circumstances the right to pump in reasonable quantities for the beneficial enjoyment of the overlying land is allowed even by those courts that have placed the narrowest restrictions on the use of percolating waters.

It was also pointed out that a different problem would have arisen if the water had been extracted for use elsewhere or if these had been waters flowing in a defined underground stream.

#### 4. Percolating Waters

THE FEW EXTANT DECISIONS HOLD THAT PERCOLATING WATERS BELONG TO THE LANDOWNER, NO MODIFICATIONS OF THE ENGLISH OR COMMON-LAW RULE HAVING BEEN APPLIED. THE RESULT IS THAT THAT RULE APPARENTLY APPLIES TO ALL PERCOLATING WATERS IN THE WESTERN PART OF THE STATE AND TO PERCOLATING WATERS IN BODIES WITHOUT REASONABLY ASCERTAINABLE BOUNDARIES IN THE EASTERN PART OF THE STATE. THE STATUTORY MODIFICATION IN EASTERN OREGON HAS NOT RECEIVED JUDICIAL CONSTRUCTION.

The few statements of the court on the law of percolating waters are to the effect that they belong to the landowner, which is the English or common-law rule. As noted below, a dictum in 1923 says the landowner may make any "reasonable" use of the water, even though it completely destroys his neighbor's water supply. The early case of *Taylor* v. *Welch*,[63] supra, decided in 1876, has been the only one in which the decision was based upon ownership by the landowner. There it was stated that the principle was to be construed with the rule that everyone may do as he sees fit on his own property, provided others are not injured.

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State to permit appropriation of water above the riparian land for beneficial use in irrigation; but he maintained that the water code, as construed in the *Hood River case* in relation to a riparian right not exercised prior to adoption of the code, by its own force destroyed all riparian rights which had not been beneficially used, solely because of such nonuse, and this without giving any opportunity to exercise the right after enactment of the law. "So construed in its application to the rights of appellant it is a clear violation of the Fourteenth Amendment to the Constitution. I hold that the Water Code did not and could not wholly destroy the power rights of the appellant."

The United States Supreme Court, in affirming the judgment in the *California-Oregon Power Co. case*, passed without consideration the question as to whether the Oregon water code had validly modified the common-law rule of riparian rights by virtue of the State's police power exercised in the interest of the general welfare (295 U. S. 142 (1935)).

[62] 297 U. S. 517 (1936).

[63] 6 Oreg. 198 (1876).

In *Boyce* v. *Cupper*,[64] the court stated that while it is the general rule that water percolating beneath the surface in an unknown and undefined channel belongs to the realty in which it is found, that property right exists only while the water remains in the soil. Consequently, the right of a landowner to spring water supplied by percolating water on his land does not entitle him to such water after it has entered a stream.

The decision in *Brosnan* v. *Harris*[65] also involved the right to a spring. It was stated that where one goes upon unoccupied public land of the United States and diverts water to some beneficial use, he acquires a right to continue such diversion and use as against a subsequent settler; it being unimportant whether the diversion is made from a natural watercourse, a spring, or a well formed by percolation.

The court, in *Hayes* v. *Adams*,[66] supra, in concluding that an underground stream existed, stated that the law of percolating waters had no application. That the English or common-law rule without substantial modification, was still (1923) considered to prevail in Oregon as to percolating waters the course of which is "unknown and unascertainable," appears from the following language in that decision:

> Defendants justify their interference with, and diversion of, the waters which supply the spring in question upon the ground that the intercepted waters are subterranean, percolating waters, the course of which is unknown and unascertainable. They invoke the rule recognized by all the authorities, that such waters are a constituent part of the land, and belong to the owner of the land, with the right in such owner to make any reasonable use thereof, including a use which, either by reason of its character or the manner of its exercise, cuts off or diverts the flow of percolating waters from his neighbor's spring and renders the same dry and useless: * * *

Thus it appears that the English rule of unqualified ownership of percolating waters still applies to all such waters in western Oregon—certainly if their characteristics are unknown and unascertainable—and to percolating waters not in bodies with ascertainable boundaries in eastern Oregon. As heretofore stated, the statutory modification as to ground waters in bodies with ascertainable boundaries in eastern Oregon is yet open to construction by the court.

## South Dakota

### 1. Summary

1. The statutes provide that subject to the statutes relating to artesian wells and water, the landowner owns water flowing over or under the surface, not forming a definite stream, and that the latter may be used by him as long as it remains there; that subject to the foregoing and to vested private rights all waters, except navigable waters, are subject to appropriation; that landowners may install artesian wells on their lands for domestic, irrigation, and manufacturing purposes, but may appropriate no more water than needed therefor if such additional use interferes with the flow of wells on adjacent lands; and that owners of artesian wells more than 300 feet deep shall be taxed and shall install control devices subject to regulation by the State engineer.

[64] 37 Oreg. 256, 61 Pac. 642 (1900).
[65] 39 Oreg. 148, 65 Pac. 867 (1901).
[66] 109 Oreg. 51, 218 Pac. 933 (1923).

2. The laws applying to surface streams are held to apply also to defined or known underground streams. Water flowing through gravel in seeking a lower level does not constitute an underground stream where it is not shown that there are fissures in the bedrock or well-defined banks and channel.

3. Percolating water is held to belong to the landowner and therefore is not subject to appropriation by others. Ground water is presumed to be percolating, and the presumption must be overcome by evidence showing the existence of an underground stream.

4. The statute regulating artesian wells has been held not to have changed the rule of absolute ownership of percolating water. The statute limiting owners of artesian wells to necessary use apparently has not been construed by the court.

### 2. Statutes

Pertinent provisions are as follows:[67]

> Subject to vested private rights, and except as hereinafter in this section specifically provided, all the waters within the limits of this state, from whatever source of supply, belong to the public and, except navigable waters, are subject to appropriation for beneficial use. Subject to the provisions of this Code relating to artesian wells and water, the owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature, over or under the surface, may be used by such landowner as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, or of a natural spring arising on his land which flows into and constitutes a part of the water supply of a natural stream, nor pursue nor pollute the same, * * * .

Provision is also made for acquiring the right to use seepage water from constructed works.[68]

In connection with the regulation of artesian wells the statutes provide:

> Any person owning land shall have the right to sink or bore an artesian well or wells on his land for the purpose of procuring water for domestic use, for irrigation, or for manufacturing purposes; but from wells constructed subsequent to the ninth day of March, 1891, no more water shall be appropriated by such person than is needed for such purposes, when such additional use of water shall interfere with the flow of wells on adjacent lands.[69]

In locating artesian wells in a township in which other wells have been established, regard must be had for their proper distribution, and the State engineer is given regulatory powers to bring this about. Casings and control valves must be provided, and waste is subject to criminal prosecution.[70] A statute entitled "An act to regulate the use of artesian and phreatic waters of the State of South Dakota," passed in 1919 and extensively revised in the code of 1939,[71] states that every landowner, by virtue of the existence of subterranean waters on his property which communicate with similar waters on adjacent lands, has certain rights in the same and certain civil obligations to all sharing in the supply, the fulfillment of which the State

[67] S. Dak. Code, 1939, sec. 61.0101.
[68] S. Dak. Code, 1939, sec. 61.0146.
[69] S. Dak. Code, 1939, sec. 61 0401.
[70] S. Dak. Code, 1939, secs. 16.0402 to 61.0406.
[71] S. Dak. Code, 1939, secs. 61.0407 to 61.0415 (Laws, 1919, ch. 100).

is bound to require. For the purpose of conserving the natural resources of the State, regulating the use of "artesian and phreatic" waters, and preventing waste, "and not for the purpose of raising revenue," all "artesian wells" are subjected to specified rates of taxation, with various exemptions. Any well over 3 inches in diameter, which is being pumped and shown to draw water from the same supply which affords artesian wells, is subject to the same annual taxes for corresponding amounts of water drawn. The provisions for taxation do not apply to artesian wells less than 300 feet in depth. The State engineer is to secure enforcement of laws relating to artesian and phreatic waters. The flow must be regulated, and the State engineer may enforce flow control. The State engineer may make rules and regulations concerning the construction and use of artesian wells.

### 3. Underground Streams

#### THE LAW OF WATERCOURSES APPLIES TO UNDERGROUND STREAMS

The laws applying to surface streams have been held to apply also to defined or known underground streams.[72] As to these adjectives, the court quoted the following language from Kinney:[73]

> * * * the word "defined" means a contracted and bounded channel, though the course of the stream may be undefined by human knowledge; and the word "known" refers to knowledge of the course of the stream by reasonable inference.

But, according to the decision, underground water is presumed to be percolating, and a finding by the trial court that a defined and known underground stream exists will not be upheld where there is no crevice or opening in the bedrock through which water can flow, and no well-defined banks or channel, but merely a flow of water through gravel in seeking a lower level. The term underground stream, having defined banks, according to this decision, is usually meant to apply only to streams in arid regions which flow partly on the surface and partly under the surface, but always in a well-defined channel, and within well-defined banks. (See p. 153 above.)

Springs fed by underground streams are governed by the rules applying to surface streams; but the presumption is that springs are fed by percolating waters.[74]

### 4. Percolating Waters

#### PERCOLATING WATER BELONGS TO THE LANDOWNER

Subterranean water, not flowing in a defined course or channel, but percolating and seeping through the earth, is a part of the realty. This is a matter of statute in South Dakota. As shown below, the court has held that this law was not affected by the 1919 law on the regulation of artesian wells.[75]

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[72] *Deadwood Central R. R.* v. *Barker* (14 S. Dak. 558, 86 N. W. 619 (1901)).
[73] Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, sec. 1155, p. 2099. The court's reference was to section 48 in the first edition.
[74] *Metcalf* v. *Nelson* (8 S. Dak. 87, 65 N. W. 911 (1895)).
[75] *Madison* v. *Rapid City* (61 S. Dak. 83, 246 N. W. 283 (1932)).

Springs fed by percolation belong to the landowner, and the presumption is that springs are so fed.[74] As the owner of the soil "owns" the percolating water under the surface, action will not lie to prevent an adjoining landowner from cutting off the supply flow of percolating water supplying a spring on plaintiff's land.[76]

There is a presumption that underground water is percolating, rather than part of a defined underground stream, and the difficulties of proof make this presumption extremely difficult to rebut. The presumption must be overcome by evidence of the existence of a definite underground stream.[77]

PERCOLATING WATER THEREFORE IS NOT SUBJECT TO APPROPRIATION

The doctrine of appropriation contemplates the appropriation of waters constituting running streams, having well-defined channels and banks, and has no application to mere percolating waters seeping under the surface.[77]

The statute, which as originally enacted made all waters within the State except navigable waters appropriable, was held unconstitutional insofar as it related to or interfered with certain vested property rights, in *St. Germain Irrigating Ditch Co.* v. *Hawthorne Ditch Co.*[78] The landowner who sinks an artesian well on his land, being the absolute owner of all water flowing therefrom, cannot be required to pay for a permit to exercise his right of appropriation and use, which is a vested property right. In the *St. Germain case*, however, the rights of users of ground water were not in issue; the case went up on demurrer to a complaint asking that the State engineer be directed to make a statutory adjudication of the waters of a creek claimed under appropriative and riparian rights. The statements of the court as to the effect of the appropriation statute upon the ownership and use of ground waters were not necessary to the decision.

Subsequently the statute was amended by prefacing with the clause: "Subject to vested private rights." As the earlier statute and the several court decisions are to the effect that percolating waters belong to the landowner, the appropriation statute is now in harmony therewith.

### 5. Artesian Waters

OWNERS OF ARTESIAN WELLS ARE LIMITED BY STATUTE TO NECESSARY USE, A RESTRICTION NOT IMPOSED BY STATUTE OR COURT DECISION UPON OWNERS OF LANDS OVERLYING PERCOLATING WATERS. ANOTHER STATUTE REGULATES ARTESIAN WELLS, PRIMARILY TO PREVENT WASTE, BUT DOES NOT AFFECT THE RULE OF ABSOLUTE OWNERSHIP OF PERCOLATING WATERS

In *Madison* v. *Rapid City*,[79] although the question of use of artesian waters was not in issue, the court referred to the 1919 legislation

[74] *Metcalf* v. *Nelson* (8 S. Dak. 87, 65 N. W. 911 (1895)).
[76] *Madison* v. *Rapid City* (61 S. Dak. 83. 246 N. W. 283 (1932)).
[77] *Deadwood Central R. R.* v. *Barker* (14 S. Dak. 558, 86 N. W. 619 (1901)).
[78] *St. Germain Irr. Ditch Co.* v. *Hawthorne Ditch Co.* (32 S. Dak. 260, 143 N. WW. 124 (1913)).
[79] 61 S. Dak. 83, 246 N. W. 283 (1932).

thereon. The presumption that the source of a spring is percolating water was affirmed, and—

Under the holding of this Metcalf Case and the later case of Deadwood Central Railroad Co. v. Barker, supra, there can be no serious contention but that the owner of the soil is the absolute owner of percolating subterranean water. The rule announced in these cases is based upon our now present section 348, Rev. Code 1919, which provides:

"The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream."

The 1919 law on artesian waters was stated not to have changed the rule. Such act was intended to apply only to artesian waters.

This, we believe, is shown quite definitely by the first sentence of section 348, which commences, "Subject to the provisions of this code relating to artesian wells and water," etc.

The legislature, in the court's opinion, intended to leave in effect the law concerning subterranean waters, as embodied in section 348, except as to artesian waters; the 1919 law "attempts to do nothing more than establish rules and regulations concerning artesian wells."

From the language in the foregoing decision, it is apparent that the court considered artesian waters as distinct from percolating subterranean waters. However, this decision is not to be taken as construing the 1919 law on regulation of artesian wells; all it holds, in effect, is that such law did not change the rule of ownership of percolating water. While the court did not so state, the phrase "Subject to the provisions of this code relating to artesian wells and water," was added to section 348 by the Revised Codes of 1919.

No decision has been found construing the statute restricting the owners of artesian wells to necessary use. If upheld, this would constitute a limitation upon the absolute ownership of such ground waters as the court should decide to be artesian waters, as differentiated from percolating waters. All that can be stated at this time regarding ownership of artesian waters is that the statutes have imposed the rule of reasonable use, primarily to prevent waste, and that the court has held that the statute regulating artesian wells does not change the rule of absolute ownership of percolating ground water.

## Texas

### 1. Summary

1. The statutes provide that the underflow of rivers, natural streams, and lakes is subject to appropriation, but contain no reference to appropriation of other ground waters.

2. A statute provides for the regulation of artesian wells to prevent waste, and another provides for the abatement of water wells encountering solutions injurious to agriculture, both under supervision of the State board of water engineers.

3. The underflow of streams is governed by the rules relating to watercourses; it is appropriable by statute and is subject to the riparian doctrine by court decision.

4. The few decisions hold that percolating waters are the absolute property of the landowner.

### 2. Constitutional and Statutory Provisions

There are no specific provisions relating to the appropriation of ground waters other than the underflow of watercourses. The constitution states:

> The conservation and development of all of the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its over-flowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.[80]

The appropriation statute provides:

> The waters of the ordinary flow and underflow and tides of every flowing river or natural stream, of all lakes, bays or arms of the Gulf of Mexico, and the storm, flood or rain waters of every river or natural stream, canyon, ravine, depression or watershed, within the State of Texas, are hereby declared to be the property of the State, and the right to the use thereof may be acquired by appropriation in the manner and for the uses and purposes hereinafter provided, and may be taken or diverted from its natural channel for any of the purposes expressed in this chapter. * * *[81]

The supreme court has held that the appropriation statute has no application to diffused surface waters on lands granted prior to its enactment.[82]

Texas has two statutes for the regulation of water wells. One provides for the control of artesian wells, an artesian well being defined as an artificial well in which, if properly cased, the waters will rise by natural pressure above the first impervious stratum below the surface of the ground. Control devices must be provided to prevent waste upon the surface or into underground strata. Wells not so controlled are declared to be a public nuisance, subject to abatement by order of the State board of water engineers, and operation thereof is a misdemeanor. Records of wells must be transmitted to the board, and annual statements are required concerning all artesian wells other than those used for domestic purposes. Anyone may drill a well on his own land for domestic or stock purposes, or an artesian well as defined, if securely cased and so controlled as to prevent injury to other land or other underground strata in the event that harmful solutions of water are encountered.[83]

The other is an act passed in 1931, which declares it to be the policy and duty of the board of water engineers to make and enforce rules and regulations for the conservation, protection, preservation, and distribution of all underground waters in the State. Every water well encountering salt water or other solutions injurious to vegetation is required to be plugged or cased so that such solutions shall be confined to the strata in which found. Refusal to abate a well ordered by the board to be plugged, cased, or capped is a misdemeanor.[84]

[80] Tex. Const., art. XVI, sec. 59a.
[81] Vernon's Tex. Stats. 1936, Rev. Civil Stats., art. 7467.
[82] *Turner* v. *Big Lake Oil Co.* (128 Tex. 155. 96 S. W. (2d) 221 (1936)).
[83] Vernon's Tex. Stats. 1936, Rev. Civil Stats., arts. 7600 to 7616.
[84] Vernon's Tex. Stats., 1936, Penal Code. art. 848a.

### 3. Underflow of Streams

#### THE UNDERFLOW IS SUBJECT TO THE RULES GOVERNING WATERCOURSES

The appropriation statute covers the waters of the underflow of rivers and natural streams and lakes; and the supreme court has held that "riparian waters are the waters of the ordinary flow and underflow of the stream." [85]

### 4. Percolating Waters

#### PERCOLATING WATERS ARE THE ABSOLUTE PROPERTY OF THE LANDOWNER

The few pertinent Texas decisions have stated this rule. *Houston & Texas Central Ry.* v. *East*,[86] decided in 1904, involved a controversy between adjoining landowners. Plaintiff had a small well, which went dry after the defendant installed a large well the water from which was used on overlying land for railroad shops and locomotives. The supply was percolating water, not from any defined stream. The supreme court reversed a decision by the court of civil appeals which adopted the rule of reasonable use, and stated the English doctrine as the accepted law, as follows:

> That the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from the underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of damnum absque injuria, which can not become the ground of an action. (Quoting from the English case of *Acton* v. *Blundell* (12 M. & W. 324, 354), a decision rendered in 1843.)

The practical arguments for acceptance of the English rule were: (1) the source and flow of these waters are so unknown that it is impossible to formulate any legal rules governing them; and (2) the recognition of correlative rights would substantially interfere with many important public projects, such as drainage of lands, etc.

*Farb* v. *Theis*,[87] *decided* in 1923, was an action brought by appropriators of stream water for domestic uses to restrain defendants from selling riparian lots for cemetery purposes, on the ground that contamination of the water supply would result. The court of civil appeals held that the danger was not great enough for immediate injunctive relief, and stated, by a dictum important to this discussion:

> It is now well settled in this state, as well as in other jurisdictions, that owners of the soil have no rights in subsurface waters not running in well-defined channels, as against neighbors who may withdraw them by wells or other excavations, even though this withdrawal by the one results in the destruction of the other's water supply.

As the injury was considered of the same kind and degree, it was held that plaintiffs had no ground for action.

More recently a decision by the supreme court held that where there was no evidence to rebut the presumption that ground waters were percolating, the ground waters were the exclusive property of the landowner and passed under a lease of water rights to the land.[88]

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[85] *Motl* v. *Boyd* (116 Tex. 82, 286 S. W. 458 (1926)).
[86] 98 Tex. 146, 81 S. W. 279 (1904); reversing the decision of the court of civil appeals reported in 77 S. W. 646.
[87] 250 S. W. 290 (Tex. Civ. App., 1923).
[88] *Texas Co.* v. *Burkett* (117 Tex. 16, 296 S. W. 273 (1927)).

Pollution of a well by reason of leakage of gasoline from underground tanks has been held actionable, by the court of civil appeals.[89] It has also been stated that the rule that any use by one of the percolating waters beneath his land may not be complained of by an adjoining landowner, does not exempt from liability one who by negligence in the construction or maintenance of his pipe lines for conducting oil allows the oil to get into the precolating waters under his land, whereby it eventually is carried into the well of an adjoining landowner.[90]

## Utah

### 1. Summary

1. The present statute, as amended in 1935, makes all waters above or under the ground public waters, subject to existing rights of use, and subject to appropriation. For many years prior to 1935, the statute specified only waters flowing above or under the ground in known or defined channels. A law on the regulation of artesian wells was superseded by the 1935 amendments, which place the installation and operation of all ground-water diversions under supervision of the State engineer.

2. Waters in defined underground streams have been held consistently to be subject to appropriation.

3. The court decisions first acknowledged the doctrine of absolute ownership of percolating waters, at least as against attempted appropriations, then adopted the California doctrine of correlative rights, with modifications, as between owners of land overlying a common artesian basin, and then adopted the appropriation doctrine. Waste waters from irrigation were exempted from the rule of correlative rights to percolating waters. Waters arising on public lands of the United States have been held not subject to either the absolute-ownership or the correlative doctrine; but have been held to belong to the appropriators of waters of streams or springs of which they form a source of supply.

4. The recent decisions applying the appropriation doctrine to percolating waters were rendered in 1935, shortly before the 1935 legislation. They were rendered by a divided court, with sharp and definite dissenting opinions. They were based upon controversies arising in artesian basins, and the opinions indicate a feeling that all ground waters are not appropriable, although the implication is that ground waters to which the appropriation doctrine would be applicable, are subject to that doctrine. Hence the present status of the ground-water law in Utah is somewhat uncertain.

5. The conclusion to be drawn from the most recent decisions and legislation is that the appropriation doctrine governs artesian and other ground waters the interception of which affects waters elsewhere. It is believed that positive conclusions, however, should await further decisions of the supreme court, particularly a decision construing the ground-water statute.

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[89] *Continental Oil Co.* v. *Berry* (52 S. W. (2d) 953 (Tex. Civ. App., 1932)).
[90] *Texas Co.* v. *Giddings* (148 S. W. 1142 (Tex. Civ. App. 1912)).

### 2. Constitutional and Statutory Provisions

The constitution provides:[91]

All existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed.

The statutes provide:[92]

All waters in this state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof.

#### THE GROUND-WATER LAW

The foregoing statutory provision was made by amendment in 1935. From 1903 to 1933, the statute had declared the water "of all streams and other sources in this State, whether flowing above or under the ground, in known or defined channels," to be the property of the public, subject to all existing rights to the use thereof.[93] In 1933, the word "natural" was inserted before "channels."[94] Hence, for 32 years prior to the 1935 legislation, the statutory declaration of ownership and appropriability of ground waters specified only ground waters of streams and other sources flowing in known or defined channels.

In 1935 legislation[95] and further legislation in 1937[96] amended sections of the Revised Statutes of 1933 and added other sections to bring the acquisition and administration of rights to all ground waters under the State engineer. Rights to the use of any unappropriated waters may be acquired only as provided by statute, through application to the State engineer. Ground-water diversions must be provided with control devices under supervision of the State engineer. Well drillers are required to secure annual permits from the State engineer. Reports from well drillers and users of ground waters are required. Claimants of rights to the use of ground waters were required to file notice of their claims with the State engineer within a designated period, failure to do which was to be prima facie evidence of intent to abandon the claimed rights. The right of replacement may be exercised by a junior appropriator, where the appropriation may diminish the quantity or impair the quality of ground water already appropriated. The State engineer may hold a hearing at any time to determine whether the ground waters in an area as defined by him are inadequate for existing claims, and he is required to do so if petitioned by at least one-third of the ground-water users in that area. If he finds the supply inadequate, he is required to divide or cause to be divided the waters in such area in accordance with the respective rights of the claimants.

The Utah ground-water law superseded and repealed an earlier law on the regulation of artesian wells, enacted in 1917.[97] The present law provides that all ground-water diversions must have control devices of design approved by the State engineer, and under his supervision, as noted above.

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[91] Utah Const., art. XVII, sec. 1.
[92] Utah Rev. Stats., 1933, sec. 100-1-1, as amended by Laws, 1935, ch. 105.
[93] Utah Laws, 1903, p. 101.
[94] Utah Rev. Stats., 1933, sec. 100-1-1.
[95] Utah Laws, 1935, ch. 105.
[96] Utah Laws, 1937, ch. 130.
[97] Utah Rev. Stats. 1933, title 19, ch. 6 (Laws 1917, ch. 126, p. 430), repealed by Laws 1935, ch. 105.

### 3. Defined Underground Streams

WATERS IN DEFINED UNDERGROUND STREAMS HAVE BEEN CONSISTENTLY HELD TO BE SUBJECT TO APPROPRIATION

This rule has been consistently recognized. The statement that the ordinary rules applying to the appropriation of surface streams do not apply to percolating waters and subterranean streams with undefined and unknown courses and banks was made in the decision in *Crescent Mining Co.* v. *Silver King Mining Co.* in 1898.[98] Subsequently, the appropriation doctrine was specifically applied to known underground streams, flowing in well-defined channels.[99]

### 4. Percolating Waters

The decisions of the Utah court have passed through the stages of recognizing the rule of absolute ownership of percolating water as against an attempted appropriation, then the rule of correlative rights as between owners of land overlying a common artesian basin, and recently the doctrine of appropriation. The latest decisions adopting the appropriation doctrine were rendered prior to the legislative amendment declaring all ground waters the property of the public, subject to appropriation. In fact, the minority opinion in *Wrathall* v. *Johnson*,[1] written by Justice Folland, who felt that percolating waters on private lands were not subject to appropriation, concluded with the following legislative recommendation:

Whether underground percolating waters be regarded as public or not the one thing needed at this time to effect a conservation of this natural resource is legislation extending a more definite control by the state engineer or other public authority. Conservation of the underground supply may be enforced by legislative action under either theory of ownership or right, and such control should be asserted and enforced without further delay.

#### (A) DECISIONS PRIOR TO 1935

*The Early Decisions Recognized the Rule of Absolute Ownership by the Owner of Overlying Land as against an Attempted Appropriation*

The first decision on ground-water law acknowledged the ownership of percolating waters by the landowner, even to the extent of drying up the wells or springs of an adjoining landowner; but this statement was dictum. The holding was that the right to a well on public land of the United States belonged to the one discovering and improving the well.[2]

The decisions in *Crescent Mining Co.* v. *Silver King Mining Co.*,[3] supra, and *Willow Creek Irrigation Co.* v. *Michaelson*,[4] as well as in the *Sullivan case*, involved controversies between owners of land on the one hand and attempted appropriators on the other hand. In the two later cases referred to, appropriators of surface supplies were seeking to compel owners of land, from which percolating waters

[98] 17 Utah 444, 54 Pac. 244 (1898).
[99] *Herriman Irr. Co.* v. *Keel* (25 Utah 96, 69 Pac. 719 (1902)); *Whitmore* v. *Utah Fuel Co.* (26 Utah 488, 73 Pac. 764 (1903)).
[1] 86 Utah 50, 40 Pac. (2d) 755 (1935).
[2] *Sullivan* v. *Northern Spy Min. Co.* (11 Utah 438, 40 Pac. 709 (1895)).
[3] 17 Utah 444, 54 Pac. 244 (1898).
[4] 21 Utah 248, 60 Pac. 943 (1900).

partly contributed to their appropriated supplies, to allow the percolating waters to continue to augment such appropriated supplies. The right to compel landowners to do this was denied, where the contributing lands passed to private ownership before the appropriations were made or before the waters appeared on the contributing lands; the ground for denial being that the percolating waters on such lands belonged to the landowner and were not subject to appropriation by others.

No Utah decisions have been found in which the rule of absolute ownership was actually applied between owners of overlying lands. Statements of such absolute ownership, such as that in the *Sullivan case*, are therefore dicta. Yet the impression appears to have prevailed at times that the early Utah decisions adopted the absolute ownership rule as between adjoining proprietors.[5]

*Later Decisions Adopted the California Rule of Correlative Rights, with Important Modifications*

Adoption of the rule of reasonable use as between owners of overlying land was foreshadowed in the majority opinion in *Herriman Irrigation Co.* v. *Keel*,[6] and it was stated by dictum in *Garns* v. *Rollins* (1912),[7] that the tendency of the decisions was toward reasonable and beneficial use. The definite adoption of correlative rights was in 1921 in *Horne* v. *Utah Oil Refining Co.*,[8] considerable reliance being placed on the California case of *Katz* v. *Walkinshaw*.[9] The early Utah cases were distinguished on their facts, and the instant case was held to be sui generis in Utah. Reasonable use was limited to a just proportion of the ground water, based upon the surface area, reasonably necessary for beneficial use.

The same land and wells and some of the same parties in the *Horne case* were involved in another controversy 2 years later, in which the correlative doctrine was modified.[10] Defendant had purchased the water rights of a number of lot owners in an artesian district and wished to convey their share of the water to distant lands outside the district. The court endeavored to harmonize the correlative doctrine with the appropriation doctrine, by holding that each owner of overlying land was entitled to a certain flow of water, depending upon his acreage, so long as he put the water to beneficial use either inside or outside the artesian district. A change in place of use, so long as the rights of others were not thereby injured, was held to be compatible with the established policy of the State.

As recently as 1934 the correlative-rights doctrine was recognized.[11] The main point decided was that a landowner, though he might prevent the escape from his land of waters bearing copper in solution [12] yet had no right to follow such waters into the lands of another and repossess them there.

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[5] *Garns* v. *Rollins* (41 Utah 260, 125 Pac. 867 (1912)).
[6] 25 Utah 96, 69 Pac. 719 (1902).
[7] 41 Utah 260, 125 Pac. 867 (1912).
[8] 59 Utah 279, 202 Pac. 815 (1921).
[9] 141 Calif. 116, 70 Pac. 663 (1902), 74 Pac. 766 (1903).
[10] *Glover* v. *Utah Oil Refining Co.* (62 Utah 174, 218 Pac. 955 (1923)).
[11] *Utah Copper Co.* v. *Stephen Hayes Estate* (83 Utah 545, 31 Pac. (2d) 624 (1934)).
[12] *Utah Copper Co.* v. *Montana-Bingham Consol. Min. Co.* (69 Utah 423, 255 Pac. 672 (1926)).

*Exceptions: Waste Waters from Irrigation Have Been Exempted from the Rule of Correlative Rights to Percolating Waters*

During the period in which the correlative doctrine was followed or foreshadowed, the Utah court refused to apply that rule to waste waters arising from irrigation on one's land. The landowner's right to drain was upheld, even though such action diverted waters which otherwise would have seeped to lower land; he could recapture and reuse such water, and the lower owner could not acquire a prescriptive right to the flow.[13]

It was held, in a river system case, that the use of seepage and run-off from irrigation, which would reach a stream if not interfered with, belonged to prior appropriators on the stream.[14] A landowner might drain his land and reuse the drainage water, but only if it could be returned to the stream in substantially the manner and quantity of its original flow. It was stated that the decision was not intended to apply to artesian or subterranean waters which come from sources deep beneath the earth's surface. (See discussion of this case in connection with diffused surface waters, p. 128.)

*Exceptions Continued: Waters Arising on Public Lands of the United States Have Been Held Not Subject to either the Absolute-Ownership or Correlative Doctrine, but To Be Subject to the Use of the Appropriators of Streams or Springs of which They Constitute a Source of Supply*

This was held in *Sullivan* v. *Northern Spy Mining Co.*,[15] and the principle has been followed many times.[16] The criterion of this principle is that the appropriation be made before the water-bearing lands pass to private ownership. If this is done, the appropriator of water from the stream or spring deriving its supply from the lands in question is protected in the source of supply. In the *Sullivan case* the court had stated that the landowner might sink an adjoining well on his own premises, although it might dry up that of the first appropriator; but this was stated in *Stookey* v. *Green* to have been dictum, which it unquestionably was, and not part of the law of the case.

Where one claims that he has developed water in close proximity to the source of a spring or stream, previously appropriated by others, he has the burden of proving that his alleged development of water does not interfere with the waters theretofore appropriated.[17]

(B) DECISIONS AND LEGISLATION IN 1935

*The Recent Decisions, by a Divided Court, Have Applied the Appropriation Doctrine to at Least Some Ground Waters Not Flowing in Definite Channels, and Specifically to Artesian Waters*

The Utah court, on January 2, 1935, handed down a decision, in which four out of the five justices wrote opinions, breaking away from the long line of earlier cases which had led up to and adopted the

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[13] *Garns* v. *Rollins* (41 Utah 260, 125 Pac. 867 (1912)); *Roberts* v. *Gribble* (43 Utah 411, 134 Pac. 1014 (1913)).
[14] *Rasmussen v. Moroni Irr. Co.* (56 Utah 140, 189 Pac. 572 (1920)).
[15] 11 Utah 438, 40 Pac. 709 (1895).
[16] See *Stookey* v. *Green* (53 Utah 311, 178 Pac. 586 (1919)).
[17] *Mountain Lake Min. Co.* v. *Midway Irr. Co.* (47 Utah 346, 149 Pac. 929 (1915)).

correlative doctrine. The decision was entitled *Wrathall* v. *Johnson*.[18] However, the break was not altogether an illogical development. The decision in *Glover* v. *Utah Oil Refining Co.*,[19] supra, had attempted to integrate the correlative and appropriation doctrines. In *Silver King Consolidated Mining Co.* v. *Sutton*,[20] Justice Moffat, who later wrote the prevailing opinion in *Wrathall* v. *Johnson*, wrote an opinion concurring in part and dissenting in part, in which he stated that the correlative doctrine, to the extent adopted in Utah, is limited by the appropriation doctrine—that one who appropriates water for beneficial use acquires a vested right as against any subsequent user. This decision was on May 17, 1934.

The controversy in *Wrathall* v. *Johnson* arose between owners of land overlying a common artesian basin. Plaintiff alleged that he had used the ground water for more than 35 years for domestic and irrigation purposes; that defendant had then installed pumps which had dried up plaintiff's supply; and that by this long use plaintiff had acquired a right of use of such water. The complaint asked for injunctive relief and damages. The trial court held that the complaint did not state a cause of action and was subject to a general demurrer; this was the question for determination on the appeal.

The prevailing opinion by Justice Moffat reviewed the decisions on ground waters, the development of legislation on water rights, and the implications of the correlative-rights and appropriation doctrines. He considered that the proportionate surface-area rule limiting reasonable use of ground waters, especially in an artesian district, laid down in *Horne* v. *Utah Oil Refining Co.*,[21] supra, is inapplicable to a situation in which priorities are involved, and should be departed from. He concluded that under the statutes it is proper to apply the doctrine of appropriation and beneficial use to percolating waters; likewise it is practicable to do so, and difficulties in proof should not avoid application of the statutes; furthermore, it is the equitable course to take. Consequently, a cause of action was held to have been stated under the appropriation doctrine. Another justice concurred. Chief Justice Straup wrote a concurring opinion in which, however, he held that a cause of action was stated under either the doctrine of correlative rights or the doctrine of appropriation.

The other two justices wrote opinions concurring in the results, but holding that a cause of action was stated under only the correlative doctrine, and not on any appropriation ground. Their thesis was: The *Horne case*, decided in 1921, is authority for the doctrine that water of an artesian basin, within or subjacent to privately owned lands, is not public water but belongs to the landowner and therefore is not subject to appropriation; that doctrine is sound; it is reasonable to assume that water rights have been adjusted and labor and money expended in reliance upon that holding; to repudiate the doctrine at this late date may result in grave injustice; hence the law announced therein should not be disturbed.

A week later (January 10, 1935), a decision was rendered on the merits of a similar controversy, applying the doctrine of prior appro-

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[18] 86 Utah 50, 40 Pac. (2d) 755 (1935).
[19] 62 Utah 174, 218 Pac. 955 (1923).
[20] 85 Utah 297, 39 Pac. (2d) 682 (1934).
[21] 59 Utah 279, 202 Pac. 815 (1921).

priation to the rights of owners of land overlying an artesian basin.[22] The lack of complete protection and complete utilization of water under the correlative rule, and the inadequacy of proportional shares of water for practical use on small areas, were stated. The decision was three to two, the dissenting justices being those who in the *Wrathall case* had concurred in the results but only on the ground that a cause of action was stated under the correlative doctrine.

In both cases, the opinions of Chief Justice Straup distinguished "percolating" waters from other ground waters. In the *Wrathall case* he defined percolating waters as "diffused waters in lands privately owned, percolating or seeping through the ground, moving by gravity in any or every direction along a line of least resistance, not forming any part of a stream or other body of water either surface or subterranean, and, as far as known, not contributing or tributary to a flow of any defined stream or body of water." Such waters he considered to belong to the landowner. On the other hand, ground waters flowing in a known or defined stream, or in or forming a part of a body of water moving forward or held in a basin, he considered public waters and subject to appropriation. No other justice even commented on this distinction. However, in the *Justesen case* the prevailing opinion stated that a prior appropriator of water from an "artesian basin," which is "nothing more than a body of water more or less compact, moving through the soils with more or less resistance," is entitled to protection as an appropriator "with a right of priority the same as if the diversion had been directly from the surface," as against a subsequent appropriation by an adjoining landowner at least part of whose lands overlie the same artesian basin. An appropriation follows the water to its original source, "whether through surface or subterranean streams or through percolation."

Hence the Utah court, as constituted at the time of these decisions, did not go to the length of applying the appropriation doctrine to all ground waters, but apparently believed that some diffused ground waters might not be classed as appropriable. The two decisions involved waters in an artesian area. However, the definitions of appropriable ground waters, particularly the statements in the *Justesen case*, apparently are broad enough to include percolating waters tributary to a surface stream, and percolating waters the interception of which would injure a prior appropriator of ground water. If that is correct, and if the term "artesian" is not restricted in its legal application to waters under pressure, then the appropriation doctrine under these holdings applies to all ground waters to which it could have practical application.

*The Legislature in 1935 Subjected All Ground Waters to Appropriation*

This statute has been summarized above. It was enacted within a few months after the rendering of the *Wrathall* and *Justesen* decisions. In addition to declaring all such waters public, subject to existing rights, the procedure for appropriating waters generally was applied to ground waters, with certain modifications necessitated by the differences in diversion methods. This statute has not yet been construed by the supreme court.

[22] *Justesen* v. *Olsen* (86 Utah 158, 40 Pac. (2d) 802 (1935)).

#### (C) PRESENT STATUS

*The Status of Ground-Water Law in Utah Is Now Somewhat Uncertain, but the Probable Rule Is That Artesian and Other Ground Waters the Interception of Which Affects Waters Elsewhere Are Subject to the Appropriation Doctrine. Positive Conclusions, However, Must Await Further Decisions. Particularly a Decision Construing the Statute*

The uncertainty lies principally in the dissenting opinions in *Wrathall* v. *Johnson*,[23] and *Justesen* v. *Olsen*,[24] indicating such a definite and pronounced feeling on the part of two out of the five members of the court that rights in ground waters vested by reason of ownership of land, should not and could not be disturbed.

There is also some uncertainty over the classification of waters subject to appropriation under the decisions. However, as indicated above, the definitions appear to be sufficiently broad for practical purposes, particularly if the scientific meaning of "artesian" is not impressed upon the legal definition of appropriable waters.

The Utah ground-water laws have been in a process of development for many years. This development has been definitely away from the English concept of absolute ownership by the landowner and toward the doctrine of appropriation—the doctrine invariably applied to surface streams in Utah. The conclusion to be drawn from the decisions and the recent legislation is that the appropriation doctrine governs rights to ground waters shown by the evidence to be physically interconnected with ground waters claimed by other users, or with a surface stream; that is, that a prior appropriator of water, surface or subterranean, is entitled to protection to the extent of his valid priority from interference with the source of supply. The statute provided a period during which claims of vested rights to the use of ground waters could be made a matter of record.[25] It is believed, however, that positive conclusions should await further decisions of the court, particularly a decision construing the present ground-water statute.

## Washington

### 1. Summary

1. The statutes provide that, subject to existing rights, all waters within the State belong to the public and that rights thereto shall be acquired by appropriation. Existing rights are not to be construed as lessened, enlarged, or modified by the statute.

2. A statute provides for the regulation of artesian wells in irrigation communities, requiring the capping and control during the winter months and use of water therefrom only for domestic and stock purposes during that period.

3. Waters of a defined underground stream were stated in an early case to be subject to the rules applying to surface streams. This does not apply to waters percolating down the hillsides into a valley drained by a surface stream, even though the valley has an underlying impervious stratum tilting toward the bed of the stream.

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[23] 86 Utah 50, 40 Pac. (2d) 755 (1935).
[24] 86 Utah 158, 40 Pac. (2d) 802 (1935).
[25] Utah Laws, 1935, ch. 105, adding sec. 100–5–12 to Rev. Stats., 1933; Laws, 1937, ch. 130 adding sec. 100–5–13 to Rev. Stats., 1933, amended by Laws, 1939, ch. 111.

4. Percolating waters belong to the landowner subject to the rule of reasonable use. The owner of overlying land may not waste the water or sell it off the premises if other owners of overlying lands are injured; otherwise his use, if reasonable in relation to the use of the overlying land, may be made without liability to other landowners injured through depletion of the common supply.

### 2. Constitutional and Statutory Provisions

The constitution provides:[26]

> The use of the waters of this state for irrigation, mining, and manufacturing purposes shall be deemed a public use.

The statutes provide:[27]

> The power of the state to regulate and control the waters within the state shall be exercised as hereinafter in this act provided. Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations, the first in time shall be the first in right. Nothing contained in this act shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise. * * *

Washington has had a statute on the regulation of artesian wells since 1901.[28] This was amended in 1929.[29] It applies only to sections and communities in which irrigation is "necessary or customary"; water may be taken from artesian wells between October 15 and March 15 only for household, stock, and domestic purposes through a specified stop and waste cock control. Artesian wells must be capped and provided with the control during that period. Violation of the act is a misdemeanor. In addition, if anyone in possession or control of an artesian well fails to comply with the provisions:

> * * * any person, firm, corporation or company lawfully in the possession of land situate adjacent to or in the vicinity or neighborhood of such well and within five miles thereof may enter upon the land upon which such well is situate, and take possession of such from which water is allowed to flow or escape in violation of the provisions of section 7404, and cap such well and shut in and secure the flow or escape of water therefrom, and the necessary expenses incurred in so doing shall constitute a lien upon said well, and a sufficient quantity of land surrounding the same for the convenient use and operation thereof, which lien may be foreclosed in a civil action * * *.

In the 1890 water law, a provision gave one entitled to water from any artesian well, the right to condemn a right-of-way for a ditch across the intervening land to the place of use.[30]

### 3. Defined Underground Streams

WATERS OF A DEFINED UNDERGROUND STREAM ARE SUBJECT TO THE RULES APPLYING TO SURFACE STREAMS

This was stated in an early case, *Meyer* v. *Tacoma Light & Water Co.*,[31] under the facts of which it was held that such a defined subterranean stream did not exist.

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[26] Wash. Const., art. XXI, sec. 1.
[27] Rem. Rev. Stats., Wash., 1931, sec. 7351.
[28] Wash. Laws, 1901, p. 259.
[29] Rem. Rev. Stats., Wash., 1931, secs. 7404 to 7407.
[30] Rem. Rev. Stats., Wash., 1931, sec. 7403.
[31] 8 Wash. 144, 35 Pac. 601 (1894).

WATERS PERCOLATING DOWN THE HILL SLOPES CONFINING A VALLEY THROUGH WHICH A STREAM FLOWS DO NOT CONSTITUTE A DEFINED UNDERGROUND STREAM

While the decision in *Meyer* v. *Tacoma Light & Water Co.* stated that a flow underground would be protected as fully as a surface flow, if it constituted a stream with defined course and boundaries, the court also said:

> It has never been held that a flow of water percolating through the sand and gravel of the hillsides which lead down to the bed of the stream will be protected on account of the fact that such waters are confined to the valley to which such hillsides descend, and of which they form a part, by some underlying stratum below which the waters cannot go.

Consequently a claimant on a lake fed by a creek was not entitled to the undisturbed flow of the ground water in the valley through which the creek flowed, notwithstanding a showing that the valley had an underlying impervious stratum covered by a porous deposit, the trend of the stratum being toward the bed of the stream.

### 4. Percolating Waters

PERCOLATING WATERS BELONG TO THE LANDOWNER, SUBJECT TO REASONABLE USE AS AGAINST THE RIGHTS OF OWNERS OF OTHER OVERLYING LAND

The early decisions on percolating waters were to the effect that they were not subject to the rights of claimants on surface streams toward which they flowed, in the absence of a showing of the defined limits of their movement (*Meyer case*),[32] and that the rule that no action will lie against a landowner for diverting or interfering with such waters does not apply where the rights are defined by deeds.[33] Thus no limitation was placed at first upon the English or common-law rule, there being no occasion therefor.

Subsequently the doctrine of reasonable use was adopted, in *Patrick* v. *Smith*.[34] Where an upper landowner had blasted, with the effect of substantially lowering the water in another's well, judgment was awarded on the ground that the sounder view and modern trend of authority favored the recognition of correlative rights in percolating waters. The court stated:

> The principles of natural justice and equity demand the recognition of correlative rights in percolating subterranean waters, so that each landowner may use such water only in a reasonable manner and to a reasonable extent upon his own land and without undue interference with the rights of other landowners to a like use and enjoyment of waters percolating beneath their lands.

Among the cases relied upon was *Miller* v. *Bay Cities Water Co.*[35] from California.

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[32] 8 Wash. 144, 35 Pac. 601 (1894).
[33] *Charon* v. *Clark* (50 Wash. 191, 96 Pac. 1040 (1908)).
[34] 75 Wash. 407, 134 Pac. 1076 (1913).
[35] 157 Calif. 256, 107 Pac. 115 (1910).

USE OF PERCOLATING WATERS, IF REASONABLE IN RELATION TO THE USE OF OVERLYING LAND, MAY BE MADE EVEN TO THE EXTENT OF SERIOUSLY DEPLETING OR PRACTICALLY EXHAUSTING THE SUPPLY OF OWNERS OF OTHER OVERLYING LAND, THUS NEGATIVING THE IDEA THAT THERE MUST BE AN APPORTIONMENT

A decision recently handed down develops the rule of reasonable use and in effect negatives the principle of apportionment. In *Evans* v. *Seattle*,[36] the city of Seattle, in order to operate more efficiently a gravel pit on city-owned land, excavated a deep ditch the result of which was practically to cut off percolating water supplying the plaintiffs' lands. The court held that the rule of correlative rights and reasonable use, rather than that of absolute ownership of percolating waters, applied, citing *Patrick* v. *Smith*. It was held that as apparently the gravel-pit property was valuable for no purpose other than the production of gravel, the operation of draining the gravel pit was for the reasonable and proper purpose of extracting gravel for use. Therefore the city was making a reasonable use of its own property, and had the right so to drain the gravel pit as to make the product thereof available for use, without thereby incurring any liability to others. Limitations upon the rule of reasonable use were stated to be well illustrated by *Patrick* v. *Smith*, where the water was being wasted for no good reason, and by other cases in which such water was taken and appropriated for commercial purposes by one landowner to the exclusion of others. Nothing of that kind was shown under the record of the instant case.

This ruling is clearly a departure from the statement in *Patrick* v. *Smith* that the reasonable use of percolating waters by the owner of land on which they are found must be made "without undue interference with the rights of other landowners to a like use and enjoyment of waters percolating beneath their lands," for in *Evans* v. *Seattle* the liability for practically cutting off the enjoyment by other landowners was expressly denied. Hence the ruling is a departure from the principle of correlative rights, for this exclusive right obviously is not a correlative right. Of course, the city was not making "a like use and enjoyment" of the percolating water, but was making a reasonable use of land which may have been the only practicable use and of which an incident was the removal of water from the gravel pit; hence the application of this ruling to a case in which water is extracted for irrigation or domestic or other such uses on the overlying land, with the result that the supply of water under other lands is seriously depleted, remains to be seen. If the ruling should be applied to such cases, as well as to those in which the drainage of water is incidental to reasonable use of the land (which operations may conceivably be subject to different principles), then it would follow that any use of percolating water is reasonable in connection with the use of overlying land if it does not result in waste for no good reason or in commercial sale off the overlying land, and within such limitations the right of the landowner would appear to

[36] 182 Wash. 450, 47 Pac. (2d) 984 (1935).

be well-nigh absolute. It should be noted that no other limitations upon use are stated in this most recent case; but it should also be borne in mind that in this case the city was making a drainage use rather than a use of the water on the overlying land for irrigation, domestic, or manufacturing purposes. Further, while the implication of the decision is to negative any idea of the apportionment of water between owners of overlying lands, the principle of apportionment was not involved in any way under the facts of the case and it was not discussed in the opinion.

GROUND WATERS ARE PRESUMED TO BE PERCOLATING

This was held in *Evans* v. *Seattle*, *supra*. The presumption was not overcome, as there was insufficient substantial evidence of an underground stream flowing in any distinct, permanent, well-known and defined channel, or that the springs and streams supplying plaintiffs' lands were fed by anything other than percolating waters.

## Wyoming

### 1. Summary

1. The constitution and statutes make no specific reference to ground waters. Public waters are those of "natural streams, springs, lakes or other collections of still water."

2. The only decision on ground waters states that percolating waters developed artificially belong to the landowner.

### 2. Constitutional and Statutory Provisions

The constitution provides:

Water being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channels, its control must be in the state, which, in providing for its use, shall equally guard all the various interests involved.[37]

The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.[38]

Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.[39]

The statutes contain no statement as to what waters are appropriable. "Water right" is defined thus:[40]

A water right is a right to use the water of the state, when such use has been acquired by the beneficial application of water under the laws of the state relating thereto, and in conformity with the rules and regulations dependent thereon. Beneficial use shall be the basis, the measure and limit of the right to use water at all times, not exceeding in any case, the statutory limit of volume. * * *

### 3. Discussion

PERCOLATING WATERS DEVELOPED ARTIFICIALLY BELONG TO THE LANDOWNER

The only Wyoming case directly relating to the use of percolating ground waters which has been found, holds to this effect.[41] The con-

[37] Wyo. Const. art I, sec. 31.
[38] Wyo. Const. art. VIII, sec. 1.
[39] Wyo. Const. art. VIII, sec. 3.
[40] Wyo. Rev. Stats. 1931, sec. 122–401.
[41] *Hunt* v. *Laramie* (26 Wyo. 160, 181 Pac. 137 (1919)).

troversy involved the right to appropriate the water of a "spring," as against the right of one to whom the landowner had later granted the right to the water. The evidence showed that there was no natural spring, and that the water supply had been developed by digging into a subsurface formation from which the waters thereupon found their way to the surface. It was held that only public waters of the State could be appropriated, and as the spring in question was not a natural spring, no rights could be acquired by an application to the State to appropriate. The waters declared to be the property of the State are those of all *natural* streams, springs, lakes, or other collections of still water. Further,

> That percolating waters developed artificially by excavation and other artificial means, as was done in this case, belong to the owner of the land upon which they are developed is supported by abundant authority. * * *

A case decided in 1940 [42] did not involve the right to use percolating water, but the court discussed the rules relating to such water. The right to use waste and seepage water which had gathered in a draw was in controversy. After referring to the constitutional and statutory provisions governing the appropriation of water, the court stated:

> If, then, we do not give any strained construction to these provisions, it would seem to be clear that only water in natural streams, springs or lakes are subject to appropriation.

It was not necessary to decide in this case whether an owner of land on which waste and seepage water originated could use such water on other land without applying to the State for a permit to do so. The court, however, discussed the rules relating to the use of seepage water, and inclined to the view that the more reasonable rule in irrigation States is that—

> * * * seepage water which, if not intercepted, would naturally reach the stream, is just as much a part of the stream as the waters of any tributaries and must be permitted to return thereto, if the owner cannot make beneficial use thereof.

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[42] *Binning* v. *Miller* (55 Wyo. 451, 102 Pac. (2d) 54 (1940)).

## Chapter 5

# SPRING WATERS

## PART 1. OWNERSHIP AND RIGHTS OF USE

### Nature of Spring Waters

The nature of spring waters has been discussed in chapter 1, relating to classification of available water supplies. Spring waters are waters which break out upon the surface of the earth through natural openings in the ground. They necessarily originate from the groundwater supply. The essential difference between a spring and a well is that the former is a natural outlet for ground water, and the latter is an artificial excavation. Natural springs, however, are sometimes developed by artificial means, in order to increase the flow. Springs often constitute important sources of supply of surface stream systems. In other cases they form marshes or bogs with no natural outlet.

Whether a landowner has the exclusive right to use a spring on his land depends, in various jurisdictions, upon whether the flow from the spring remains on his land. If the spring waters have been dedicated to the public, prior to the acquisition of a private right of use, the only way in which the landowner can acquire an exclusive right of use is by appropriating the water, regardless of whether it remains on his land. And if the spring water flows away from his land in a defined stream which constitutes a watercourse, the law of watercourses is held to apply, which means that he has no exclusive right to use the spring solely by virtue of land ownership. A detailed discussion of the statutes and court decisions affecting the use of spring waters in each Western State is given in part 2 of this chapter.

### Statutes

The statutes of several States specifically make spring waters subject to appropriation. In Arizona, this applies to springs on the surface;[1] in Colorado, to natural flowing springs[2] and springs;[3] in Idaho, to natural springs[4] and springs;[5] in Montana, to springs;[6] and in Wyoming, to natural springs.[7]

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[1] Ariz. Rev. Code, 1928, sec. 3280.
[2] Colo. Comp. Laws, 1921, sec. 1638; Stats. Ann., 1935, ch. 90, sec. 21.
[3] Colo. Comp. Laws, 1921, sec. 1637; Stats. Ann., 1935, ch. 90, sec. 20.
[4] Idaho Code Ann., 1932, sec. 41-101.
[5] Idaho Code Ann., 1932, secs. 41-103 and 41-107.
[6] Mont. Rev. Codes, 1935, sec. 7093.
[7] Wyo. Const., art. VIII, secs. 1 and 3.

All waters, with designated exceptions, are appropriable in Nevada,[8] North Dakota,[9] Oregon,[10] South Dakota,[11] Utah,[12] and Washington.[13]

In the other Western States, the waters of watercourses are subject to appropriation. This includes, by implication, springs which form the sources of watercourses.

## Springs Which Constitute the Source of Watercourses

### Such Springs Are Subject to the Law of Watercourses

This has been the uniform holding in all cases that have come to attention. Decisions to this effect, where rights to the use of water were concerned, are found in all western jurisdictions except Kansas, North Dakota, and Oklahoma. The Kansas Supreme Court has stated, in a case involving the abatement of a nuisance, that a watercourse originating from a spring becomes a watercourse from that point; hence the clear implication is that rights to the watercourse attach equally to the spring.[14] No cases on the use of spring waters have been found in the North Dakota and Oklahoma reports.

The statutes of Colorado and Oregon accord the owner of land a prior right to spring waters arising on his land.[15] A similar Washington statute [16] was repealed in 1917.[17] Notwithstanding these statutes, the courts have held that if such waters constitute one of the sources of supply of a watercourse, they are subject to the law of watercourses. The landowner, therefore, has no exclusive rights to springs feeding definite streams, solely by virtue of the fact that the water comes naturally to the surface on his land.[18]

Thus the doctrine of appropriation applies to the waters of such springs which supply watercourses throughout the West. There are decisions to this effect in most of the States. (See pt. 2 of this chapter.) There are no decisions to the contrary in the remaining States, so far as has been found, and there is no basis for assuming that this doctrine would not be so applied in these other States.

An appropriation of such a spring may be made for a certain period of the year, and a subsequent appropriation by others during the balance of the year.[19] Likewise, a flow that does not reach the prior appropriator during the dry season may be appropriated during such period by others.[20]

The riparian doctrine likewise applies to the waters of springs which feed watercourses, to the extent that such doctrine is recognized as applicable to watercourses in the West. There are decisions applying

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[8] Nev. Comp. Laws, 1929, secs. 7890 and 7891.
[9] N. Dak. Comp. Laws, 1913, sec. 8235, as amended by Laws 1939, ch. 255.
[10] Oreg. Code Ann., 1930, sec. 47–402.
[11] S. Dak. Code, 1939, sec. 61.0101.
[12] Utah Rev. Stats., 1933, secs. 100–1–1 and 100–1–3, amended Laws, 1935, ch. 105.
[13] Wash. Rem. Rev. Stats., 1931, sec. 7351.
[14] *Rait* v. *Furrow* (74 Kans. 101, 85 Pac. 934 (1906)).
[15] Colo. Comp. Laws, 1921, sec. 1637; Colo. Stats. Ann., 1935, ch. 90, sec. 20; Oreg. Code Ann., 1930, sec. 47–1401.
[16] Wash. Sess. Laws, 1889–90, p. 710, sec. 15.
[17] Wash. Sess. Laws, 1917, ch. 117, sec. 47, p. 468.
[18] *Nevius* v. *Smith* (86 Colo. 178, 279 Pac. 44 (1928, 1929)); *Hildebrandt* v. *Montgomery* (113 Oreg. 687, 234 Pac. 267 (1925)); *Hollett* v. *Davis* (54 Wash. 326, 103 Pac. 423 (1909)).
[19] *Suisun* v. *de Freitas* (142 Calif. 350, 75 Pac. 1092 (1904)); *Cleary* v. *Daniels* (50 Utah 494, 167 Pac. 820 (1917)).
[20] *Beaverhead Canal Co.* v. *Dillon Elec. Light & Power Co.* (34 Mont. 135, 85 Pac. 880 (1906)).

the riparian doctrine to such springs in several States. (See part 2 of this chapter.) Statutes in North Dakota,[21] Oklahoma,[22] and South Dakota [23] give the owner of land on which such springs arise and which supply natural streams only a limited right of use amounting to the narrowest application of the common-law riparian doctrine.

The decisions from riparian-doctrine States, where the right of an owner of land to springs arising on his land and constituting sources of streams has been involved, have denied him exclusive rights to such springs and limited him to the ordinary rights of a riparian proprietor, qualified by the similar rights of other owners of land riparian to the main or tributary stream.[24]

## Springs Which Do Not Flow From the Tract on Which Located

### Such Natural Springs, if Supplied by Percolating Waters, Ordinarily Belong to or Are Subject to the Prior Right of the Owner of the Land

This is the general rule throughout the West. It is a matter of statute in Colorado,[25] North Dakota,[26] Oklahoma,[27] Oregon,[28] and South Dakota.[29] Court decisions adopting or supporting the rule are found in California, Colorado, Idaho, New Mexico, Oregon, South Dakota, Texas, Utah, and Washington, but in Utah all waters have since been dedicated to the public, subject to existing rights. The Montana statute [30] provides that the right to the use of spring water may be acquired by appropriation; no decision has been found on the appropriability of springs, on private land, that do not flow from such land.

#### EXCEPTIONS

In Arizona, the statute [31] subjecting springs on the surface to appropriation, has been upheld if the spring is capable of being put to beneficial use, even though the flow does not extend beyond the boundaries of the tract on which found.[32] This applies only to waters which emerge from the earth without artificial assistance.[33]

In Wyoming, no decision has been found on the appropriability of a natural spring on private land, which does not form a watercourse. It has been held, however, that the appropriation doctrine applies only to natural springs, and that a spring developed artificially, supplied by percolating waters, is the private property of the landowner and therefore not appropriable by others.[34]

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[21] N. Dak. Comp. Laws, 1913, sec. 5341.
[22] Okla. Stats., 1931, sec. 11785; Stats. Ann. (1936), tit. 60, sec. 60.
[23] S. Dak. Code, 1939, sec. 61.0101.
[24] *Scott* v. *Fruit Growers' Supply Co.* (202 Calif. 47, 258 Pac. 1095 (1927)); *Slattery* v. *Dout* (121 Nebr. 418, 237 N. W. 301 (1931)); *Fleming* v. *Davis* (37 Tex. 173 (1872)); *Hollett* v. *Davis* (54 Wash. 326, 103 Pac. 423 (1909)).
[25] Colo. Comp. Laws, 1921, sec. 1637; Stats. Ann., 1935, ch. 90, sec. 20.
[26] N. Dak. Comp. Laws, 1913, sec. 5341.
[27] Okla. Stats., 1931, sec. 11785; Stats. Ann. (1936), tit. 60, sec. 60.
[28] Oreg. Code Ann., 1930, sec. 47–1401.
[29] S. Dak. Code, 1939, sec. 61.0101.
[30] Mont. Rev. Codes, 1935, sec. 7093.
[31] Ariz. Rev. Code, 1928, sec. 3280.
[32] *Parker* v. *McIntyre* (47 Ariz. 484, 56 Pac. (2d) 1337 (1936)). The spring in this case was on public land of the United States at the time of appropriation, but the court's statement of the principle was not qualified by that fact.
[33] *Fourzan* v. *Curtis* (43 Ariz. 140, 29 Pac. (2d) 722 (1934)).
[34] *Hunt* v. *Laramie* (26 Wyo. 160, 181 Pac. 137- (1919)).

## Rights to Springs on Public Land of the United States

### Appropriations of Springs on Public Land Are Protected as Against the Claims of Subsequent Entrymen

The rule throughout the West is that appropriations of water on public land of the United States are protected, notwithstanding the passing of such lands subsequently to private ownership. An entryman takes title subject to vested and accrued water rights. This rule is based upon the congressional act of 1866,[35] providing that the possessors of water rights vested under local customs, laws, and court decisions should be protected; the act of 1870,[36] making all patents, preemptions, and homesteads subject to vested and accrued water and ditch rights; and the Desert Land Acts of 1877[37] and 1891,[38] providing that the right to water on desert land should depend upon prior appropriation, and that the surplus should be held free for appropriation and use by the public. The United States Supreme Court has held that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the public-land States.[39]

This rule has been applied specifically to springs on Government land, in all of the State supreme court decisions which have been found on the subject. Cases dealing with rights to the use of springs on public land have been found in Arizona, California, Idaho, Oregon, Utah, and Washington. In none of these instances was the right of one who had entered the land prior to the Congressional legislation involved.

Washington is one of the States which recognize the riparian doctrine. This doctrine applies to streams which have their sources in springs. However, where such springs are located on public land, an appropriator may acquire rights superior to a riparian right incident to land subsequently acquired from the Government.[40]

The fact that in acquiring an appropriative right to a spring on public land, the source of the water is not controlling—that is, that the spring may originate from percolating water or from an underground stream—has been recognized by the Idaho and Utah Supreme Courts.[41] Further, the Idaho and Oregon courts have held that the appropriation is not defeated by reason of the fact that no defined stream flows from the spring.[42]

The initiation of a right with consent of an entryman, as against one who entered the land after the first entry had been canceled, was upheld in Idaho.[43] The Idaho court also held that the convey-

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[35] U. S. Rev. Stats., sec. 2339 (July 26, 1866).
[36] U. S. Rev. Stats., sec. 2340 (July 9, 1870).
[37] 19 Stat. L. 377 (March 3, 1877).
[38] 26 Stat. L. 1096, 1097 (March 3, 1891).
[39] *California-Oregon Power Co.* v. *Beaver Portland Cement Co.* (295 U. S. 142 (1935)).
[40] *Geddis* v. *Parrish* (1 Wash. 587, 21 Pac. 314 (1889)).
[41] *Le Quime* v. *Chambers* (15 Idaho 405, 98 Pac. 415 (1908)); *Peterson* v. *Wood* (71 Utah 77, 262 Pac. 828 (1927)).
[42] *Le Quime* v. *Chambers* (15 Idaho 405, 98 Pac. 415 (1908)); *Brosnan* v. *Harris* (39 Oreg. 148, 65 Pac. 867 (1901)).
[43] *Le Quime* v. *Chambers* (15 Idaho 405, 98 Pac. 415 (1908)).

ance of a right to a spring by a homestead entryman was not contrary to the Federal statutes on alienation of homestead rights.[44]

The California court held in a fairly early case that one who had taken possession under the California Possessory Act of 1852,[45] was justified in preventing another from completing the diversion of a spring on the land where the latter was not, at the time of entry, in possession or occupancy of the land, and where, although he had posted a notice claiming the spring, he had not complied with the requirements of the cvil code, and therefore could not claim any rights thereunder as an appropriator. Hence, the intending appropriator did not have such a vested and acrued water right, recognized by local law, as to entitle him to protection under the congressional act of 1866.[46] If the latter had completed his appropriation before the entryman took possession, his rights would have been superior.[47] It has also been held that the title of a patentee of State land relates back to the time of application to purchase, and that an appropriation of spring water on such land thereafter made is subject to such title.[48]

## Sources of Springs

The sources of springs are ground waters; therefore it is inevitable that controversies should have arisen between claimants to the right of use of springs and those who claim the right to intercept the tributary ground waters. Generally, the issue has been settled by applying the principles relating to ownership and use of ground waters. Where the spring in question does not flow from the land on which located, the owner of such land has usually been accorded the right of an owner of land overlying the ground water, under whatever ground-water doctrine prevails in the jurisdiction in question, as against others who intercept the flow of ground water to his land and thence to his spring located thereon. Where the spring is the source of a watercourse, the question then is the relation between claimants of rights to tributary ground waters and rights to waters of the stream, concerning which there are varying rules in the several jurisdictions. (See ch. 4 on the law of ground waters.) It has been noted above, in connection with springs on public land, that several decisions have held that in such case the source of the spring does not control the right to appropriate.

Thus, in California, rights of owners of land overlying ground waters feeding a spring are correlated with rights to the spring, under the doctrine of reasonable use.[49] This applies, whether the source of the spring is percolating water or otherwise. Where the source of the spring is percolating water, the rule of reasonable use has also been applied under such circumstances in Washington.[50] On the other hand, it has been held in several States which adhere

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44 *Short* v. *Praisewater* (35 Idaho 691, 208 Pac. 844 (1922)).

45 Calif. Stats. 1852, ch. LXXXII, p. 158.

46 *Taylor* v. *Abbott* (103 Calif. 421, 37 Pac. 408 (1894)).

47 *De Necochea* v. *Curtis* (80 Calif. 397, 20 Pac. 563, 22 Pac. 198 (1889)).

48 *Shenandoah Min. & Mill. Co.* v. *Morgan* (106 Calif. 409, 39 Pac. 802 (1895)).

49 *Cohen* v. *La Canada Land & Water Co.* (142 Calif. 437, 76 Pac. 47 (1904); second appeal, 151 Calif. 680, 91 Pac. 584 (1907)).

50 *Evans* v. *Seattle* (182 Wash. 450, 47 Pac. (2d) 984 (1935)). See the discussion of this case in ch. 4, p. 263, and of the court's interpretation of reasonable use.

to the English or common-law rule, that the owner of land on which the spring is located, cannot enjoin other landowners from intercepting the tributary percolating waters while under their own land.[51]

### Developed Spring Water

Decisions from several States have held that the person responsible for developing a spring by artificial means, is entitled to the increase in flow resulting from such development.[52]

This doctrine was applied in a Washington case in which the increase was caused by return water from irrigation water brought from another watershed, as against the claim of an appropriator on the stream into which the spring flowed.[53] On the other hand, the Montana court has held that such increase is not developed water, and does not belong to the irrigation company supplying the irrigation water; but when these added waters reach the spring they become a part of the watercourse which it supplies and belong to the appropriators thereon.[54]

### Loss of Rights to Spring Waters

It has been held, or at least recognized, in a number of cases that one's rights to spring waters may be lost through adverse possession and use by another, as well as by estoppel, statutory forfeiture, and abandonment. There are decisions on this from California, Idaho, Kansas, Texas, Utah, and Washington. (See pt. 2 of this chapter.) In most of the cases, the prescriptive rights were initiated by actually diverting the spring waters while on another's land, the original entry in some cases having been permissive. However, a decision from Washington upheld a prescriptive right on the part of one landowner, to water flowing upon his property from a spring on neighboring land, as against the owner of the land on which the spring was located.[55]

## PART 2. THE SEVERAL RULES OF SPRING-WATER LAW, BY STATES

### Arizona

#### Summary

1. Springs on the surface are subject to appropriation.
2. An appropriable spring is one that is susceptible of beneficial use without artificial development.
3. An entryman on Government land takes his interest or title subject to all existing water rights.

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[51] *Mosier* v. *Caldwell* (7 Nev. 363 (1872)) : *Taylor* v. *Welch* (6 Oreg. 198 (1876)) ; *Madison* v. *Rapid City* (61 S. Dak. 83, 246 N. W. 283 (1932)).

[52] *Churchill* v. *Rose* (136 Calif. 576, 69 Pac. 416 (1902)) ; *St. John Irr. Co.* v. *Danforth* (50 Idaho 513, 298 Pac. 365 (1931)).

[53] *Miller* v. *Wheeler* (54 Wash. 429, 103 Pac. 641 (1909)).

[54] *Rock Creek Ditch & Flume Co.* v. *Miller* (93 Mont. 248, 17 Pac. (2d) 1074 (1933)).

[55] *Mason* v. *Yearwood* (58 Wash. 276, 108 Pac. 608 (1910)).

#### Statutes and Decisions

The present statute provides that springs on the surface are open to appropriation.[56]

Prior to enactment of the statute, it was held that a spring which was not the source of a watercourse, belongs to the owner of the land on which the spring is found.[57] However, the statute has been upheld as applicable to the water of a spring which is capable of being put to beneficial use, even though the flow does not extend beyond the boundaries of the tract on which found.[58] The spring in this case was on public land of the United States at the time of appropriation, but the broad principle was stated without reference to that qualification. This decision likewise holds that an entryman on Government land takes subject to all existing water rights.

The appropriation statute has been held to refer only to waters which emerge from the surface of the earth without artificial assistance. Further, a small damp place with a little grass around it does not constitute an appropriable spring, as it is insufficient in quantity to apply to any beneficial use.[59]

## California

#### Summary

1. The appropriation statutes relate to watercourses, and do not specifically refer to springs.
2. Springs which constitute the source of watercourses are governed by the law of watercourses. In California this includes both the riparian and appropriation doctrines. Appropriations of springs on public land are protected as against the claims of subsequent entrymen.
3. A spring with no natural outlet belongs, under ordinary circumstances, to the owner of the land on which it rises, as against attempted appropriations. The landowner who develops the water of a spring on his land is entitled to the resulting increase in flow.
4. The sources of a spring, whether in percolating water or definite underground streams, and the waters of the spring, and those of a stream into which it may flow, are considered a common water supply. The rights of all having access to the supply, by reason of land ownership or appropriative rights, are correlated under the rule of reasonable use.
5. Rights to springs may be acquired by grant, prescription, and estoppel.

#### Statutes and Decisions

##### STATUTES

The appropriation statutes do not refer specifically to spring waters. With the exception of waters to which riparian and appropriative rights have vested, the waters specifically subject to appropriation are those flowing in rivers, streams, canyons, ravines, or other natural channels on the surface, and those in subterranean streams flowing through known and definite channels.[60]

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[56] Ariz. Rev. Code 1928. sec. 3280.
[57] *McKenzie* v. *Moore* (20 Ariz. 1, 176 Pac. 568 (1918)).
[58] *Parker* v. *McIntyre* (47 Ariz. 484, 56 Pac. (2d) 1337 (1936)).
[59] *Fourzan* v. *Curtis* (43 Ariz. 140, 29 Pac. (2d) 722 (1934)).
[60] Calif. Stats. 1913, ch. 586, sec. 11, amended by Stats. 1923, ch. 62, p. 124; Stats. 1913, ch. 586, sec. 42 amended by Stats. 1933, ch. 357, p. 955. See Deering's Gen. Laws 1937, Act 9091, secs. 11 and 42.

### DEFINITION OF SPRING

According to the decision in *Harrison* v. *Chaboya:* [61]

> * * * the term "spring" in its common acceptation, at least in California, is a term which in general usage has been applied to a damp, marshy or boggy area, usually of small but definite extent, wherein underground waters from a larger tract of land find their way to the surface thereof and make their presence known either by a definite outflow or by the surface presenting such a quantity thereof as will render practicable their assembling in such receptacles as those described in the record herein as Box A and Box B; * * *

### SPRINGS CONSTITUTING THE SOURCE OF A WATERCOURSE ARE GOVERNED BY THE LAW OF WATERCOURSES, WHICH IN CALIFORNIA INCLUDES BOTH THE RIPARIAN AND APPROPRIATION DOCTRINES

This principle has been consistently recognized. Waters passing from springs into a watercourse become a part of it.[62] Hence the owner of land on which such spring arises has no greater right in the spring than in the stream below; and it makes no difference whether the water reaches the stream by percolation or in a stream.[63]

Riparian rights apply to such springs.[64] Consequently, the landowner's right is that of a riparian owner only, not an exclusive right,[65] and is not lost merely because of nonuse.[66] Appropriative rights likewise may be secured.[67]

Such appropriation of springs on one's own land may be made for a certain period of the year, and the flow during the remainder of the year may be appropriated by others.[68]

Conceding that one may drain his land for purposes of cultivation, he may be enjoined from adopting a drainage method that is intentionally injurious to others, which results in cutting off the flow of springs that feed a watercourse.[69]

### APPROPRIATIONS OF SPRINGS ON PUBLIC LAND ARE PROTECTED AGAINST THE CLAIMS OF SUBSEQUENT ENTRYMEN

This was held in the fairly early case of *De Necochea* v. *Curtis*,[70] under the Federal statutes. The doctrine was affirmed in *Ely* v. *Ferguson*,[71] it being stated that the California Civil Code does not require complete ownership as prerequisite to the appurtenancy of a water right, and was reaffirmed in *Williams* v. *Harter*.[72]

To perfect such a water title on public land, where the appropriation was made before passage of the water commission act,[73] it was necessary that there be (1) an intent to appropriate, (2) an

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[61] 198 Calif. 473, 245 Pac. 1087 (1926).
[62] *Barneich* v. *Mercy* (136 Calif. 205, 68 Pac. 589 (1902)).
[63] *Gutierrez* v. *Wege* (145 Calif. 730, 79 Pac. 449 (1905)).
[64] *Chauvet* v. *Hill* (93 Calif. 407, 28 Pac. 1066 (1892)).
[65] *Bigelow* v. *Merz* (57 Calif. App. 613, 208 Pac. 128 (1922)); *Scott* v. *Fruit Growers' Supply Co.* (202 Calif. 47, 258 Pac. 1095 (1927)).
[66] *Stepp* v. *Williams* (52 Calif. App. 237, 198 Pac. 661 (1921)).
[67] *De Necochea* v. *Curtis* (80 Calif. 397, 20 Pac. 563, 22 Pac. 198 (1889)); *Ely* v. *Ferguson* (91 Calif. 187, 27 Pac. 587 (1891)); *De Wolfskill* v. *Smith* (5 Calif. App. 175, 89 Pac. 1001 (1907)).
[68] *Suisun* v. *de Freitas* (142 Calif. 350, 75 Pac. 1092 (1904)).
[69] *Bartlett* v. *O'Connor* (102 Calif. XVII, 4 Calif. U. 610, 36 Pac. 513 (1894)).
[70] 80 Calif. 397, 20 Pac. 563, 22 Pac. 198 (1889).
[71] 91 Calif. 187, 27 Pac. 587 (1891).
[72] 121 Calif. 47, 53 Pac. 405 (1898).
[73] Calif. Stats., 1913, ch. 586.

actual diversion, and (3) beneficial use within a reasonable time. Where the civil code provisions were not followed, the right is to be measured by actual use.[74]

One who had taken possession under the California Possessory Act of 1852,[75] was held to have been justified in preventing an intending appropriator from completing the diversion of a spring on the land. The latter was not in possession or occupancy of the land at the time of entry. He had posted a notice claiming the spring, but had not complied with the requirements of the civil code and therefore could not claim any rights thereunder as an appropriator. Hence the intending appropriator did not have such a vested and accrued water right, recognized by local law, as to entitle him to protection under the congressional act of July 26, 1866.[76]

Title to State lands, as against the claim of another to a spring thereon, relates back to the date of application to purchase.[77]

#### A SPRING WITH NO NATURAL OUTLET ORDINARILY BELONGS TO THE LANDOWER, AS AGAINST ATTEMPTED APPROPRIATIONS

A fairly early decision held that the owner of the land on which there is a spring fed entirely by percolating water, with no stream naturally flowing from the spring, owns the spring as against an attempted appropriation.[78]

The California District Court of Appeal stated that there could be no more private ownership in a spring than in the corpus of a stream—only a usufructuary right.[79] The California Supreme Court, while denying a rehearing, took exception to this, and stated that the case of a spring having no natural outlet is not parallel to the question of ownership of water of a stream. In such event, the owner of the land on which the contained spring occurs, under ordinary circumstances, owns the water as completely as he owns the soil. This case involved the appropriation of spring water, and not ownership of the sources supplying the springs. (See further reference to this case below, p. 275.)

#### A LANDOWNER IS ENTITLED TO THE INCREASE IN FLOW OF A SPRING DEVELOPED BY ARTIFICIAL MEANS

This has been held or recognized in several cases.[80]

#### RIGHTS TO WATERS FEEDING A SPRING ARE NOW CORRELATED WITH RIGHTS TO THE SPRING

It was held in one of the early decisions that an underground stream feeding a spring on one's land could not be intercepted by another landowner, for other than domestic and stockwatering purposes.[81] Where the source was percolating water, the common-

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[74] *Simons* v. *Inyo Cerro Gordo Min. & Power Co.* (48 Calif. App. 524, 192 Pac. 144 (1920); hearing denied by supreme court).
[75] Calif. Stats., 1852, ch. LXXXII, p. 158.
[76] *Taylor* v. *Abbott* (103 Calif. 421, 37 Pac. 408 (1894)).
[77] *Shenandoah Min. & Mill. Co.* v. *Morgan* (106 Calif. 409, 39 Pac. 802 (1895)).
[78] *Southern Pacific R. R.* v. *Dufour* (95 Calif. 615, 30 Pac. 783 (1892)).
[79] *Simons* v. *Inyo Cerro Gordo Min. & Power Co.* (48 Calif. App. 524, 192 Pac. 144 (1920); hearing denied by supreme court).
[80] *Churchill* v. *Rose* (136 Calif. 576, 69 Pac. 416 (1902); *Gutierrez* v. *Wege* (145 Calif. 730, 79 Pac. 449 (1905)).
[81] *Hale* v. *McLea* (53 Calif. 578 (1879)).

law rule was applied, to the effect that such waters belonged to the owner of the land on which they occurred, regardless of the fact that they fed a spring on another's land.[82] It was stated in *De Wolfskill* v. *Smith*,[83] that percolating water gathering in sufficient volume to form a spring no longer was a part of the soil, but was subject to appropriation; the contest there being between an appropriator of water at abandoned wells on the public domain and a subsequent entryman.

Adoption of the doctrine of correlative rights to percolating ground waters led to a correlation of rights to such waters feeding a spring and rights to the spring. The diversion of such waters by the owner of overlying land may not be made to the injury of one having rights to the spring, other than for reasonable use on the overlying land.[84] As the rights of the owner of land on which a spring arises, and those of owners riparian to the stream into which the spring flows, are correlative, the landowner may be enjoined from drying the spring by intercepting the tributary percolating waters. Each is entitled to a reasonable use, which means a proportionate share when the supply is not enough for all.[85]

It has been noted that the supreme court has stated that a spring with no natural outlet is ordinarily the absolute property of the landowner.[86] However, the source of the spring and rights thereto were not involved in that case. Had upper landowners asserted rights to tributary percolating waters, it is believed that the correlative doctrine would have been applied.

One of the fairly early decisions stated that where a spring feeds a definite watercourse, it is useless to consider the sources of the spring.[87] That is not the present California law. All rights to a common supply of water, which includes the surface stream, its surface and underground sources, and the ground waters flowing away from it, are correlated under the rule of reasonable, beneficial use.[88]

#### RIGHTS TO SPRINGS MAY BE ACQUIRED BY PRESCRIPTION AND ESTOPPEL

It was recognized in *Shenandoah Mining & Milling Co.* v. *Morgan*,[89] that a right to a spring might be acquired by adverse possession; although in that case adverse possession was negatived by testimony showing that the party claiming title to the land had consented to the use of water. As the owner of land on which a spring arises has only the right of a riparian proprietor to water which if not intercepted would flow away from the land, a prescriptive right to the flow would be limited to the actual amount appropriated by him.[90] Prescriptive rights were held to have vested in *Higuera* v. *Del Ponte*.[91]

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[82] *Hanson* v. *McCue* (42 Calif. 303, 10 Am. Rep. 299 (1871)); *Southern Pacific R. R.* v. *Dufour* (95 Calif. 615, 30 Pac. 783 (1892)).
[83] 5 Calif. App. 175, 89 Pac. 1001 (1907).
[84] *Cohen* v. *La Canada Land & Water Co.* (142 Calif. 437, 76 Pac. 47 (1904); second appeal, 151 Calif. 680, 91 Pac. 584 (1907)).
[85] *Eckel* v. *Springfield Tunnel and Dev. Co.* (87 Calif. App. 617, 262 Pac. 425 (1927)).
[86] *Simons* v. *Inyo Cerro Gordo Min. & Power Co.* (48 Calif. App. 524, 192 Pac. 144 (1920); hearing denied by supreme court).
[87] *Chauvet* v. *Hill* (93 Calif. 407, 28 Pac. 1066 (1892)).
[88] *Peabody* v. *Vallejo* (2 Calif. (2d) 351, 40 Pac. (2d) 486 (1935)).
[89] 106 Calif. 409, 39 Pac. 802 (1895).
[90] *Gutierrez* v. *Wege* (145 Calif. 730, 79 Pac. 449 (1905)).
[91] 7 Calif. U. 320, 88 Pac. 808 (1906).

The landowner was held to have acquired a prescriptive right to springs on his land, in *Neasham* v. *Yonkin*.[92] Such right was acquired to a spring located on another's land, where works were constructed at the spring, in *Stepp* v. *Williams*.[93] The water right in both these cases was also grounded on an equitable estoppel. In the first instance, the party in whose favor the estoppel operated had been induced to homestead the tract on the promise that he would have the use of the waters. In the second case, the party had entered the other's land under a parol license and had built and maintained the irrigation works, the result of which was to make the license irrevocable.

However, the circumstances in *Powers* v. *Perry* [94] were held insufficient to establish an adverse user. Although a pipe had been laid to a spring, pursuant to an unrecorded grant containing an easement of ingress to and egress from the spring, the pipe was covered with earth and there were otherwise no visible evidences of the diversion sufficient to put a prudent purchaser of the land upon inquiry. Purchasers therefore were not bound by the grant. The taking was not open and notorious, nor had it continued for the prescriptive period.

#### RIGHTS TO SPRINGS MAY BE ACQUIRED BY GRANT

A right to the water of a spring on public land may be acquired from the entryman by grant, as well as by adverse possession.[95] It was held in one case that a quitclaim deed of ditches diverting from such spring to other public lands, by the owner of the appropriative right, passed the rights to the water which were incidental and appurtenant to the ditches.[96] It may be noted in this connection that the California Supreme Court in another decision held that if either a water right or a ditch is appurtenant to the other, the ditch is appurtenant to the water right, that being the principal item.[97] The grant of a portion of the water of a spring was recognized in *Robertson* v. *Finkler*.[98]

The effect of an unrecorded grant upon the rights of a purchaser without notice, has been discussed above.

## Colorado

#### Summary

1. The statutes subject natural flowing springs to appropriation, and provide that spring waters are subject to the same laws of priority as water of running streams, the landowner to have the prior right if it is capable of being used on his lands.

2. Springs which constitute part of the supply of a stream belong to the stream; they are subject to appropriation and to the rights of prior appropriators thereon.

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[92] 39 Calif. App. 464, 179 Pac. 448 (1919).
[93] 52 Calif. App. 237, 198 Pac. 661 (1921).
[94] 12 Calif. App. 77, 106 Pac. 595 (1909).
[95] See *Shenandoah Min. & Mill. Co.* v. *Morgan* (106 Calif. 409, 39 Pac. 802 (1895)).
[96] *Williams* v. *Harter* (121 Calif. 47, 53 Pac. 405 (1898)).
[97] *Jacob* v. *Lorenz* (98 Calif. 332, 33 Pac. 119 (1893)).
[98] 27 Calif. App. 322, 149 Pac. 784 (1915).

**Statutes and Decisions**

A Colorado statute provides that the waters of natural flowing springs may be appropriated for all beneficial uses, as in case of natural streams.[99]

It is further provided that ditches for the purpose of utilizing waste, seepage, or spring waters shall be governed by the same laws relating to priority as ditches diverting from running streams; but that the owner of lands on which the seepage or spring waters first arise shall have the prior right thereto if capable of being used on his lands.[1]

It was held in a fairly early case that the statute is not applicable to a spring which is part of the supply of a stream the water of which was appropriated before its enactment. Further, the fact that the spring has increased in flow as a result of irrigation on higher lands does not alter its status.[2] Another decision at about the same time held concerning the statute that [3]—

> If valid at all, it is applicable only to appropriations of waste, seepage and spring waters before they reach the channel or bed of a natural stream, whether by natural surface flow, by percolation or by being artificially turned into the same.

The fact that a spring feeding a stream originates from percolating water does not give the landowner a prior right to the spring to the prejudice of a senior appropriator on the stream of which the spring is a tributary.[4]

In *Nevius* v. *Smith* [5] it was held that the prior right to the use of spring waters belonging to a stream (or which, if not diverted but left to themselves would reach a stream) does not vest in the landowner, solely by virtue of land ownership, regardless of any provision in the statute. Any appropriation of such water is subject to all prior appropriations from the stream.

Another decision, several years earlier than *Nevius* v. *Smith*, was to the effect that under the statute, the use of a spring is accorded to the owner of the land on which it rises, if capable of use thereon, where the flow is shown not to constitute a natural watercourse. *Haver* v. *Matonock*.[6] The language in the opinion on first hearing in *Nevius* v. *Smith*, before there had been a finding that the spring waters were a part of the river, tended to cast some doubt upon this principle. However, *Nevius* v. *Smith* was decided on the other point and the decision was made expressly applicable to waters which were a part of the river. Hence the principle of *Haver* v. *Matonock* has not been rejected.

The court will not take judicial notice that a spring is tributary to a natural stream, as against a positive declaration to the contrary, "and uphold a general demurrer on that judicial assumption." [7]

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[99] Colo. Comp. Laws, 1921, sec. 1638; Stats. Ann., 1935, ch. 90, sec. 21.
[1] Colo. Comp. Laws, 1921, sec. 1637; Stats. Ann., 1935, ch. 90, sec. 20.
[2] *Clark* v. *Ashley* (34 Colo. 285, 82 Pac. 588 (1905)).
[3] *La Jara Creamery and Live Stock Assn.* v. *Hansen* (35 Colo. 105, 83 Pac. 644 (1905)).
[4] *Bruening* v. *Dorr* (23 Colo. 195, 47 Pac. 290 (1896)).
[5] 86 Colo. 178, 279 Pac. 44 (1928, 1929).
[6] 79 Colo. 194, 244 Pac. 914 (1926).
[7] *Colorado & Utah Coal Co.* v. *Walter* (75 Colo. 489, 226 Pac. 864 (1924)).

## Idaho

### Summary

1. The statutes provide that the waters of springs may be acquired by appropriation, and that ditches utilizing them shall be governed by the same laws of priority as those diverting from streams. The department of reclamation is prohibited from granting a permit to appropriate water of a spring located wholly on one's land, except to the owner, without his written permission.

2. The water of natural springs is subject to appropriation. Rights to the use of springs tributary to a surface stream belong to the appropriators thereon. Such stream appropriation, however, does not include springs developed as new water by another.

3. The use of a spring appearing on one's land, and not flowing therefrom, where no question before the court involves the ownership of ground waters feeding the spring, apparently belongs to the landowner as against a surface appropriation attempted without the landowner's express consent.

4. Spring water on public land, regardless of origin or the formation of a defined stream, is subject to appropriation as against a subsequent entryman.

5. A prescriptive right may be acquired to spring water arising on another's land.

### Statutes and Decisions

#### STATUTES

The statutes provide that the waters of natural springs are the property of the State, and that the right to use spring waters may be acquired by appropriation.[8] It is also provided that ditches for the purpose of utilizing seepage, waste or spring water shall be governed by the same laws relating to priority of right as ditches diverting from running streams.[9]

The statutes prohibit the State department of reclamation from granting a permit to divert or appropriate the waters of any lake not exceeding 5 acres in surface area at high-water mark, pond, pool, or spring, located wholly on lands of a person or corporation, except to the landowner, or with the owner's written permission executed and acknowledged as in case of conveyance of real estate.[10]

The owner or appropriator of a spring or stream may condemn a right of way across the lands of others for conveyance of the water to the place of use.[11]

#### RIGHTS TO THE USE OF SPRINGS TRIBUTARY TO A WATERCOURSE BELONG TO THE APPROPRIATORS THEREON

One of the earliest Idaho decisions, *Malad Valley Irrigation Co.* v. *Campbell*,[12] held to this effect. Subsequently, in *Josslyn* v. *Daly*,[13] it was held that a judgment and decree adjudicating rights and priorities

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[8] Idaho Code Ann., 1932, secs. 41–101 and 41–103.
[9] Idaho Code Ann., 1932, sec. 41–107.
[10] Idaho Code Ann., 1932, secs. 41–206 and 41–207.
[11] Idaho Code Ann., 1932, secs. 41–1002 to 41–1008.
[12] 2 Idaho 411, 18 Pac. 52 (1888).
[13] 15 Idaho 137, 96 Pac. 568 (1908).

to the use of waters of a stream carries with it and adjudicates and decrees the rights and priorities to the water of upstream tributaries, including the waters of tributary springs and lakes. A decision in 1922 stated that under the Idaho statutes, the water of natural springs is public water and subject to a valid appropriation for beneficial use.[14]

The water of a stream which constitutes a watercourse, although formed by the flow from natural springs located on privately owned land, is public water and hence subject to appropriation.[15] The water from a natural spring located on one's land and flowing in a natural channel upon the land of another, is subject to appropriation by the latter landowner on his own land as against the claim of the owner of the land on which the spring arises, even though the flow is never sufficient to cross the lower tract.[16]

An appropriation on a creek, however, does not include waters from springs appropriated by another and brought into the creek.[17] Further, springs developed as new water, independent of surface connection with a stream, and with no evidence of underground connection or interference, do not belong to the stream, but those developing such water are entitled to it.[18]

### A SPRING ON ONE'S LAND, NOT FLOWING THEREFROM, APPARENTLY BELONGS TO THE LANDOWNER AS AGAINST AN ATTEMPTED APPROPRIATION ON THE SURFACE, WHERE THE OWNERSHIP OF GROUND WATERS FEEDING THE SPRING IS NOT IN CONTROVERSY AND WHERE PRESCRIPTIVE RIGHTS ARE NOT INVOLVED

Although the statute declares the waters of natural springs subject to appropriation, and appropriations have been upheld, there has been no decision holding that such springs may be appropriated on the surface without the landowner's consent, if the water does not flow from the tract on which the springs are located. (A different question arises if rights to ground waters supplying the spring are involved. Ground waters are subject to appropriation in Idaho. See ch. 4.) On the contrary, recent expressions of the Idaho Supreme Court, although not necessary to the decisions in which rendered, are to the effect that such springs belong exclusively to the owners of the lands upon which the spring waters are wholly contained. But in other decisions it has been stated that springs are subject to appropriation and use with the consent of the owner of the land on which located. The situation with reference to the right to appropriate the waters of springs of this character is as follows:

An appropriator may condemn a right-of-way for the purpose of conveying appropriated waters to the place of use.[19] If a landowner will not permit entry upon his land for the purpose of initiating an appropriation, the intending appropriator apparently may condemn the right-of-way for accomplishing that purpose, but an appropriation initiated by trespass upon private property is void as against the

[14] *Short* v. *Praisewater* (35 Idaho 691. 208 Pac. 844 (1922)).
[15] *Bachman* v. *Reynolds Irr. Dist.* (56 Idaho 507. 55 Pac. (2d) 1314 (1936); *Marshall* v. *Niagara Springs Orchard Co.* (22 Idaho 144, 125 Pac. 208 (1912)).
[16] *Jones* v. *McIntire* (60 Idaho 338. 91 Pac. (2d) 373 (1939)).
[17] *Rabido* v. *Furey* (33 Idaho 56. 190 Pac. 73 (1920)).
[18] *St. John Irr. Co.* v. *Danforth* (50 Idaho 513. 298 Pac. 365 (1931)).
[19] Idaho Code Ann., 1932, secs. 41–1002 to 41–1008.

owner of the land.[20] Furthermore, a statute [21] above referred to prohibits the department of reclamation from granting a permit to appropriate a spring wholly on private land, except to the landowner, without his written permission. According to the majority opinions in *Public Utilities Commission* v. *Natatorium Co.*,[22] this is a statutory recognition of the private ownership of such springs. According to a dissenting opinion, this statute is not recognition of private ownership, but is simply an expression of legislative policy concerning the appropriation of waters situated wholly on another's land. This appears to be the better reasoning on the matter of legislative intent; for if these are private waters, there is no reason for applying to the State for a permit to divert them; a grant from the landowner would confer all the authority necessary. In the *Natatorium case* there was no question of appropriating such waters; the question of public or private ownership was simply a factor in arriving at whether or not they had been dedicated to public use. In any event, it is clear that this statute is mandatory upon the State administrative officials. It is equally clear that it contains no reference to procedure in appropriating spring waters solely by diversion and application to beneficial use, and that it does not extend thereto by necessary implication. The present statutory procedure for acquirement of appropriative rights begins with an application to the department of reclamation.

The decision in *Le Quime* v. *Chambers*,[23] while holding that an appropriation on public land is valid as against a subsequent entryman, stated:

> If the land on which this spring was located had already been patented before the location by appellants, then a different question would arise, because appellants would have been trespassers in entering upon the land for the purpose of locating, appropriating and diverting the water, unless they first had acquired a license or easement so to do.

Subsequently, in *Short* v. *Praisewater*,[24] it was held that a homestead entryman could convey to a stranger a right to use spring water and a right-of-way to develop the spring and take the water for use on other land. This was an action for specific performance of an agreement to convey the right to the spring. The court stated:

> The trial court finds that appellant, for value, purchased from respondent the right to the use of the water of this spring in question, that with the active assistance and cooperation of respondent the spring was further developed by placing therein two sets of boxing four by four by six feet deep, and by means of an underground pipe this water was conveyed to appellant's premises, and that he used the same continuously and uninterruptedly, without his right to do so being questioned, for a period of more than eight years. Without respondent's consent, appellant could not have entered upon his premises and initiated a valid appropriation to this spring, which did not flow sufficient water to create a natural stream that ran beyond the lines of respondent's premises. But appellant, after having acquired the right to develop this spring, and after having dedicated the waters of such spring to the highest beneficial use known to the law, that is, domestic use, his continued and uninterrupted use of this water for a period of more than five years constitutes a valid appropriation, and gives him a right to the use of the water as against respondent, and constitutes a valid appropriation of the water of this spring as against all other persons.

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[20] *Marshall* v. *Niagara Springs Orchard Co.* (22 Idaho 144, 125 Pac. 208 (1912)).
[21] Idaho Code Ann., 1932, secs. 41–206 and 41–207
[22] 36 Idaho 287, 211 Pac. 533 (1922).
[23] 15 Idaho 405, 98 Pac. 415 (1908).
[24] 35 Idaho 691, 208 Pac. 844 (1922).

The reference to the 5-year period is not clear. If these were truly public waters, it would seem that their diversion with the entryman's permission, and application to beneficial use continuously for any period of time preceding the interruption of use by the entryman, would have constituted a valid appropriation as against him and the world. The trial court had found that title had not been obtained by adverse possession. The supreme court did not discuss the matter of adverse possession; on the contrary the facts do not show that the possession was adverse. If there was any change in the attitude or action of either party during the 8 years of use following the agreement to convey the right, up to the time the entryman made final proof and thereafter interfered with the other's use, such does not appear in the opinion. Before the statute of limitations begins to run, after a revocable license, it is necessary that the party claiming the easement shall repudiate the license and make the fact known to the landowner.[25] This, then, was apparently a case of "appropriation" with consent of the landowner, of waters the use of which the landowner (entryman) had the right to convey to a stranger. In a later decision it was held, upon the authority of this case, that springs are subject to appropriation and use with the consent of the owner of the land.[26]

The decision in *King* v. *Chamberlin*[27] held that diffused surface waters on one's land were private waters, not subject to appropriation; and cited with approval *Metcalf* v. *Nelson* (South Dakota)[28] and *Vanderwork* v. *Hewes* (New Mexico),[29] both of which involved waters appearing on the surface from underground sources other than running streams, and not the fountainhead of watercourses. Recently, in *Hall* v. *Taylor* (1937),[30] the following language appears:

> It is urged by appellants that the water claimed by respondent was merely seepage or percolating water that came to the surface on appellants' land, near the division line between the two places, and did not flow off of the premises, nor did it form any watercourse and was, therefore, the private property of the owner of the land under the rule announced by this court in *King v. Chamberlin*, 20 Ida. 504, 118 Pac. 1099, *Public Utilities Com. v. Natatorium Co.*, 36 Ida. 287, 211 Pac. 533, and *Washington County Irr. Dist. v. Talboy*, 55 Ida. 382, 389, 43 Pac. (2d) 943. We think that contention may well be conceded.
>
> It is next contended that a lawful location or appropriation of such waters could not originate in trespass. That proposition, too, may be conceded. (Sec. 41–101, I. C. A.; *Marshall* v. *Niagara Springs Orchard Co.*, 22 Ida. 144, 125 Pac. 208; *Bassett v. Swenson*, 51 Ida. 256, 5 Pac. (2d) 722). Nevertheless, we may eliminate from this case all contention that the water was lawfully appropriated and diverted as public waters and may well ignore the license and certificate of water right which was issued by the commissioner of reclamation to respondent's predecessor in interest, Hornbeck, in so far as it may apply to the spring here in question. This we do, because the court finds that the right here quieted in respondent was acquired by *adverse possession and use*. An adverse right is not originated by consent but rather against the will and without the consent of the true owner, and generally rests on an original trespass, which matures into a property right by reason of the true owner allowing the claimant or trespasser to continue the adverse use and possession uninterruptedly and with assertion of right until the statutory period has run, which bars the true owner from either asserting or defending his right to the property. (Sec. 5–210, I. C. A.)

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[25] *Bachman* v. *Reynolds Irr. Dist.* (56 Idaho 507, 55 Pac. (2d) 1314 (1936)); *Morgan* v. *Udy* (58 Idaho 670, 79 Pac. (2d) 295 (1938)).

[26] *Harris* v. *Chapman* (51 Idaho 283, 5 Pac .(2d) 733 (1931)).

[27] 20 Idaho 504, 118 Pac. 1099 (1911).

[28] 8 S. Dak. 87, 65 N. W. 911 (1895).

[29] 15 N. Mex. 439, 110 Pac. 567 (1910).

[30] 57 Idaho 662, 67 Pac. (2d) 901 (1937).

The definite decision in the foregoing case was that the landowner was barred from asserting or defending any right to that portion of the spring water to which the neighbor had established a right by adverse user. The concession that the spring belonged to the landowner is important as indicating the view of the court on that point, rather than as a definite holding. An even more recent (1939) statement of the rule was made in *Jones* v. *McIntire*,[31] although here the spring water arose *wholly* upon one tract and flowed in two natural channels onto an adjoining tract where the channels joined. An appropriation was made on the land to which the spring water flowed, by the owner of that land, and was upheld. The court stated:

> While the rule prevails that lakes of a surface area of less than 5 acres and pools and springs, located *wholly* upon and within the lands of a person or corporation, are appurtenant to and a part of the lands and belong exclusively to the owners of the land (sec. 41–206, I. C. A.; *Kinnison et al. v. McMillan Sheep Co. et al.*, 46 Ida. 754, 270 Pac. 1062; *Hall v. Taylor*, 57 Ida. 662, 67 Pac. (2d) 901; *Washington County Irr. Dist. v. Talboy*, 55 Ida. 382, 43 Pac. (2d) 943; *Marshall v. Niagara Springs Orchard Co., Ltd.*, 22 Ida. 144, 125 Pac. 208; *Tobey v. Bridgewood*, 22 Ida. 566, 127 Pac. 178; *Public Utilities Com. v. Natatorium Co.*, 36 Ida. 287, 211 Pac. 533; *King v. Chamberlin*, 20 Ida. 504, 118 Pac. 1099), it is also well settled that the waters of natural springs, which form a natural stream or streams flowing off the premises on which they arise, are public waters subject to acquirement by appropriation, diversion and application to a beneficial use. (The court cited Idaho Code Ann. 1932, secs. 41–103 and 41–101.)

It seems clear from these recent expressions that as against an attempted appropriation, the landowner has the "ownership"—or at least the prior right to the use—of a spring located wholly upon and not flowing from his land, where the ownership of ground waters feeding the spring is not in controversy and where prescriptive rights are not involved. If such waters are a part of the lands on which they arise, they are necessarily private, not public waters. Hence, while the decisions state that such waters may be appropriated with the consent of the owner of the land, nevertheless if the landowner should object to an attempted nonstatutory appropriation, it is doubtful if the intending appropriator has the right to condemn a right of way for the purpose of effectuating such an appropriation. And as stated, the department of reclamation is prohibited by statute from issuing a permit for such an appropriation under the statute except to the landowner or with his express written permission.[32]

SPRINGS ON PUBLIC LAND ARE APPROPRIABLE AS AGAINST SUBSEQUENT ENTRYMEN, REGARDLESS OF FORMATION OF DEFINITE STREAM

A spring on public land is subject to appropriation, which will be protected as against the claims of a subsequent entryman.[33] The fact that no defined stream flows away does not affect this result. Nor does the fact that the appropriation was initiated on entered land with consent of the entryman, whose entry was subsequently cancelled, defeat the right of the appropriator as against a later entryman.[34] A homestead entryman can convey to a stranger the right to use

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[31] 60 Idaho 338, 91 Pac. (2d) 373 (1939).
[32] Idaho Code Ann., 1932, secs. 41–206 and 41–207.
[33] *Keiler* v. *McDonald* (37 Idaho 573, 218 Pac. 365 (1923)).
[34] *Le Quime* v. *Chambers* (15 Idaho 405, 98 Pac. 415 (1908)).

water of a spring on the land, with right of way; this being not contrary to the Federal statutes concerning alienation of homestead rights.[35]

#### LOSS OF RIGHTS TO SPRINGS

A right to the use of a spring on one's land can be lost through adverse possession and use by another. Such prescriptive right was held to have vested in a case in which the initial control over the water was effected by digging a trench on neighboring land, close to the spring, deeper than the landowner's trench.[36]

Abandonment of spring water is a matter of intent, coupled with corresponding conduct; it is thus a question of fact.[37]

## Kansas

### Summary

1. There are no statutes relating to the ownership or appropriation of springs. Kansas recognizes the riparian doctrine, and appropritive rights may be acquired on watercourses.

2. A watercourse is none the less a watercourse because it originates in a spring. The implication is that riparian and appropriative rights on a watercourse include the spring at the source, and that an appropriative right may be established at the spring itself.

3. The possibility of acquiring a prescriptive right to spring water is inferentially recognized.

### Statutes and Decisions

A Kansas statute provides for reductions in assessed valuations of land on which reservoirs on "dry watercourses" are constructed, the supply being principally from springs.[38] There are no statutes on the ownership or appropriability of springs as such.

Running water in a river or stream may be appropriated.[39] Kansas likewise recognizes the riparian doctrine. While the statute does not refer to springs as appropriable, the court has held that a watercourse may have its origin in a spring, and becomes a watercourse from the point at which it comes to or collects on the surface and flows therefrom in a channel having the characteristics of a watercourse.[40] This case concerned the abatement of a nuisance, not the appropriation of water; however, the clear implication is that whatever rights may exist to the use of a watercourse, riparian or appropriative, extend to the spring which is the source of the watercourse as well as to the water after it leaves the spring, and that subject to existing rights an appropriation can be made at the spring itself.

Another decision denied an easement to spring water. There was no prescriptive right, because the user was not sufficiently open and notorious, and there was no proven parol grant.[41] Thus the possibility of acquiring an easement is inferentially recognized.

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[35] *Short* v. *Praisewater* (35 Idaho 691, 208 Pac. 844 (1922)).
[36] *Hall* v. *Taylor* (57 Idaho 662, 67 Pac. (2d) 901 (1937)).
[37] *St. John Irr. Co.* v. *Danforth* (50 Idaho 513, 298 Pac. 365 (1931)).
[38] Kans. Gen. Stats. Ann., 1935, secs. 82a–401 to 82a–404.
[39] Kans. G n. Stats. Ann., 1935, sec. 42–101.
[40] *Rait* v. *Furrow* (74 Kans. 101, 85 Pac. 934 (1906)).
[41] *Jobling* v. *Tuttle* (75 Kans. 351, 89 Pac. 699 (1907)).

## Montana

### Summary

1. The statutes provide that spring waters may be appropriated.
2. An appropriator on a stream has the right to the flow of tributary springs. Such flow, however, may be appropriated by others during periods in which it could not reach the prior diversion.
3. The increase in flow of a spring at the head of an appropriated watercourse, resulting from irrigation of higher lands, does not belong to the company supplying such irrigation water, but becomes a part of the watercourse.

### Statutes and Decisions

A Montana statute provides that the right to the use of spring water may be acquired by appropriation.[42]

An appropriator on a stream has the right to the flow of a spring subsequently appearing in the bed of a tributary as the result of natural causes. However, if the flow would not reach his diversion during the dry season, it may be appropriated during such period by others.[43] Further, an appropriator on a stream cannot claim the flow of a spring which in its natural state does not reach his diversion during the irrigation season.[44]

It was stated, in an early case, that the source of water on a given tract does not of itself necessarily give the owner an exclusive right to the water,[45] and this statement was repeated recently by reference to the earlier decision.[46] Recently, it has been held that the increase in flow of a spring, at the head of a watercourse on which appropriative rights have been established, the increase resulting from the irrigation of higher lands, does not belong to the company supplying the irrigation water.[47] Such increase was held not to be "developed" water, that term applying to subsurface waters not theretofore available. When the waters escaped from the irrigated lands and reached the spring, they became tributary to the stream which it supplied.

## Nebraska

### Summary

1. There are no statutes relating to the ownership or appropriation of springs. Nebraska recognizes the riparian doctrine, and appropriative rights may be acquired to the water of watercourses and water flowing in canyons and ravines.
2. An owner of land on which is a spring, which is the fountainhead of a watercourse, has by virtue of land ownership the rights only of a riparian owner.

[42] Mont. Rev. Codes, 1935, sec. 7093.
[43] *Beaverhead Canal Co.* v. *Dillon Elec. Light & Power Co.* (34 Mont. 135, 85 Pac. 880 (1906)).
[44] *Leonard* v. *Shatzer* (11 Mont. 422, 28 Pac. 457 (1892)).
[45] *Quinlan* v. *Calvert* (31 Mont. 115, 77 Pac. 428 (1904).
[46] *West Side Ditch Co.* v. *Bennett* (106 Mont. 422, 78 Pac. (2d) 78 (1938)).
[47] *Rock Creek Ditch & Flume Co.* v. *Miller* (93 Mont. 248, 17 Pac. (2d) 1074 (1933).

### Statutes and Decisions

The Nebraska appropriation statutes make no reference to springs. They provide that rights to the waters of natural streams and those flowing down any canyon or ravine may be acquired by appropriation.[48]

It has been held that ownership of land on which arises a spring that is the fountainhead of a watercourse, gives the landowner no exclusive rights to the spring, but only the rights of a riparian proprietor.[49]

The implication is that water in the spring at the source of a stream would be open to appropriation to the same extent as at any place in the channel leading therefrom, subject of course to existing rights on the stream.

## Nevada

### Summary

1. All waters are made appropriable by statute.
2. Springs constituting the source of a creek are subject to appropriation and to appropriative rights on the creek.
3. Percolating waters were held in an early case to belong to the landowner, even though they supplied a spring on the land of another; but this principle has probably no application at the present time in view of the statutory appropriability of percolating waters.

### Statutes and Decisions

The Nevada statutes provide that the water of all sources belongs to the public, subject to appropriation.[50]

Springs constituting the source of a creek are subject to appropriative rights on the creek, even though they flow underground part of the way to the creek.[51] Ownership of a mining claim embracing a spring which is the source of a watercourse, gives no rights to the owner as against a prior appropriator on the stream whose use antedates location of the claim. The court said: [52]

> Whatever may be the law respecting a spring from which no water flows, there can be no question as to the right to appropriate water flowing in a natural water course, the source of which is a spring.

It was held in an early case that the owner and appropriator of a spring fed by percolating waters on another's land, cannot enjoin interference with the percolating source by such landowner, as percolating waters belong to the land on which they are found.[53] However, as noted in chapter 4, all ground waters have since been subjected to appropriation by statute, with minor exceptions, so that the principle of this early case is probably no longer applicable to such a state of facts.

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[48] Nebr. Comp. Stats., 1929, sec. 46–613.
[49] *Slattery* v. *Dout* (121 Nebr. 418. 237 N. W. 301 (1931)).
[50] Nev. Comp. Laws. 1929. secs. 7890 and 7891; Sess. Laws, 1939, ch. 178.
[51] *Strait* v. *Brown* (16 Nev. 317 (1881)).
[52] *Campbell* v. *Goldfield Consol. Water Co.* (36 Nev. 458, 136 Pac. 976 (1913)).
[53] *Mosier* v. *Caldwell* (7 Nev. 363 (1872)).

## New Mexico

### Summary

1. The New Mexico appropriation statutes do not refer to springs. Natural waters flowing in watercourses are appropriable.

2. An appropriation of water from springs fed by an underground stream is protected against interference with the source of supply.

3. Water appearing on the surface from an unknown source, not forming a watercourse, belongs to the landowner as against an attempted appropriation.

### Statutes and Decisions

Although the appropriation statute refers only to natural waters flowing in streams and watercourses (aside from the question of ground waters),[54] an appropriator of the flow from springs fed by an underground stream, has been protected against interference with water in a marsh which was shown to be a part of the stream.[55]

As against an attempted appropriation under the statute, it has been held that water appearing on the surface from an unknown source, which did not flow from the premises in a defined stream, belongs to the landowner.[56] Whether the surplus would be appropriable under the general doctrine of appropriation, was not decided. The court stated:

> It would be doing violence to the Act of 1907, to hold, that the Territorial Engineer was empowered by it, to authorize another applicant to go upon lands held in private ownership, construct ditches and appropriate seepage water or waters from snows, rain or springs, not traceable to or forming a stream or water course, or from constructed works, as the limitations contained in sections 1 and 53, defining the waters over which the engineer has been given jurisdiction, plainly indicates.

## North Dakota

### Summary

1. The statutes provide that all waters belong to the public and are subject to appropriation. It is also provided that the owner of land owns water standing on or flowing over or under the surface, not forming a definite stream; the latter being subject to his use while it remains there, except that he may not prevent the flow thereof, or of the natural spring from which it commences its definite course.

2. As North Dakota follows both the riparian and appropriation doctrines, it thus appears that rights to natural springs which constitute the source of definite streams are subject to those doctrines.

### Statutes and Decisions

The statute provides for the appropriation of all waters.[57]

However, another earlier statute vests ownership of standing and flowing waters in the landowner, if they do not form a definite stream. He may use a definite stream while it remains on his land, but may

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[54] N. Mex. Stats. Ann., Comp. 1929, sec. 151–101.
[55] *Keeney* v. *Carillo* (2 N. Mex. 480 (1883)).
[56] *Vanderwork* v. *Hewes* (15 N. Mex. 439, 110 Pac. 567 (1910)).
[57] N. Dak. Comp. Laws, 1913, sec. 8235, amended by Laws 1939, ch. 255.

not prevent the flow, or the flow of the natural spring from which it commences its definite course, nor pursue nor pollute the same.[58]

There are no court decisions in North Dakota on the ownership or appropriability of springs. However, South Dakota has a similar statute vesting the ownership of waters in the landowner if they do not form a definite stream, the two statutes being derived from the same source, a statute of the Territory of Dakota;[59] and the South Dakota Supreme Court has construed this statute as vesting absolute ownership of a spring in the owner of the land on which it rises if the spring is not the source of a definite stream, and has stated that the rights of the landowner to the waters of a spring from which a stream commences its definite course are limited by the terms of the statute.[60]

North Dakota recognizes both the riparian and appropriation doctrines. The inference is that natural springs which form the source of watercourses will be governed by the laws applying to watercourses, and that appropriations may be perfected to the flow of such springs, subject to whatever riparian or other rights may have vested on the watercourse as a whole.

## Oklahoma

### Summary

1. An Oklahoma statute provides that the owner of land owns water standing on or flowing over or under the surface, not forming a definite stream; the latter being subject to his use while it remains there, but he may not prevent the flow thereof, or of the natural spring from which it commences its definite course. Another statute provides complete machinery for appropriation of water, but does not specify the waters that may be appropriated.

2. As Oklahoma follows the appropriation doctrine, it thus appears that rights to natural springs which constitute the source of definite streams are subject to that doctrine. The status of the riparian doctrine is uncertain.

### Statutes and Decisions

The appropriation statutes do not mention springs.[61] A statute vests ownership of standing and flowing waters in the landowner if they do not form a definite stream. He may use a definite stream while it remains on his land, but may not prevent the flow, or the flow of the natural spring from which it commences its definite course, nor pursue nor pollute the same.[62]

There are no court decisions on the ownership or appropriability of springs. A decision on ground water interpreted the statute, holding that the landowner is limited to a reasonable use of percolating waters under his land, with regard to the similar rights of others.[63]

As Oklahoma recognizes the appropriation doctrine, the inference is that such doctrine applies to natural springs which are the source of

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[58] N. Dak. Comp. Laws, 1913, sec. 5341.
[59] Terr. Dak. Civ. Code, sec. 255.
[60] *Madison* v. *Rapid City* (61 S. Dak. 83, 246 N. W. 283 (1932)).
[61] Okla. Stats., 1931, sec. 13057; Stats. Ann. (1936), tit. 82, sec. 1.
[62] Okla. Stats., 1931, sec. 11785; Stats. Ann. (1936), tit. 60, sec. 60.
[63] *Canada* v. *Shawnee* (179 Okla. 53, 64 Pac. (2d) 694 (1936)).

definite watercourses. The riparian doctrine has not yet been defined with reference to the right to appropriate water out of streams. (See ch. 2, p. 53.)

## Oregon

### Summary

1. The statutes provide that all waters belong to the public, and subject to existing rights, all waters, with certain designated exceptions, may be appropriated. It is also provided that ditches for the purpose of utilizing waste, spring, or seepage waters shall be governed by the rules of priority applying to ditches diverting from surface streams, the person on whose land the seepage or spring waters arise having the right to their use.
2. The landowner has the first right to a spring arising on his land, unless it is the source of a watercourse. In the latter case, it is subject to prior appropriations on the stream.
3. The appropriation doctrine applies to watercourses having their source in springs.
4. An appropriation of a spring on public land is valid as against a subsequent entryman, whether or not the spring is the source of a stream.

### Statutes and Decisions

#### STATUTES

All waters, with certain designated exceptions in the case of streams, are subject to appropriation under the statutes.[64]

Ditches for the purpose of utilizing waste, spring, or seepage waters are to be governed by the same rules relating to priority of right as ditches diverting from streams. The person upon whose lands the seepage or spring waters first arise has the right to their use.[65]

#### SPRINGS NOT THE SOURCE OF WATERCOURSES BELONG TO THE LANDOWNER

It was held in an early case that the landowner owns percolating waters under his land, and cannot be enjoined from intercepting such waters which feed a spring on his land from which water flows to other land.[66]

The statute vesting ownership in the landowner has been upheld, where the spring does not constitute the source of a watercourse.[67] These are private waters, not subject to appropriation by others.[68]

Several recent cases have involved the right to the use of waters of springs the flows from which are not of sufficient volume to constitute watercourses. It was held in one case that spring water which by reason of seepage or evaporation would not flow in any channel or to or upon adjacent property, is not subject to appropriation by others than the landowner and that a permit from the State engineer issued to others is void so far as it refers to such spring or its waters.[69] In

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[64] Oreg. Code Ann., 1930, sec. 47–402.
[65] Oreg. Code Ann., 1930, sec. 47–1401.
[66] *Taylor* v. *Welch* (6 Oreg. 198 (1876)).
[67] *Morrison* v. *Officer* (48 Oreg. 569, 87 Pac. 896 (1906)); see also *David* v. *Brokaw* (121 Oreg. 591, 256 Pac. 186 (1927)).
[68] *Henrici* v. *Paulson* (134 Oreg. 222, 293 Pac. 424 (1930)).
[69] *Klamath Dev. Co.* v. *Lewis* (136 Oreg. 445, 299 Pac. 705 (1931)).

another case it was stated that such waters are not appurtenant to the land on which they arise, but under the statute [70] are part and parcel of the land itself.[71] Hence the right was held to have passed by virtue of a mortgage of the land in which there was no reservation of the water right. It was further stated that a filing with the State engineer would have only the effect of protecting the landowner in case there should be an increase in the flow which might pass to other lands, and that it would not legally separate the water from the land. Only the landowner could file on such waters, as they were held to be private and not public waters. The most recent case states that the owner of the land on which a spring rises is entitled to the use of the water if not of sufficient volume to flow from the land in a defined channel, even though it does reach other land by seepage.[72]

#### SPRINGS WHICH DISCHARGE INTO NATURAL STREAMS ARE SUBJECT TO THE LAW OF WATERCOURSES AND HENCE TO THE DOCTRINE OF APPROPRIATION, REGARDLESS OF THEIR LOCATION ON PRIVATE LAND

A different rule is applied where the springs discharge into a natural stream. Such springs are physically and legally tributary to the stream, and a prior appropriator on the stream may enjoin interference with the springs by the owner of land on which they arise.[73] Even though the springs are fed by percolating water, the landowner cannot reclaim such water after it has entered a stream.[74]

It was held in a fairly early case that where the waters of springs constituted one source of a watercourse, and predecessors of the parties had made an artificial change in the flow, causing it to flow in a channel across their land for a long period (in this case 15 years), their interests were to be measured and determined as if they were riparian owners on a natural stream.[75]

The law of percolating waters has no application to an underground stream which feeds a spring. The grant of such a spring cannot be defeated by intercepting the flow to the spring.[76]

#### APPROPRIATIONS OF SPRINGS ON PUBLIC LANDS OF THE UNITED STATES ARE PROTECTED AS AGAINST SUBSEQUENT ENTRYMEN

As appropriations on public land of the United States are protected as against subsequent entrymen, an appropriator on a stream flowing from a spring on such land takes precedence over the claim of the subsequent patentee to such spring. The source of the watercourse is immaterial, provided the supply is permanent or at least periodical.[77] Furthermore, as under the statutes there is no distinction between appropriations of water from running streams and those from springs, it is immaterial, as against a subsequent entryman, that the spring waters do not flow in a natural channel or form part of a watercourse.[78]

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[70] Oreg. Code Ann., 1930, sec. 47–1401.
[71] *Skinner* v. *Silver* (158 Oreg. 81, 75 Pac. (2d) 21 (1938)).
[72] *Messinger* v. *Woodcock* (159 Oreg. 435, 80 Pac. (2d) 895 (1938)).
[73] *Low* v. *Schaffer* (24 Oreg. 239, 33 Pac. 678 (1893)); *Hildebrandt* v. *Montgomery* (113 Oreg. 687, 234 Pac. 267 (1925)).
[74] *Boyce* v. *Cupper* (37 Oreg. 256, 61 Pac. 642 (1900)).
[75] *Harrington* v. *Demaris* (46 Oreg. 111, 77 Pac. 603, 82 Pac. 14 (1904)).
[76] *Hayes* v. *Adams* (109 Oreg. 51, 218 Pac. 933 (1923)).
[77] *Hildebrandt* v. *Montgomery* (113 Oreg. 687, 234 Pac. 267 (1925)).
[78] *Brosnan* v. *Harris* (39 Oreg. 148, 65 Pac. 867 (1901)).

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## South Dakota

### Summary

1. Under the statute, subject to the artesian-well provisions, the owner of land owns water standing on or flowing over or under the surface, not forming a definite stream. The latter may be used while it remains there, but the flow thereof, or of the natural spring from which it commences its definite course or which contributes to the supply of a watercourse, may not be prevented but may be appropriated as in case of other waters. Another later statute provides that subject to vested private rights, all waters belong to the public and with the exception of navigable waters, are subject to appropriation, this provision now being made subject to the provisions vesting ownership of certain waters in the landowner.

2. Waters of a natural spring from which a stream commences its definite course are classified the same as water running in a definite stream. Thus such waters are governed by the law of watercourses, which in South Dakota is based upon the riparian and appropriation doctrines.

3. The landowner has the absolute right to water from a spring on his land, not the source of a definite stream.

4. Springs fed by definite underground watercourses are subject to the law of watercourses.

5. Springs fed by percolating water belong to the landowner. The presumption is that springs are fed by percolating water. The owner of land where such water occurs may interfere with the flow, even though it is the supply of a neighbor's spring.

### Statutes and Decisions

A statute provides that, subject to the statutes relating to artesian wells and water, the owner of land owns water standing thereon or flowing over or under the surface if it does not form a definite stream.[79] It is further provided that water running in a natural stream may be used by the landowner while on his land; but he may not prevent the natural flow of the stream, or of the natural springs from which it commences its definite course, or of the natural spring arising on his land which flows into and constitutes a part of the water supply of a natural stream, nor pursue nor pollute the same. It is provided, however, that the statute shall not be construed to prevent the owner of land on which a natural spring arises, and which constitutes the source or part of the water supply of a definite stream, from acquiring a right to appropriate the flow from such spring in the manner provided for appropriation of waters.

The foregoing statute contains revisions made by the code of 1939 which clarify the intent that a spring which contributes to the water supply of a watercourse is subject to the law of watercourses. In its earlier form it was specifically upheld by the court; the right of the landowner being stated to be absolute in case of a spring which is not the source of a definite stream, and his right to the waters of a spring from which a stream commences its definite course being limited by the terms of the statute.[80]

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[79] S. Dak. Code 1939, sec. 61.0101.
[80] *Madison* v. *Rapid City* (61 S. Dak. 83, 246 N. W. 283 (1932)).

In a fairly early case[81] it was held that riparian owners who seek to enjoin the diversion of waters of springs which they claim are part of the supply of the stream to which their lands are riparian, must prove by a preponderance of evidence that the spring waters constitute a part of the supply of the stream at or above their land.

The supreme court has held that springs fed by definite underground streams are subject to the rules applying to surface streams (which in South Dakota are the riparian and appropriation doctrines).[82] However, as percolating water belongs to the owner of the land where found, it was held that springs fed by percolating water belong to the landowner, or at least are subject to his exclusive right to use and dispose of the water. Further, it is presumed that springs are fed by percolating water, though the presumption may be rebutted.

Hence, percolating water, even though it supplies a spring on adjoining land, belongs to the owner of the land where it occurs.[83] The decision to this effect holds, further, that in enacting legislation applying to artesian wells, the legislature did not intend to alter the law of percolating water.

A statute, enacted much later than the original enactment vesting ownership of certain waters in the landowner, provides that, subject to vested private rights, all waters belong to the public and, except navigable waters, are subject to appropriation. These provisions are now all part of the same section of the 1939 code, and the reservation for the public is made subject to the provisions concerning ownership by the landowner.[84] It thus appears that rights to natural springs which constitute the source of definite streams may be acquired by appropriation, subject to whatever appropriative and riparian rights may have vested in the watercourse as a whole.

## Texas

### Summary

1. There are no statutes on ownership or appropriability of springs. Texas recognizes the riparian and appropriation doctrines, and the statutes make the waters of flowing rivers or natural streams subject to appropriation.
2. Where springs constitute the source of a creek, the owner of land has only riparian rights thereto. The implication is that appropriative rights also may be acquired to such spring.
3. Springs originating from percolating water and not the source of a watercourse, belong to the landowner.

### Statutes and Decisions

The statutes do not mention springs, but make the waters of flowing rivers and natural streams subject to appropriation.[85] Springs constituting the source of a watercourse are a part thereof, and the owner of land on which the springs arise does not have exclusive rights to the water, but only the ordinary rights of a riparian pro-

[81] *Farwell* v. *Sturgis Water Co.* (10 S. Dak. 421. 73 N. W. 916 (1898)).
[82] *Metcalf* v. *Nelson* (8 S. Dak. 87, 65 NW. 911 (1895).
[83] *Madison* v. *Rapid City* (61 S. Dak. 83. 246 N. W. 283 (1932)).
[84] S. Dak. Code 1939, sec. 61.0101.
[85] Vernon's Tex. Stats. 1936, Rev. Civil Stats., art. 7467.

prietor.[86] The implication is that appropriative rights may be established at such springs, as well as at other points along the watercourse.

However, springs which originate from percolating water, and which do not supply a watercourse, belong to the owner of the land on which they arise.[87]

It was recognized in *Watkins Land Co.* v. *Clements*[88] that a prescriptive right might be acquired to water of a spring.

## Utah

### Summary

1. The statutes subject all waters to appropriation.
2. Springs may be appropriated, regardless of the character of their source. Whether a spring is on public or private land, such water is subject to appropriation.

### Statutes and Decisions

#### STATUTES

The statutes provide that all waters, whether above or under the ground, are the property of the public, subject to existing rights of use;[89] and that unappropriated public waters may be appropriated.[90]

Prior to amendment in 1935, the appropriation statutes related only to water flowing above or under the ground in known or defined natural channels.[91]

#### THE APPROPRIATION DOCTRINE APPLIES TO SPRING WATERS

Springs are those places where water issues naturally from the surface of the earth.[92] Such waters may be appropriated.[93] In acquiring the right to use such water, the source is not controlling, whether the water comes from percolation or from a defined underground stream.[94] A party claiming to have developed water, taken from the same underground source that supplies surface springs appropriated by another, must show by clear and convincing evidence that the claimed water is developed water.[95] Where an appropriation of springs has been made for use during certain months of the year, the flow during the other months is appropriable by others.[96]

A defined underground stream supplying a spring is subject to appropriation.[97] Applying the appropriative principle further,

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[86] *Fleming* v. *Davis* (37 Tex. 173 (1872)); *Watkins Land Co.* v. *Clements* (98 Tex. 578, 86 S. W. 733 (1905)).
[87] *Texas Co.* v. *Burkett* (117 Tex. 16, 296 S. W. 273 (1927)).
[88] 98 Tex. 578, 86 S. W. 733 (1905).
[89] Utah Rev. Stats. 1933, sec. 100–1–1, amended by Laws 1935, ch. 105.
[90] Utah Rev. Stats. 1933, sec. 100–3–1, amended by Laws 1935, ch. 105.
[91] Utah Rev. Stats. 1933, sec. 100–1–1 (Laws 1903, p. 101).
[92] *Holman* v. *Christensen* (73 Utah 389, 274 Pac. 457 (1929)).
[93] *Munsee* v. *McKellar* (39 Utah 282, 116 Pac. 1024 (1911)).
[94] *Peterson* v. *Lund* (57 Utah 162, 193 Pac. 1087 (1920)).
[95] *Bastian* v. *Nebeker* (49 Utah 390, 163 Pac. 1092 (1916, 1917)).
[96] *Cleary* v. *Daniels* (50 Utah 494, 167 Pac. 820 (1917)).
[97] *Whitmore* v. *Utah Fuel Co.* (26 Utah 488, 73 Pac. 764 (1903)).

water in underground channels supplying springs which flow into a surface stream, may not be intercepted to the injury of prior appropriators on the stream.[98]

The earlier decisions gave the landowner rights to percolating water under his land as against the claim of an appropriator from a source supplied by such percolations, where the land had passed to private ownership before the appropriation was initiated.[99] Likewise previous decisions were to the effect that a spring originating from percolating water, appearing on land after it had passed to private ownership, belonged to the owner of the land;[1] and that a spring located on private land, unless the waters were of sufficient volume to flow away from the tract, could not be appropriated as against the landowner.[2] However, in view of the recent ground-water decisions in *Wrathall* v. *Johnson*[3] and *Justesen* v. *Olsen*,[4] and the present statute[5] which declares all waters above or under the ground to be the property of the public, subject to existing rights, and which subjects all unappropriated waters to appropriation, it would appear that unappropriated spring waters are now subject to appropriation regardless of their location with respect to private lands; and it would further appear that the appropriator of water from a spring is entitled to protection against interference with proven sources of supply, whether the tributary ground water be percolating or flowing in a definite channel, and regardless of whether the land on which the interception is attempted was in public or private ownership at the time the appropriation of the spring was initiated.

Even prior to the legislative dedication of all waters to the public, in 1935, the courts had held that springs might be appropriated on public land.[6] It was also held that an appropriative right to a spring at its source is not defeated when the land passes into private ownership;[7] and that in an appropriation of the water of such a spring, it makes no difference whether the water supplying the spring is percolating or moving through the soil in an underground stream.[8] A further decision was to the effect that water from a spring on either public or private land is subject to appropriation as against the landowner if it flows off the land in a natural channel.[9] The court in this case made it clear that it was not holding that water arising from springs on private land and flowing off such land other than through a natural channel was subject to appropriation. As stated, it is believed that these previous distinctions as to the source and location of springs and as to their character as headwaters of streams are no longer controlling as to appropriations initiated after the legislature in 1935 dedicated all waters to the public, at least in the absence of a supreme court decision construing the effect of the dedication statute.

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[98] *Herriman Irr. Co.* v. *Keel* (25 Utah 96, 69 Pac. 719 (1902)).

[99] *Crescent Min. Co.* v. *Silver King Min. Co.* (17 Utah 444, 54 Pac. 244 (1898)); *Willow Creek Irr. Co.* v. *Michaelson* (21 Utah 248, 60 Pac. 943 (1900)).

[1] *Willow Creek Irr. Co.* v. *Michaelson* (21 Utah 248, 60 Pac. 943 (1900)).

[2] *Peterson* v. *Eureka Hill Min. Co.* (53 Utah 70, 176 Pac. 729 (1918)); *Deseret Live Stock Co.* v. *Hooppiania* (66 Utah 25, 239 Pac. 479 (1925)).

[3] 86 Utah 50, 40 Pac. (2d) 755 (1935).

[4] 86 Utah 158, 40 Pac. (2d) 802 (1935).

[5] Utah Laws 1935, ch. 105, amending Rev. Stats. 1933, sec. 100–1–1.

[6] *Patterson* v. *Ryan* (37 Utah 410, 108 Pac. 1118 (1910)); *Peterson* v. *Eureka Hill Min. Co.* (53 Utah 70, 176 Pac. 729 (1918)).

[7] *Holman* v. *Christensen* (73 Utah 389, 274 Pac. 457 (1929)).

[8] *Peterson* v. *Wood* (71 Utah 77, 262 Pac. 828 (1927)).

[9] *Holman* v. *Christensen* (73 Utah 389, 274 Pac. 457 (1929)).

Appropriations of the water of springs must be made under the statutory procedure, exclusively. The question arose in *Deseret Live Stock Co.* v. *Hooppiania*,[10] which was an action to quiet title to a number of springs, and was discussed in *Wrathall* v. *Johnson*, *supra*, after which the legislature spoke positively on the matter.[11] The court apparently now agrees with the legislative view.[12] This subject is discussed in chapter 2 in connection with the operation of the doctrine of appropriation in Utah. (See p. 104.)

LOSS OF RIGHTS TO SPRINGS

In determining the question of abandonment of a right to use spring water, intent to abandon is an essential element. Mere failure to use is not controlling.[13] However, abandonment is to be distinguished from nonuser over the statutory period. Rights to the use of appropriated spring waters are forfeited by such nonuse, and the intent is immaterial to the result.[14] One who fails to assert his alleged rights as against an appropriator of a spring, when in good faith he should have done so, is estopped from making the assertion later.[15]

In two very recent decisions, it has been held that rights to springs, tributary to streams, may be acquired by adverse use.[16] In one of the cases (the *Hammond case*) the doctrine of adverse use was limited to appropriated waters, as between the titles of the parties. A dissenting opinion in this last case maintained that a right would cease and the water revert to the State after 5 years of nonuse, whereas the prescriptive period is 7 years; hence a new right could be initiated only through the State administrative procedure. As noted in the discussion of the loss of water rights in chapter 6, the legislature in 1939 provided that unused or abandoned water shall revert to the public whether the water is permitted to run to waste or is used by others without right, and that no right to the use of water either appropriated or unappropriated might be acquired by adverse use or adverse possession.[17] (See p. 400.)

## Washington

### Summary

1. Under the statutes, subject to existing rights, all waters are subject to appropriation.

2. Springs which flow into a natural watercourse are subject to the appropriation and riparian doctrines. An appropriation of a spring on public land is protected as against the claims of a subsequent patentee.

3. Springs which are not the source of watercourses are not subject to appropriation as against the landowner. Percolating waters feeding springs on another's land are subject to reasonable use by the owner

[10] 66 Utah 25, 239 Pac. 479 (1925).
[11] Utah Laws 1935, ch. 105, amending Rev. Stats. 1933, sec. 100-3-1.
[12] *Adams* v. *Portage Irr., Res. & Power Co.* (95 Utah 1, 72 Pac. (2d) 648 (1937), 95 Utah 20, 81 Pac. (2d) 368 (1938)).
[13] *Gill* v. *Malan* (29 Utah 431, 82 Pac. 471 (1905)).
[14] *Deseret Live Stock Co.* v. *Hooppiania* (66 Utah 25, 239 Pac. 479 (1925)).
[15] *Orient Min. Co.* v. *Freckleton* (27 Utah 125, 74 Pac. 652 (1903)).
[16] *Hammond* v. *Johnson* (94 Utah 20, 66 Pac. (2d) 894 (1937), 94 Utah 35, 75 Pac. (2d) 164 (1938); *Adams* v. *Portage Irr., Res. & Power Co.* (95 Utah 1, 72 Pac. (2d) 648 (1937), 95 Utah 20, 81 Pac. (2d) 368 (1938)).
[17] Utah Laws, 1939, ch. 111, amending Rev. Stats. 1933, secs. 100-1-4 and 100-3-1.

of overlying land. Prescriptive rights may be acquired to springs rising on the land of another, and likewise as against an appropriator.

4. Water brought to an area from another watershed, resulting in increased flow from a spring, is "developed" water and belongs to the person responsible for developing it.

### Statutes and Decisions

#### STATUTES

The statutes provide that subject to existing rights, all waters belong to the public, and that rights thereto may be acquired by appropriation only under the prescribed procedure.[18]

A statute enacted in 1890,[19] and repealed in the enactment of the water code in 1917,[20] had provided that ditches for the utilization of waste, seepage, and spring waters should be governed by the same laws as those diverting from streams, and that the owner of the lands upon which the seepage or spring waters first arose should have the prior right thereto if capable of being used upon his lands.

#### WATER FROM A SPRING WHICH FORMS A NATURAL WATERCOURSE IS SUBJECT TO THE LAW OF WATERCOURSES, WHICH, IN WASHINGTON, INCLUDES BOTH THE RIPARIAN AND APPROPRIATION DOCTRINES

Water from a spring which forms a natural watercourse is subject to appropriation,[21] as such a spring is part and parcel of the stream.[22] Such a watercourse is established where there is a substantial flow from the spring is a defined stream running in a definite direction for a certain distance, even though the water then disappears in the ground; and the fact that beneficial use could be and is being made, should be considered in determining the appropriability of the water.[23]

A watercourse originating from a spring is also subject to the riparian doctrine.[24] The fact that the spring originates on another's land does not defeat the riparian right of the lower landowner; and such a vested riparian right, actually exercised, cannot be divested by a subsequent statute giving the prior right to spring waters to the landowner.[25] The fact that such statute, in force for a period of years, could have no application to springs having sufficient flow to form a watercourse, was held in *Miller* v. *Wheeler*,[26] thus:

> A review of the authorities will show that a clear distinction is drawn between springs rising or seeping upon lands and from which there is no outlet, and springs which form the fountain heads of living water courses. The court below has found (otherwise its decree could not be sustained) that there was a living flow from these springs. They thus became a part of the Squillchuck waters, and therefore subject to appropriation.

A decision delivered shortly before had stated the same principle, and had held further that riparian rights applied to the spring as well

[18] Wash. Rem. Rev. Stats., 1931, sec. 7351.
[19] Wash. Sess. Laws, 1889–90, p. 710, sec. 15.
[20] Wash. Sess. Laws, 1917, ch. 117, sec. 47, p. 468.
[21] *Geddis* v. *Parrish* (1 Wash. 587, 21 Pac. 314 (1889)); *Miller* v. *Wheeler* (54 Wash. 429, 103 Pac. 641 (1909)).
[22] *In re Ahtanum Creek* (139 Wash. 84, 245 Pac. 758 (1926)).
[23] *Allison* v. *Linn* (139 Wash. 474, 247 Pac. 731 (1926)); see also *Pays* v. *Roseburg* (123 Wash. 82, 211 Pac. 750 (1923)).
[24] *Geddis* v. *Parrish* (1 Wash. 587, 21 Pac. 314 (1889)).
[25] *Nielson* v. *Sponer* (46 Wash. 14, 89 Pac. 155 (1907)).
[26] 54 Wash. 429, 103 Pac. 641 (1909).

as the watercourse.[27] It was also held in that case that where a landowner changes the flow of a spring into a new channel and leaves it there for more than 30 years, he is estopped to interfere with it to the injury of a party who acquires land and makes improvements relying on the continued flow.

#### APPROPRIATIONS OF SPRINGS ON PUBLIC LAND ARE PROTECTED AS AGAINST THE CLAIMS OF SUBSEQUENT ENTRYMEN

Under the Federal statutes, an appropriation of a spring on public land will be protected as against the claims of a subsequent patentee. Although the riparian doctrine applies in Washington to streams having their sources in springs, an appropriator may acquire a right superior to a fee subsequently derived from the Government.[28]

#### THE OWNER OF LAND HAS THE RIGHT TO THE USE OF SPRINGS WHICH DO NOT FLOW THEREFROM, AND ALSO NEW SPRINGS WHICH FLOW TO OTHER LANDS, AS AGAINST OTHER CLAIMANTS TO THE FLOW

Moreover, springs forming a bog, with no surface inlet or outlet, are not subject to appropriation as against the landowner. It has been held that there is no authority in law for the appropriation of water of this character.[29] Furthermore, the landowner has the right to a new spring breaking out on his land, even though if unmolested it would cause a stream to flow over another's land. Such water is not subject to appropriation; nor is it subject to the riparian doctrine unless flowing from time immemorial.[30]

#### PERCOLATING WATERS FEEDING SPRINGS ON ANOTHER'S LAND ARE SUBJECT TO REASONABLE USE BY THE OWNER OF OVERLYING LAND

Percolating waters which feed springs on another's land are subject to reasonable use by the owner of land overlying the percolating water. Waste of water, or transport for commercial purposes, would not be such a reasonable use.[31] (See ch. 4, p. 263.)

#### AN INCREASE IN THE FLOW OF SPRINGS, RESULTING FROM RETURN WATER FROM IRRIGATION WATER BROUGHT FROM ANOTHER WATERSHED, BELONGS TO THE PERSON RESPONSIBLE FOR THE DEVELOPMENT

Such water has been held to be developed water, belonging to the person responsible for it.[32]

#### PRESCRIPTIVE RIGHTS MAY BE ACQUIRED TO THE USE OF SPRING WATERS IN CASES IN WHICH THE ADVERSE USE CONSTITUTES AN ACTUAL INVASION OF THE RIGHTS OF THE LANDOWNER OR OTHER CLAIMANT

It was held in *Mason* v. *Yearwood*[33] that a prescriptive right might be acquired to the use of water draining upon one's land from a spring and swamp on the land of another. In *Kiser* v. *Douglas County*[34] it

[27] *Hollett* v. *Davis* (54 Wash. 326, 103 Pac. 423 (1909)).
[28] *Geddis* v. *Parrish* (1 Wash. 587, 21 Pac. 314 (1889)).
[29] *Dickey* v. *Maddux* (48 Wash. 411, 93 Pac. 1090 (1908)).
[30] *Mason* v. *Yearwood* (58 Wash. 276, 108 Pac. 608 (1910)).
[31] *Evans* v. *Seattle* (182 Wash. 450, 47 Pac. (2d) 984 (1935)).
[32] *Miller* v. *Wheeler* (54 Wash. 429, 103 Pac. 641 (1909)).
[33] 58 Wash. 276, 108 Pac. 608 (1910).
[34] 70 Wash. 242, 126 Pac. 622 (1912).

was held that title to spring water might be acquired by prescription against the claim of an appropriator of the springs. In a later case, *Dontanello* v. *Gust*,[35] a lower landowner had constructed a ditch, dam, and intake on the land of an upper owner and had diverted the waters of a spring which supplied a watercourse, throughout the statutory period. The court stated that while generally a lower owner cannot acquire title to the use of water by adverse use, because of the usual physical conditions, nevertheless here there was a clear invasion of the upper property and consequently title by adverse user was upheld. These three cases were reviewed in a fairly recent statutory adjudication suit;[36] and the court, in denying in that case the perfection of a prescriptive right to use the waters of springs situated on the land of another, distinguished the circumstances of those earlier cases. Hence, while title by prescription to the use of springs on the land of another has been recognized, the rule is that the rights of the landowner must have been clearly invaded throughout the statutory period. Of course the provisions of the statute of limitations must be complied with.[37] The right of cotenants to springs may be terminated by adverse possession on the part of one holding warranty deed to the whole title from one tenant in common.[38]

## Wyoming

### Summary

1. The waters of natural springs are subject to appropriation, regardless of ownership of the land on which found.

2. A spring developed artificially, supplied by percolating water, belongs to the landowner and is not subject to appropriation by others.

### Constitutional Provisions and Decisions

The State constitution provides that the waters of natural springs are the property of the State, subject to appropriation.[39]

A spring tributary to a surface stream gives the owner of the land on which found, no riparian rights, as riparian rights are not recognized in Wyoming. Regardless of ownership of the land, such spring is subject to appropriation.[40]

However, the constitution refers only to *natural* springs. A spring developed artificially, and supplied by percolating waters, is not subject to appropriation, being the private property of the landowner.[41]

[35] 86 Wash. 268, 150 Pac. 420 (1915).
[36] *In re Ahtanum Creek* (139 Wash. 84, 245 Pac. 758 (1926)).
[37] *Dickey* v. *Maddux* (48 Wash. 411, 93 Pac. 1090 (1908)).
[38] *Church* v. *State* (65 Wash. 50, 117 Pac. 711 (1911)).
[39] Wyo. Const., art. VIII, secs. 1 and 3.
[40] *Moyer* v. *Preston* (6 Wyo. 308, 44 Pac. 845 (1896).
[41] *Hunt* v. *Laramie* (26 Wyo. 160, 181 Pac. 137 (1919)).

# Chapter 6

# SOME PROBLEMS IN OPERATION OF THE APPROPRIATION DOCTRINE

## Elements of an Appropriative Right

The Supreme Court of Utah has recently summarized important elements of a completed appropriation thus:[1]

> When an appropriation of water has been made and the right to the use thereof perfected, certain of the elements involved in that right are: (a) Quantity of water appropriated; (b) time, period, or season when the right to the use exists; (c) the place upon the stream at which the right of diversion attaches; (d) the nature of the use or the purpose to which the right of use applies, such as irrigation, domestic use, culinary use, commercial use, or otherwise; (e) the place where the right of use may be applied; (f) the priority date of appropriation or right as related to other rights and priorities. There are also certain limitations, restrictions, responsibilities, and duties pertaining to a water right. It must be used economically or without waste. It must be so controlled and used as not to damage others. It is so related to the rights of others that regulations are required. When necessary, periods of rotation may be imposed.

The appropriative right, furthermore, may be kept in good standing only by continuing to exercise it, if the water supply is available. It may be lost instantly by intentional abandonment, and in most States by forfeiture for a prescribed period of years regardless of the intention of the water-right holder. Under some circumstances, the right may be lost by adverse user on the part of another. These matters are discussed below. (See p. 389 et seq.)

Generally, an appropriation of water may be made by a person, a formal or informal association, a corporation, or a governmental agency or entity.

### The Appropriative Right Refers to a Definite Quantity of Water

The quantity of water appropriated is stated in the claim of the appropriator, in cubic feet per second or in miner's inches in case of diversions for direct irrigation and in acre-feet in case of diversions for storage purposes, and is allowed in the permit from the State and finally fixed in the decree of adjudication to the extent to which the quantity of water claimed has actually been applied to beneficial use. Various early decrees referred to stated fractions of the total stream flow, or allowed appropriations to the extent of the carrying capacity of ditches. Appropriations now are measured by other more specific standards. These standards are discussed below in connection with the exclusive quality of the appropriative right (p. 316 et seq.).

Various water codes, as noted in the appendix, place a limit upon the quantity of water that may be appropriated. For example, the Nebraska statute provides that no allotment from the natural flow

[1] *Rocky Ford Canal Co.* v. *Cox* (92 Utah 148, 59 Pac. (2d) 935 (1936)).

of streams for irrigation shall exceed 1 second-foot for each 70 acres or 3 acre-feet per acre during the calendar year, except in case of stored waters; and the Wyoming statute provides that no allotment for the direct use of the natural unstored flow of any stream shall exceed 1 second-foot for each 70 acres. The supreme court of each of these States ruled in 1939 that these statutory limitations could have no application to preexisting appropriative rights; the Nebraska court stating that the statute could not affect a valid appropriation which had vested prior to its enactment,[2] and the Wyoming court that the section refers only to rights adjudicated under State laws and that it does not control the exercise of rights adjudicated by decree of the territorial court.[3]

The court decisions have recognized the fact that reclamation of land is a continuing process, and that completion of the appropriation by the application of water to beneficial use will not necessarily be made during the first year in which water is diverted and, in case of a large project, not for many years.[4] Under existing statutory procedures, these periods of time for completion are stated in the permits to appropriate water, often subject to extensions for good cause shown.

### The Appropriation Commonly Relates to a Definite Period of Use

The appropriative right commonly relates to a period during which water may be diverted for use. One may be entitled to divert a given quantity continuously throughout the entire year, or during only a portion of the year, or only at intervals. The Nevada Supreme Court stated in one of the early important water cases:[5]

> We think the rule is well settled, upon reason and authority, that if the first appropriator only appropriates a part of the waters of a stream for a certain period of time, any other person, or persons, may not only appropriate a part, or the whole of the residue and acquire a right thereto, as perfect as the first appropriator, but may also acquire a right to the quantity of water used by the first appropriator at such times as not needed or used by him. In other words, if plaintiff only appropriated the water during certain days in the week, or during a certain number of days in a month, then the defendants would be entitled to its use in the other days of the week, or the other days in the month.

Various other courts have held to the same effect.[6] The principle is logical, for one perfects an appropriative right only to the extent of actual application of water to beneficial use; the flow during other

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[2] *Enterprise Irr. Dist.* v. *Willis* (135 Nebr. 827, 284 N. W. 326 (1939)).

[3] *Quinn* v. *John Whitaker Ranch Co.* (54 Wyo. 367, 92 Pac. (2d) 568 (1939)).

[4] *Haight* v. *Costanich* (184 Calif. 426, 194 Pac. 26 (1920)); *Wheldon Valley Ditch Co.* v. *Farmers' Pawnee Canal Co.* (51 Colo. 545, 119 Pac. 1056 (1911)); *Barnes* v. *Sabron* (10 Nev. 217 (1875)); *Elliot* v. *Whitmore* (23 Utah 342, 65 Pac. 70 (1901)); *Rodgers* v. *Pitt* (129 Fed. 932 (1904)).

It was stated very recently in *Campbell* v. *Wyoming Dev. Co.* (55 Wyo. 347, 100 Pac. (2d) 124 (1940)): "* * * in view of all that has been stated, the courts ought not, we think, take it upon themselves to declare that the right of gradual development was taken away from the defendant company as a matter of law by the mere fact that the development was slow."

[5] *Barnes* v. *Sabron* (10 Nev. 217 (1875)).

[6] See, for example, *Smith* v. *O'Hara* (43 Calif. 371 (1872)); *Santa Paula Water Works* v. *Peralta* (113 Calif. 38, 45 Pac. 168 (1896)); *Suisun* v. *De Frietas* (142 Calif. 350, 75 Pac. 1092 (1904)); *Hufford* v. *Dye* (162 Calif. 147, 121 Pac. 400 (1912)); *Davis* v. *Chamberlain* (51 Oreg. 304, 98 Pac. 154 (1908)); *Cleary* v. *Daniels* (50 Utah 494, 167 Pac. 820 (1917)); *Hardy* v. *Beaver County Irr. Co.* (65 Utah 28, 234 Pac. 524 (1924)).

The Supreme Court of Montana, in the recent case of *Galiger* v. *McNulty* (80 Mont. 339, 260 Pac. 401 (1927)), stated that the court undoubtedly had the right to fix in its decree both the amount of water and the dates when the same might be used.

In the very recent California case of *Thorne* v. *McKinley Bros.* (5 Calif. (2d) 704, 56 Pac. (2d) 204 (1936)), in which only the daytime flow of a stream had been devoted to beneficial use prior to a certain time, it was held that the rights thereunder were limited to daytime use, and that when use of the night flow was commenced that constituted a new appropriation which was subject to intervening rights.

seasons or periods, in which there was no attempt or intent to divert the available flow, has not been applied to beneficial use by this particular appropriator and therefore is unappropriated water so far as he is concerned.

The Supreme Court of Montana recently had for consideration the question as to whether the holder of a decreed right to the use of a certain flow of water could extend the use of that flow to lands not under actual or contemplated irrigation at the time the right was decreed, where subsequent rights had intervened.[6a] It was held that the fact that no limitations in hours or days were expressly imposed in the decree could not logically be taken as an adjudication that the appropriation was of an absolutely uninterrupted flow, use of water seldom being made in practice without interruption throughout an irrigation season. Consequently, the use could not later be extended to additional lands to the injury of subsequent appropriators.

As in case of other features of the appropriative right, the period of use is more readily susceptible to accurate determination in those cases in which the right is exercised by virtue of a permit from the State. Many of the State water codes either provide that the applicant for a permit to appropriate water shall state among other things the period or periods of annual use, or else authorize the State engineer to require additional information relating to the proposed use. If the permittee uses the quantity applied for during whatever period of use is specified in the permit, and complies with all other requirements, he perfects the right of appropriation of such quantity under the terms of the permit; this period of use may extend throughout the irrigation season or it may be limited to certain months. The Supreme Court of New Mexico had occasion to consider the claim of a subsequent appropriator to water for winter use, based upon the fact that a prior appropriator had not used the water during the winter for the 4-year period of statutory forfeiture, although it appeared that he had exercised his full appropriation each year.[7] It was held that the arid-region doctrine had been modified by statute, so that the right of use, both as to volume and periods of annual use, is regulated either by the permit of the State engineer or court decree; and that the forfeiture provision clearly referred to quantity of water and not to periods of use. Consequently one who used fully the quantity appropriated, in good faith for beneficial use in accordance with his necessities, forfeited no part of his right, but might use the water at any time he required it during the year.

It should also be recalled that certain State water codes place a limitation upon the quantity of water in acre-feet per acre that is subject to appropriation. The maximum diversion through an appropriator's headgate may exhaust the statutory limit within a comparatively small portion of the irrigation season. For example, the right to use 3 acre-feet per acre for 40 acres totals 120 acre-feet; continuous day and night diversion of 5 second-feet will yield this total in approximately 12 days, and 1 second-foot will do so in about 60 days. Of course the appropriator must take the water when it is

[6a] *Quigley* v. *McIntosh* (110 Mont. 495, 103 Pac. (2d) 1067 (1940)).

[7] *Harkey* v. *Smith* (31 N. Mex. 521, 247 Pac. 550 (1926)). The court went on to observe that the doctrine of seasonal appropriation is not well adapted to the requirements of general farming.

naturally available, and if his priority is late and therefore attaches to only the high flows of the stream, or even if his priority is an early one but the flow of the stream becomes low during the early summer, he may have no choice other than to divert his entire seasonal allotment within a comparatively short time early in the season if he is to irrigate at all during such year.

The irrigation season in the southwest is long, lasting in some sections throughout most or all of the year. However, in most western regions the season lasts ordinarily 5 to 7 months. Diversions for irrigation purposes out of the regular season of direct irrigation are made by virtue of appropriations for the storage of water for subsequent use.

### Rotation Is Practiced in Many Areas in the Interest of More Efficient Utilization of Water Supplies

Rotation in the use of an entire stream of water is regularly practiced within many irrigation projects for the purpose of avoiding the losses and inefficiency which so often are found to attend the continuous delivery of a multiplicity of small heads or streams;[8] and some of the irrigation-district statutes provide that this shall be done as among users of water within the districts in time of water shortage. Likewise, rotation is sometimes practiced as among independent diversions from watercourses as the result of court decrees or agreement of the water users. The practice requires a schedule under which each water user is entitled to divert the entire flow of the stream for, say, 1 or 2 or 3 days during each 15-day period, the length of his time of use—or turn—during each period being computed according to the ratio which his appropriative right bears to all rights involved in the schedule. Generally speaking, and particularly during periods of water shortage, rotation in the complete diversion of a stream flow to the use of which a number of parties are entitled gives better results than does the continuous diversion by each water-right holder of his small fraction of the total flow.

The statutes of several States specifically authorize water users to rotate in the use of water to which they are collectively entitled, sometimes with the requisite approval of the supervising public officials, and some statutory authorizations relate only to the practice as among different irrigation districts which have rights in a common source of supply.[9] The Colorado statute provides that holders of water rights from the same stream may exchange water with each other, or loan it to each other, for a limited time, to save crops or to make a more economical use of the water.[10] However, the Colorado Supreme Court has held that this may not be done to the injury of other appropriators; and a company having no present need of water may not loan it to others in time of shortage when

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[8] Hutchins, W. A., Delivery of Irrigation Water, U. S. Dept. Agr. Tech. Bull. 47 (1928).

[9] Arizona: Rev. Code, 1928, sec. 3313. California: Deering's Gen. Laws of Calif., 1937, vol. I, act 3854, sec. 62 (among various districts). Kansas: Gen. Stats. 1935, secs. 42–340 to 42–347. Nebraska: Comp. Stats., 1929, sec. 46–133 (among various districts); sec. 81–6311 (in case of small allotments of water for small areas). Nevada: Comp. Laws, 1929, sec. 7971. Oklahoma. Stats., 1931, sec. 13140; Stats. Ann. (1936), title 82, sec. 201 (among various districts). Oregon: Code Ann., 1930, sec. 47–710. Washington: Rem. Rev. Stats., 1931, sec. 7391a. Wyoming: Rev. Stats., 1931, sec. 122–308.

[10] Colo. Stats. Ann., 1935, ch. 90, sec. 110.

the water is needed by an appropriator who is junior to the lender and senior to the borrower.[11]

A number of appellate courts have voiced approval of the plan of rotating a stream among appropriators, provided the operation of the plan does not interfere with the rights of nonparticipants and does not otherwise adversely affect vested rights or established customs. In some of these cases the rotation plan had been entered into voluntarily by the interested water users, or had been decreed by the court without objection.[12] On the other hand, the highest courts of several western States have stated or definitely held that the trial courts may impose systems of rotation upon the users to whom rights are decreed, if satisfied that it is the better plan under the existing circumstances.[13] The Washington Supreme Court in a recent statutory adjudication case [14] stated that a plan of rotation, to be provided in the decree, should first be considered and adjusted by the State supervisor of hydraulics. The same court had stated in an earlier case [15] that where waters had been apportioned by decree on a percentage basis, the State administrator could not order a rotation system unless the parties agreed upon one. In a Washington case decided in 1911,[16] it was held that a rule or regulation of an irrigation company providing for rotation in the delivery of water, rather than constant flow, could not be declared unreasonable as a matter of law, provided that the water user received the quantity of water contracted for.

The Idaho Supreme Court has taken a position contrary to the more general rule, above stated, concerning the imposition of rotation plans by court order. In a case decided in 1906 [17] it was held that parties under a company ditch had a right to enter into an agreement providing for rotation in the use of water among themselves, the court stating:

> Rotation in irrigation undoubtedly tends to conserve the waters of the state and to increase and enlarge their duty and service, and is, consequently, a practice that deserves encouragement in so far as it may be done within legal bounds.

And in a later case [18] it was held that contracts providing for rotation of water would be enforced by the courts, as such system was stated to be recognized by leading authorities as the most efficient and desirable method of distribution of water in use. However, the supreme court in 1920 [19] declined to adopt a rule *compelling* the use of water by

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[11] *Fort Lyon Canal Co.* v. *Chew* (33 Colo. 392, 81 Pac. 37 (1905)); *Bowman* v. *Virdin* (40 Colo. 247, 90 Pac. 506 (1907)).

[12] *Krebs* v. *Perry* (134 Oreg. 290, 292 Pac. 319, 293 Pac. 432 (1930)); *Ward County W. I. Dist. No. 3* v. *Ward County Irr. Dist. No. 1* (117 Tex. 10, 295 S. W. 917 (1927)); *In re Crab Creek* (194 Wash. 634, 79 Pac. (2d) 323 (1938)). See also, for attitude of court on this point, *Hutchinson* v. *Stricklin* (146 Oreg. 285 (28 Pac. (2d) 225 (1933)).

[13] *Hufford* v. *Dye* (162 Calif. 147, 121 Pac. 400 (1912)); *McCoy* v. *Huntley* (60 Oreg. 372, 119 Pac. 481 (1911)); *Cantrall* v. *Sterling Min. Co.* (61 Oreg. 516, 122 Pac. 42 (1912)); *Cook* v. *Evans* (45 S. Dak. 31, 185 N. W. 262 (1921)), 45 S. Dak. 43, 186 N. W. 571 (1922)); *Dameron Valley Res. & Canal Co.* v. *Bleak* (61 Utah 230, 211 Pac. 974 (1922)); *Rocky Ford Canal Co.* v. *Cox* (92 Utah 148, 59 Pac. (2d) 935 (1936)); *Anderson* v. *Bassman* (140 Fed. 14 (C. C. N. D. Calif., 1905)).

Provision made by the State Board of Control for a rotation system was approved in *In re Willow Creek* (74 Oreg. 592, 144 Pac. 505 (1914), 146 Pac. 475 (1915)).

For rotation as among riparian users, see *Harris* v. *Harrison* (93 Calif. 676, 29 Pac. 325 (1892)); *Wiggins* v. *Muscupiabe Land & Water Co.* (113 Calif. 182, 45 Pac. 160 (1896)); *Smith* v. *Corbit* (116 Calif. 587, 48 Pac. 725 (1897)); *Gutierrez* v. *Wege* (145 Calif. 730, 79 Pac. 449 1905)).

[14] *In re Ahtanum Creek* (139 Wash. 84, 245 Pac. 758 (1926)).

[15] *Osborn* v. *Chase* (119 Wash. 476, 205 Pac. 844 (1922)).

[16] *Shafford* v. *White Bluffs Land & Irr. Co.* (63 Wash. 10, 114 Pac. 883 (1911)).

[17] *Helphery* v. *Perrault* (12 Idaho 451, 86 Pac. 417 (1906)).

[18] *State* v. *Twin Falls Canal Co.* (21 Idaho 410, 121 Pac. 1039 (1911, 1912)).

[19] *Muir* v. *Allison* (33 Idaho 146, 191 Pac. 206 (1920)).

rotation, being not convinced that the time had arrived for the adoption of such rule in Idaho. This position was taken because of the long-standing practice in various irrigation communities of giving each user a continuous flow of water. The practice of rotation was not condemned, but would be enforced where the parties had contracted for such system; but until the practice had become established by custom, it would not be imposed upon water users accustomed to the continuous-delivery plan, without their consent.

### The Appropriation Usually Includes an Actual Diversion of Water From the Source of Supply

The rule is often stated that to constitute a valid appropriation of water, there must be an actual diversion of the water from the natural source of supply.[20] It is so stated in one form or another in a number of decisions.[21] In actual practice it is unquestionably the case that the vast majority of appropriative rights are based upon diversions of the water from the stream channels into canals or other conduits, or upon retentions of the water in channel reservoirs under the physical control of the appropriators, the water stored in channel reservoirs being diverted subsequently as needed.

There have been some exceptions, such as in case of watering of stock and irrigation by natural overflow. For example, a Colorado statute[22] passed in 1879 provided that persons who should have enjoyed the use of water from a natural stream for the irrigation of meadowland by the natural overflow or operation of the stream might, in case of diminution of flow, construct ditches for that purpose with priorities as of the time of the first use of the meadows. The supreme court held that this statute gave an appropriation without any affirmative act on the part of the owner of the meadow in withdrawing water from the stream;[23] but held also that the appropriator is not exempt from the necessity of proving his claim in case of an adjudication, and that if he fails to do this, and later builds a ditch on account of diminution of the stream flow, he is not entitled to have his priority date back by relation to his meadow appropriation ahead of priorities fixed by a previous statutory decree.[24]

The Nevada Supreme Court, in a decision antedating the passage of the present water code, where the irrigation consisted principally of overflow from a river, held that an actual diversion was necessary to completion of an appropriation.[25] This principle was recently (1931)

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[20] Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, sec. 722, p. 1242.

[21] For example: "* * * it has been repeatedly decided in this jurisdiction that an appropriation consists of an actual diversion of water from a natural stream, followed within a reasonable time thereafter by an application thereof to some beneficial use." *Windsor Res. & Canal Co.* v. *Lake Supply Ditch Co.* (44 Colo. 214, 98 Pac. 729 (1908)). (In the earlier case of *Thomas* v. *Guiraud* (6 Colo. 530 (1883)), it had been stated that the true test of appropriation is the successful application of water to beneficial use and that the method of diverting or carrying the water or of making the application is immaterial. See also the discussion below concerning irrigation of meadows in Colorado.)

For typical statements to the same effect see: *McPhail* v. *Forney* (4 Wyo. 556, 35 Pac. 773 (1894)); *Murray* v. *Tingley* (20 Mont. 260, 50 Pac. 723 (1897)); *Rodgers* v. *Pitt* (129 Fed. 932 (C. C. D. Nev., 1904)).

The Montana Supreme Court recently stated, in *Sherlock* v. *Greaves* (106 Mont. 206, 76 Pac. (2d) 87 (1938)): "The defendants failed to establish an appropriation of water in that they offered no proof of the diversion of water by them from Crow Creek. One of the essential elements of a completed appropriation is the diversion of water."

[22] Colo. Stats. Ann., 1935, ch. 90, sec. 19.

[23] *Humphreys Tunnel & Min. Co.* v. *Frank* (46 Colo. 524, 105 Pac. 1093 (1909)).

[24] *Broad Run Inv. Co.* v. *Deuel & Snyder Impr. Co.* (47 Colo. 573, 108 Pac. 755 (1910)).

[25] *Walsh* v. *Wallace* (26 Nev. 299, 67 Pac. 914 (1902)).

limited to the facts of the earlier case, in a decision [26] to the effect that a mechanical means of diversion is not invariably necessary to constitute an appropriation of water, and upholding an appropriation for stock-watering purposes, made before the passage of laws specifying the manner in which water should be appropriated, in pursuance of a well-established custom which was stated to result in a use of water as economical and beneficial as would be the case if there were a mechanical diversion. The Nevada stock-watering act of 1925 [27] provides that a sufficient measure of the quantity of water appropriated for watering livestock is the number and kind of animals watered. The Supreme Court of Utah has recently stated [28] that the right to take water for camp purposes from public streams—a lawful right belonging to the public, provided the exercise thereof does not appreciably decrease the quantity or deteriorate the quality of the water to which prior rights have been established—does not require an actual diversion of the flow from the natural channel. Such water is common property. But the right to take waters into private control may be exercised only in the manner provided by statute. Further:

> * * * there must be a diversion from the natural channel or an interference with the natural free flow, for storage, effected by the work, labor, or art of man. Then, and not until then, can the appropriator assert any rights in and to the water itself.

It has also been stated, variously, that the right to use water is the essence of an appropriation, such right depending upon actual capture of the water and application to beneficial use; and that the means by which the appropriation is effected is a secondary consideration or incidental, though not inconsequential.[29]

The Oregon Supreme Court has stated in a recent case: [30]

> It is now well settled that where practically no artificial works for irrigation are necessary, the requirement of a valid appropriation that there be a diversion from the natural channel is satisfied, when the appropriator accepts the gift of nature, and indicates his intention to reap the benefits of natural irrigation.

It was suggested by that court in a case decided in 1925 [31] that while an appropriation could be effectuated by irrigation by natural overflow from the stream channel, the change to a control system should be made within a reasonable time, as circumstances permit and necessities require, where necessary to effect economies in the use of the water. Previously, in *Hough* v. *Porter*,[32] the court had stated that

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[26] *Steptoe Live Stock Co.* v. *Gulley* (53 Nev. 163, 295 Pac. 772 (1931)).

[27] Nev. Comp. Laws, 1929, secs. 7979 to 7985.

[28] *Adams* v. *Portage Irr. Res. & Power Co.* (95 Utah 1, 72 Pac. (2d) 648 (1937); 95 Utah 20, 81 Pac. (2d) 368 (1938)). In the more recent case of *Tanner* v. *Provo Res. Co.* (99 Utah 139, 98 Pac. (2d) 695 (1940), the court reaffirmed the three principal elements necessary to constitute a valid appropriation of water as (1) an intent to apply the water to a beneficial use; (2) a diversion from the natural channel by means of a ditch, canal, or other structure; and (3) an application of the water within a reasonable time to some useful industry.

[29] *Offield* v. *Ish* (21 Wash. 277, 57 Pac. 809 (1899)); *McCall* v. *Porter* (42 Oreg. 49, 70 Pac. 820 (1902), 71 Pac. 976 (1903)).

A secondary consideration, but important from the standpoint of protection from interference; *Pima Farms Co.* v. *Proctor* (30 Ariz. 96, 245 Pac. 369 (1926)). On this general question, see ch. 4, p. 169 and following.

[30] *Masterson* v. *Pacific Live Stock Co.* (144 Oreg. 396 24 Pac. (2d) 1046 (1933)).

[31] *In re Silvies River* (115 Oreg. 27, 237 Pac. 322 (1925)).

[32] 51 Oreg. 318, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909).

A Federal court, in a case arising in Colorado, held that where one owned a tract of land which had been improved at great expense as a summer resort, on which there flowed a small, precipitous stream, and where the seepage from the stream and mist and spray from waterfalls produced a luxuriant vegetation, which added to the value of the place as a summer resort, such use of water was a beneficial use and subject to a valid appropria-

no certain method was necessary to make an appropriation; that it might be accomplished by means of ditches or other methods of diversion and application, such as dams which cause overflow from streams, or by subirrigation.

The point of diversion from the source of supply is an element of the appropriation; it is there that the appropriative right attaches to the flow of the stream, and it is to that point that the appropriator is entitled to have the stream flow without interference by others junior in right or without right. The place of diversion of an appropriator may also be important from the standpoint of other appropriators of the flow of the same stream, and may be changed only if the rights of others are not adversely affected and usually only by following a prescribed statutory procedure. (See p. 379 et seq.)

#### The Question of Locating a Diversion on Another's Land

An intending appropriator may initiate his appropriation by making the diversion on private land owned by another, but he has no right to do so without the consent of the latter,[33] or without acquiring the right-of-way by condemnation in jurisdictions in which such right may be exercised. (In some of the western States even individuals may condemn such rights-of-way for their own irrigation use.)[34]

The statement has been made in various cases that an appropriative right is not valid if initiated in trespass upon private land.[35] For example, in a fairly recent Montana decision,[36] it was stated that the principle that actual diversion of water to beneficial use existing or in contemplation[37] constitutes an appropriation, necessarily implies rightful diversion by lawful means; that mere use of water, even if for a beneficial purpose, if made by trespass, would not constitute an appropriation. In most of the cases in which this statement is made, it appears that the point actually decided was that the attempted appropriation was void as against the owner of the land upon which the trespass was committed. This matter was recently considered by the Wyoming Supreme Court,[38] which concluded that the more nearly correct statement is that the initiation of a water right by trespass on another's land is void as against the owner of the land, the term "void" as here used meaning no more than "void-

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tion as against an attempted upstream diversion: *Cascade Town Co.* v. *Empire Water & Power Co.* (181 Fed. 1011 (C. C. D. Colo. 1910)).

An actual diversion is necessary to constitute an appropriation, but any mode may be resorted to which under the circumstances is effective: *Simons* v. *Inyo Cerro Gordo Min. & Power Co.* (48 Calif. App. 524, 192 Pac. 144 (1920: hearing denied by supreme court)).

[33] *Sternberger* v. *Seaton Mountain &c. Co.* (45 Colo. 401, 102 Pac. 168 (1909); *Marshall* v. *Niagara Springs Orchard Co.* (22 Idaho 144, 125 Pac. 208 (1912)); *Prentice* v. *McKay* (38 Mont. 114, 98 Pac. 1081 (1909)); *Talbot* v. *Joseph* (79 Oreg. 308, 155 Pac. 184 (1916)); *Barker* v. *Sonner* (135 Oreg. 75, 294 Pac. 1053 (1931)); *Redwater Land & Canal Co.* v. *Reed* (26 S. Dak. 466, 128 N. W. 702 (1910)); *Scherck* v. *Nichols* (55 Wyo. 4, 95 Pac. (2d) 74 (1939)).

[34] The United States Supreme Court, in *Clark* v. *Nash* (198 U. S. 361 (1905)), sustained the judgment of the Utah Supreme Court (*Nash* v. *Clark* (27 Utah 158, 75 Pac. 371, (1904)) in upholding the statute authorizing individuals to condemn rights-of-way in ditches owned by others, by enlargement of the same, for the irrigation of their own farms. Several western States grant the right of condemnation for rights-of-way to individuals for their own private irrigation purposes on the theory that the use of water for irrigation is a public use even when made by private individuals.

[35] Recent cases: *Bassett* v. *Swenson* (51 Idaho 256, 5 Pac. (2d) 722 (1931)); *Connolly* v. *Harrel* (102 Mont. 295, 57 Pac. (2d) 781 (1936)); *Minton* v. *Coast Property Corp.* (151 Oreg. 208, 46 Pac. (2d) 1029 (1935)).

[36] *Warren* v. *Senecal* (71 Mont. 210, 228 Pac. 71 (1924)).

[37] Citing *Wheat* v. *Cameron* (64 Mont. 494, 210 Pac. 761 (1922)).

[38] *Scherck* v. *Nichols* (55 Wyo. 4, 95 Pac. (2d) 74 (1939)).

able," inasmuch as the owner of the land has the right to grant an easement in the land. As to the general principle, Wiel has stated, citing numerous cases: [39]

* * * as to private land the principle is to day equally clear from the decisions, which now in all jurisdictions hold that an entry upon private land to build ditches or dams or other structures or work is a plain trespass and unlawful, like any trespass upon private property. An appropriation cannot be initiated unlawfully by a trespass upon private land, and no rights can be obtained thereby against the landowner whose land is trespassed upon, in any jurisdiction. * * *

The Supreme Court of Idaho held in *Marshall* v. *Niagara Springs Orchard Co.*[40] that as an initiation of a right to appropriate public water on private land is void as against the landowner, a permit from the State engineer was of no effect if the facts stated in the application were secured by entrance upon and surveys of the premises without the consent of the landowner. It was stated that if the landowner would not permit the entry, the intending appropriator should have proceeded under the statute to condemn the right or easement. Where he did not do so in the first instance, and nevertheless secured from the State a permit to appropriate water, his action to condemn a right of way for a ditch and powerhouse was dismissed. In another case [41] the data required for the application to appropriate water were obtained by surveys made from the highway, without going on the land. Here there was no trespass and it was held that the permit was properly issued. The court, however, made the broad statement that a water right initiated by trespass is void, and—

That is to say, one who diverts water and puts it to a beneficial use by aid of a trespass does not, pursuant to such trespass, acquire a water right. Any claim of right thus initiated is void.

In a Washington case [42] it was held that a technical trespass, such as the posting of notices of appropriation on unoccupied private land, without riparian rights, would not render the posting unavailable to the appropriator as a lawful initiation of the appropriation.

The question of completing an appropriation by beneficial use of the water on land trespassed upon is discussed hereinafter (p. 310).

### The Method of Diversion and Conveyance of the Water to the Place of Use Must Be Such as Will Avoid Unnecessary and Unreasonable Waste, Measured by the Methods Customarily Prevailing in the Region

While the rule prevails that unreasonable and unnecessary losses of water are not to be tolerated, the court decisions take cognizance of the fact that the older systems used in diverting and distributing water for irrigation have often been far from perfect, notably in the less prosperous agricultural areas. They also recognize that the cost of replacement of old earthen ditches with concrete-lined canals and pipes, while justifiable under certain agricultural-economic conditions, would be greater under other circumstances than the value of the water to be saved. Hence reasonable losses of water in transit between the

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[39] Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 221, p. 244.
[40] 22 Idaho 144, 125 Pac. 208 (1912).
[41] *Bassett* v. *Swenson* (51 Idaho 256, 5 Pac. (2d) 722 (1931)). Approved in *Idaho Power Co.* v. *Buhl* (— Idaho —, 111 Pac. (2d) 1088 (1941)).
[42] *State ex rel. Ham, Yearsley & Ryrie* v. *Superior Court* (70 Wash. 442, 126 Pac. 945 (1912)).

point of diversion and the place of use do not affect the validity of the appropriation.[43] But it has also been held that the diversion works must be maintained in such condition and the water distributed and applied in such manner as to entail the least possible waste, if a diversion of the full amount of water called for by the appropriation is to be allowed.[44] A reduction of avoidable losses in the diversion of water, to the use of which others also have rights, will be required, even though some expense must be incurred in putting the facilities in reasonably effective condition.[45]

"Reasonableness" as applied to the question of avoidable water losses is a highly variable term, as it is likewise in relation to other matters, depending as it does upon the circumstances of a particular controversy. It is apparent from the decisions of the courts that the custom of the country has a material bearing upon the conclusions of the courts as to what constitutes reasonableness in existing methods of diverting, distributing, and applying water to useful purposes. It was recognized in a fairly early Nevada decision [46] that the conveyance of water in an earth ditch through porous soil involves considerable loss which is generally unavoidable within any reasonable expense; but it was insisted that where there are junior appropriators, the first appropriator must continue his means of diversion and conveyance in at least as economical a manner as before the subsequent appropriations were made. A California decision [47] rendered two years earlier recognized ditches and flumes as the usual and ordinary means of diverting water in the State; hence parties who had appropriated water by such means could not be compelled to substitute iron pipes, though they might be compelled to keep their structures in good repair to prevent unnecessary waste. The Supreme Court of Oregon stated in 1912 [48] that the methods of use of the old settlers were the least expensive and no doubt somewhat extravagant—

> * * * yet they cannot be expected to install methods now that might reduce to a minimum the amount of water necessary, at a cost that would absorb the profits.

And the same court said in 1923: [49]

> We have not arrived at the stage of irrigation when farmers can practically lay iron water-pipes, or construct concrete ditches; yet the question that water for irrigation must be used economically and without needless waste is no

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[43] *Barrows* v. *Fox* (98 Calif. 63, 32 Pac. 811 (1893); *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.* (3 Calif. (2d) 489, 45 Pac. (2d) 972 (1935)); *Basinger* v. *Taylor* (36 Idaho 591, 211 Pac. 1085 (1922)); *Joseph Mill. Co.* v. *Joseph* (74 Oreg. 296, 144 Pac. 465 (1914)); *In re Althouse Creek* (85 Oreg. 224, 162 Pac. 1072 (1917)).

In the recent Utah case of *Tanner* v. *Provo Res. Co.* (99 Utah 139, 98 Pac. (2d) 695 (1940)) the court stated that the fact that some of the water appropriated leaked from the canal could not be material to another claimant; that if some of the water returned to the stream through seepage, it was only a temporary condition which the owners of the ditch were asserting every effort to remedy.

[44] *Sterling* v. *Pawnee Ditch Extension Co.* (42 Colo. 421, 94 Pac. 339 (1908)); *Stickney* v. *Hanrahan* (7 Idaho 424, 63 Pac. 189 (1900)); *Clark* v. *Hansen* (35 Idaho 449, 206 Pac. 808 (1922)): *Court House Rock Irr. Co.* v. *Willard* (75 Nebr. 408, 106 N. W. 463 (1906)); *Doherty* v. *Pratt* (34 Nev. 343, 124 Pac. 574 (1912)); *In re Willow Creek* (74 Oreg. 592, 144 Pac. 505 (1914), 146 Pac. 475 (1915)); *Cook* v. *Evans* (45 S. Dak. 31, 185 N. W. 262 (1921), 45 S. Dak. 43, 186 N. W. 571 (1922)); *Biggs* v. *Miller* (147 S. W. 632 (Tex. Civ. App. 1912)).

[45] *Foster* v. *Foster* (107 Oreg. 355, 213 Pac. 895 (1923)); *Broughton* v. *Stricklin*, 146 Oreg. 259, 28 Pac. (2d) 219 (1933), 30 Pac. (2d) 332 (1934)).

[46] *Roeder* v. *Stein* (23 Nev. 92, 42 Pac. 867 (1895)).

[47] *Barrows* v. *Fox* (98 Calif. 63, 32 Pac. 811 (1893)).

[48] *Little Walla Walla Irr. Union* v. *Finis Irr. Co.* (62 Oreg. 348, 124 Pac. 666, 125 Pac. 270 (1912)).

[49] *Foster* v. *Foster* (107 Oreg. 355, 213 Pac. 895 (1923)).

longer debatable. Public necessity demands such use and conservation of the public waters of the state.

The parties were required, by a certain date, to repair their ditches and flumes and to keep them in reasonable repair and with reasonable grade, which the court said could be done "without building concrete or new ditches, and at a reasonable expense."

The Idaho Supreme Court has stated that a water user is entitled to an allowance for only a reasonable loss in conducting his water from the point of diversion to the place of use, and that a loss of 50 percent was not a reasonable loss.[50] In this case it was stated that the farmers could not have been reasonably expected to build a cement ditch at a cost of $100,000, but that they could have been reasonably expected to prevent the water from spreading out over the ground in several places.

The Supreme Court of California stated in 1929:[51]

While an appropriator can claim only the amount which is necessary to properly supply his needs, and can permit no water to go to waste, he is not bound, as here claimed, to adopt the best method for utilizing the water or take extraordinary precautions to prevent waste. He is entitled to make a reasonable use of the water according to the custom of the locality and as long as he does so, other persons cannot complain of his acts. The amount of water required to irrigate his lands should, therefore, be determined by reference to the system used, although it may result in some waste which might be avoided by the adoption of another or more elaborate and extensive distribution system.

This language was quoted with approval in a California decision rendered in 1935[52] in which complaint had been made that the use of earth ditches resulted in large transmission losses. It was held that the appropriators as a matter of law had the right to divert by earth ditches, which they had been doing in some instances for more than 50 years, and could not be compelled to construct impervious conduits in order that seepage water might be made available to a later appropriator. While it was primarily the distribution systems that were under attack in this case, the decision stated that an appropriator is not required either to irrigate or to divert water in the most scientific manner known. A very recent Montana decision[53] holds that absolute efficiency of the means of diversion is not required, if the system is reasonably efficient, for otherwise the value of many existing water rights would be seriously impaired if not destroyed; and another, that economy should not be insisted upon to such an extent as to imperil success.[54] It has been shown, in chapter 4, in discussing the matter of protection in the means of diversion of ground waters, that the decisions have accorded the appropriator of water from a surface stream substantial protection in the continuance of his method of diversion if reasonable in the light of all the circumstances, and have denied protection in those cases in which the method was not deemed reasonable. (See page 169.)

The foregoing decisions, several of which were rendered in recent years, are representative of the attitude of the courts toward the

[50] *Basinger* v. *Taylor* (36 Idaho 591, 211 Pac. 1085 (1922)).
[51] *Joerger* v. *Pacific Gas & Elec. Co.* (207 Calif. 8, 276 Pac. 1017 (1929)).
[52] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.* (3 Calif. (2d) 489, 45 Pac. (2d) 972 (1935)). See also *Enterprise Irr. Dist.* v. *Willis* (135 Nebr. 827, 284 N. W. 326 (1939)); and *Worden* v. *Alexander* (108 Mont. 208, 90 Pac. (2d) 160 (1939)).
[53] *State ex rel. Crowley* v. *District Court* (108 Mont. 89, 88 Pac. (2d) 23, 121 A. L. R. 1031 (1939)).
[54] *Worden* v. *Alexander* (108 Mont. 208, 90 Pac. (2d) 160 (1939)).

burden which rests upon an appropriator in the maintenance of his diversion and distribution works. He will not be penalized because a loss of water takes place in transit, the permissible loss depending upon the character of his appliances; he will be required to keep the appliances in repair, and to incur some expense if necessary to prevent substantial leaks which materially deprive others of the use of water; but he will not be required to reconstruct his system in order that water may be saved for the use of other appropriators if such system is typical of those prevailing generally in the region. The question as to whether his method of diversion and distribution is reasonable is determined by applying these principles to the facts of the particular controversy.

### The Right Is Acquired for a Particular Purpose

As some uses of water are consumptive and others are non-consumptive, and as certain uses are given preference over other uses under certain circumstances, the purpose for which water is appropriated is important. These matters are discussed more fully hereinafter in connection with "Purposes for which rights may be acquired" (page 314) and "Preferential uses of water" (page 337). The character of use under an appropriative right may be changed under some circumstances. (See page 382.)

### The Appropriation Relates to a Definite Place of Use of the Water

To perfect an appropriative right it is necessary that proof of beneficial use be made. This includes in most States proof of the place of use—location of irrigated land, power plant, mill, or other means by which the water is put to use. The place of use may be changed under certain circumstances, as noted hereinafter (page 381); but even in Colorado, where the decisions are very liberal in affirming the right to transfer the use of water from one tract to another, the water appropriated and decreed may be applied to a larger or smaller acreage or to a different tract only so long as the decreed diversion is not exceeded or the vested rights of other appropriators are otherwise uninjured.[55] In the States having the permit system of appropriation, the place of use under State permits or licenses is recorded in the State engineer's office.

The place of use of water under an appropriative right may or may not be located on land contiguous to the stream from which the water is diverted, in which respect the doctrine of appropriation differs from the riparian doctrine with its requirement that the use of water be made in general only on riparian land. On many large irrigation projects in the West the area of land which would conform to the accepted definition of "riparian" land is a very small fraction of the total area irrigated; and even in the States which recognize the riparian doctrine, the water rights of most of the large irrigation enterprises consist principally or entirely of appropriative rights.

In some States there are limitations upon the diversion of water out of the watershed in which it naturally flows, even under appropriative rights, as noted hereinafter. (See page 360.)

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[55] *Hassler* v. *Fountain Mutual Irr. Co.* (93 Colo. 246, 26 Pac. (2d) 102 (1933)).

**The Question of Ownership of Land as Affecting the Right To Appropriate Water**

Perfection of the right to appropriate water for irrigation purposes requires application of the water to land, but it is not essential that the appropriator shall own the land outright. As the validity of an appropriative right does not depend upon the location of the land, in connection with which the right is exercised, with reference to the source of supply (excepting in those cases in which water may not be appropriated for use outside the watershed), so its validity does not depend upon the ownership of any land by the appropriator, or at least by the one initiating the appropriation. That is, ownership of land is not *of itself* a prerequisite; the important matter is that all steps taken in connection with the appropriation be taken in a lawful manner. In fact, under some circumstances even a trespasser upon land may appropriate water in connection with that land, while under other circumstances some courts have held that at least a valid right of possession of the land is necessary. (The question of locating the point of diversion on another's land has been discussed heretofore, p. 305.)

So far as public lands are concerned, the law of appropriation arose through the acts of persons who originally were trespassers on the public domain,[56] and the rights to water thus initiated were later recognized by Congress as against the claims of subsequent entrymen, in acts which contained no provisions concerning the qualifications of appropriators. (See ch. 2, p. 70.) It is apparently the rule that one may appropriate water for use on public lands without regard to the question of title to the place of use.[57]

As to private lands, it has been held in some States that a trespasser may make an original appropriation of water for use on the land trespassed upon and may later transfer the use to other property.[58] The Supreme Court of Washington, however, has ruled that an appropriator must own the land sought to be irrigated or be an actual bona fide settler having a possessory interest therein, with some evidence of an intent to acquire title.[59] This court stated in other cases, that an appropriation may be made of water which the appropriator may later sell, that he becomes a conditional owner of the water appropriated;[60] that while the appropriator need not own any lands, his appropriation is valid only to the extent of lands which may

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[56] Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 319, p. 342.

[57] Long, J. R., A Treatise on the Law of Irrigation, 2d ed., sec. 102, p. 181; Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 319, p. 342; Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, sec. 687, p. 1189.

[58] See, for example: *Smith* v. *Logan* (18 Nev. 149, 1 Pac. 678 (1883)); *Patterson* v. *Ryan* (37 Utah 410, 108 Pac. 1118 (1910)).

That this has been held is stated only as one example in *First Security Bank of Blackfoot* v. *State* (49 Idaho 740, 291 Pac. 1064 (1930)), to support the statement that water may be appropriated for beneficial use on land not owned by the appropriator, this water right becoming the property of the appropriator.

In *Seaweard* v. *Pacific Live Stock Co.* (49 Oreg. 157, 88 Pac. 963 (1907)) a water right was recognized as valid for use on property to which a lease had been acquired by the assignee of the water right, even though the initial use of the water was made by a trespasser on the land.

In *Alta Land & Water Co.* v. *Hancock* (85 Calif. 219, 24 Pac. 645 (1890)) it was stated that the use of water by a trespasser on the land of another does not make such water appurtenant to the land on which wrongfully used; but that it does not follow that use of water on land to which it is already appurtenant, by one who is a trespasser thereon, gives him such a right to the water that he may thereafter divert it from the land.

[59] *Avery* v. *Johnson* (59 Wash. 332, 109 Pac. 1028 (1910)).

[60] *Thorpe* v. *Tenem Ditch Co.* (1 Wash. 566, 20 Pac. 588 (1889)); *In re Alpowa Creek* (129 Wash. 9, 224 Pac. 29 (1924)).

be acquired and to which water is beneficially applied.[61] The matter of *initiating* an appropriation by trespass upon private lands has been discussed heretofore (p. 305).

The general rule, in any event, is that one at least rightfully in possession of land, even though not the owner, may make a valid appropriation in connection with such land, which water right remains his property and does not become the property of the landowner.[62] The appropriative right is property distinct from an estate in land,[63] and it exists without private ownership in the soil or without perfect title thereto, as against all persons except the Government or its grantees.[64] As the right can be acquired separate and apart from the land, an uncompleted title to the land on which beneficial use is to be made does not bar the acquisition of the right.[65] A lessee, then, can make an appropriation in his own behalf, which is his property unless he is acting as agent for the lessor;[66] and his right to transfer the appropriation to other land on the conclusion of his lease will then depend upon the State rule governing transfers of place of use and perhaps point of diversion (see p. 378), and upon the physical feasibility of making the change. The question of the right to appropriate water for the future use of others is discussed below.

The rule in Arizona is an exception to the above general rule. It has been recently emphasized in *Tattersfield* v. *Putnam*[67] that the water law of Arizona was derived principally from the old Spanish and Mexican laws; that under such laws, as enforced in the State of Sonora while Arizona was a part of that Mexican State prior to the cession, the holding of land was the basis for any valid appropriation of water from a public stream. Consequently the appropriator in Arizona must be the owner or possessor of land susceptible of irrigation, and a "possessor" must have a present intent and apparent future ability to acquire ownership of the land. A temporary possessor may not make an appropriation. As a necessary corollary, a lessee of land in that State cannot initiate an appropriation which inures to the benefit of his lessor; the lessor must make the appropriation.

Appropriations in all Western States are made not only by individuals but by public or private organizations or associations—Federal and State agencies, municipalities, districts, incorporated and unincorporated mutual companies, or commercial companies—for the purpose of supplying water to the inhabitants or landowners within their service areas. These appropriations are granted and exercised regardless of whether the agency or organization itself owns land or property served with the water. By far the largest part of the area irrigated from Western streams is served through organizations;[68]

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[61] *In re Ahtanum Creek* (139 Wash. 84, 245 Pac. 758 (1926)).

[62] Long, J. R., A Treatise on the Law of Irrigation, 2d ed., sec. 102, p. 181;
Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 318, p. 341;
Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, sec. 686, p. 1187.

[63] *Smith* v. *Denniff* (24 Mont. 20, 60 Pac. 398 (1900)).
See also *Sarret* v. *Hunter* (32 Idaho 536, 185 Pac. 1072 (1919)), and *Jensen* v. *Birch Creek Ranch Co.* (76 Utah 356, 289 Pac. 1097 (1930)).

[64] *Laurance* v. *Brown* (94 Oreg. 387, 185 Pac. 761 (1919)).

[65] *Kountz* v. *Olson* (94 Colo. 186, 29 Pac. (2d) 627 (1934)); *Hough* v. *Porter* (51 Oreg. 318, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909)).

[66] *First Security Bank of Blackfoot* v. *State* (49 Idaho 740, 291 Pac. 1064 (1930)).

[67] 45 Ariz. 156, 41 Pac. (2d) 228 (1935). See also *Slosser* v. *Salt River Valley Canal Co.* (7 Ariz. 376, 65 Pac. 332 (1901)), and *Gould* v. *Maricopa Canal Co.* (8 Ari. 429, 76 Pac. 598 (1904)).

[68] The census of 1930 shows that about two-thirds of the total area irrigated in 1929 was served through enterprises other than "individual and partnership." The segregation by enterprises for lands irrigated from streams is not shown. See Fifteenth Census of the United States: 1930, Irrigation of Agricultural Lands, p. 17.

and in the making of an application to appropriate water a requirement that all water users be named would be obviously impractical in many cases and would be impossible in the case of reclamation of new land. It is required under many of the water codes that the lands proposed to be irrigated be enumerated; in several States which provide for primary and secondary permits for the appropriation and use of stored water, the proposed lands are not enumerated in the primary permit for storage, but the parties proposing to use stored water must apply for secondary permits supported by written agreements with the reservoir owners and make proof of beneficial use under the terms of the two permits. (See appendix.)

It has been long settled and is therefore not open to question that a valid appropriation may be made for the sale or rental of water, otherwise public utilities would be unable to appropriate water for service to the public. This means that an appropriation of water may be made or at least initiated by one for the future use of another; and hence it may be perfected through the combined acts of an organization in initiating the procedure and making the diversion and distribution of water, and those of a number of individuals in applying the water to beneficial use.[69] Whether the corporation or other organization is deemed the agent of the water users in initiating the appropriation, or whether the water users are the agents of the organization in perfecting it by application of the water to beneficial use, makes no difference so far as the validity of the appropriation is concerned. Such a water right is governed by the principles of the appropriation doctrine as fully as is that of an individual who makes an independent diversion for his own use; and the fact that a large project is granted more time within which to perfect the right through beneficial use than is ordinarily accorded a small project or a partnership or individual is simply an application of the principle of diligence and good faith to the circumstances of the case, not a modification of the principle.[70]

It follows that a corporation empowered by its charter to do so may appropriate water for delivery to individuals who may be the present or prospective owners of its capital stock, or who then or

[69] See, for example: *Gould* v. *Maricopa Canal Co.* (8 Ariz. 429, 76 Pac. 598 (1904)); *Combs* v. *Farmers' High Line Canal & Res. Co.*, (38 Colo. 420, 88 Pac. 396 (1907)); *Jefferson County* v. *Rocky Mountain Water Co.* (102 Colo. 351, 79 Pac. (2d) 373 (1938)); *Bailey* v. *Tintinger* (45 Mont. 154, 122 Pac. 575 (1912)); *Sherlock* v. *Greaves* (106 Mont. 206, 76 Pac. (2d) 87 (1938)); *Nevada Ditch Co.* v. *Bennett* (30 Oreg. 59, 45 Pac. 472 (1896)); *In re Deschutes River and Tributaries* (134 Oreg. 623, 286 Pac. 563, 294 Pac. 1049 (1930)); *Sowards* v. *Meagher* (37 Utah 212, 108 Pac. 1112 (1910)).

The United States Supreme Court stated, in *Gutierres* v. *Albuquerque Land & Irr. Co.* (188 U. S. 545 (1903), affirming 10 N. Mex. 177, 61 Pac. 357 (1900)), a case arising in the then Territory of New Mexico, that there was no merit in the contentions that under the Desert Land Act all waters must be directly appropriated by landowners and that a Territorial legislature could not lawfully empower a corporation to become an intermediary for furnishing water to irrigate lands of others.

The fact that the carrier or distributing organization itself owns no irrigable land does not affect the validity of an appropriation of water for service to the public under the view that ownership of land of itself is not prerequisite to the right to make an appropriation. If the rule as to requisite possessory interest in land is satisfied by the consumer, a valid appropriation can be completed.

One may act as volunteer for another in the steps leading up to a perfected appropriation: *Scherck* v. *Nichols* (55 Wyo. 4, 95 Pac. (2d) 74 (1939)).

[70] The Idaho Supreme Court, in *Big Wood Canal Co.* v. *Chapman* (45 Idaho 380, 263 Pac. 45 (1927)), stated that the statute granting special privileges in the matter of making proof of beneficial use to those constructing irrigation projects covering more than 25,000 acres, is not class legislation; that both as to the time necessary to complete the application of water to beneficial use, and the detailed description of lands to which applied, there are reasonable differences which distinguish a large from a small irrigation project.

Reclamation of land is a continuing process, often requiring many years before the proof of completion of beneficial land use can be made. See page 299. See also Teele, R. P., "The Economics of Land Reclamation in the United States" (Chicago and New York, 1927), p. 181 et seq. See also Fifteenth Census of the United States: 1930, Irrigation of Agricultural Lands, p. 24.

later may enter into contracts with the company for the furnishing of water, or who are simply members of the public to the use of whom the water is dedicated. In some cases the individual water users have been held to be the appropriators and in other cases the appropriative right has been held to vest in the corporation.[71] This question is principally important in connection with problems of internal management and operation, contractual rights, and public relations—such, for example, as delivery of water, compulsory service, priority rights of consumers as against each other in time of scarcity of supply, ownership and transfer of land without shares of water stock, transfer of the right of use of water from one lateral to another or outside the regular service area, valuation for public-utility rate-making purposes, remedies against water users delinquent in payment of service charges, and remedies of creditors of the organization in case of default. These problems sometimes involve distinctions between the public and private attributes of organizations delivering the water, and for the most part they are outside the scope of the present discussion.[72]

### The Priority Date Determines the Right to Divert Water when the Supply Is Not Enough for All Claimants

The essence of the doctrine of prior appropriation is the exclusive right to divert water from a source at a time at which the water supply naturally available is not sufficient for the needs of all those holding rights to its use, such exclusive right depending upon the effective date of the appropriation with reference to the dates of other rights attaching to the same source. Obviously this is a most important factor. It is simply noted here as an element of the right, and is discussed in some detail later in this chapter in connection with "Implications of the exclusive character of the appropriative right." (See p. 326.)

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[71] For cases in which the public-service organization was held to be the appropriator, see: *Bailey* v. *Tintinger* (45 Mont. 154, 122 Pac. 575 (1912)): *Brose* v. *Nampa & Meridian Irr. Dist.* (24 Idaho 116, 132 Pac. 799 (1913)); *Nampa & Meridian Irr. Dist.* v. *Barclay* (56 Idaho 13. 47 Pac. (2d) 916 (1935)); *In re Walla Walla River* (141 Oreg. 492, 16 Pac. 2d) 939 (1932)); *Butte County* v. *Lovinger* (64 S. Dak. 200, 266 N. W. 127 (1936)), as to the 1881 water law.

The consumers were held to be the appropriators in: *Gould* v. *Maricopa Canal Co.* (8 Ariz. 429, 76 Pac. 598 (1904)); *Prosole* v. *Steamboat Canal Co.* (37 Nev. 154, 140 Pac. 720, 144 Pac. 744 (1914)).

The United States Supreme Court stated in *Montezuma Canal Co.* v. *Smithville Canal Co.* (218 U. S. 371 (1910)), a case arising in the then Territory of Arizona and involving the rights of users under one canal company as against those under another company, that the company, whether viewed as an appropriator or as a mere carrier for others, sufficiently represented the users to cause them to be bound by an adjudication decree.

The Colorado Supreme Court. in the very recent case of *Jefferson County* v. *Rocky Mountain Water Co.* (102 Colo. 351, 79 Pac. (2d) 373 (1938)). stated: "The cases in Colorado dealing with situations analogous to the one before us all hold that neither the ditch company alone nor the users alone are appropriators in the strict sense of that term." The act of diversion and the act of applying water diverted to a beneficial use, whether performed by the same or by different persons, are both necessary to constitute an appropriation and to keep it alive.

Different questions arise in case of mutual irrigation companies, in which the capital stock is owned by the water users themselves. The stockholder-water users are as a rule considered the holders of the water rights, or at least as the beneficial owners. For recent cases, see: *Adams* v. *Salt River Valley Water Users' Assn.* (53 Ariz. 374, 89 Pac. (2d) 1060 (1939)); *In re Walla Walla River* (141 Oreg. 492, 16 Pac. (2d) 939 (1932)); *Genola* v. *Santaquin* (96 Utah 88, 80 Pac. (2d) 930 (1938)).

In *Consolidated People's Ditch Co.* v. *Foothill Ditch Co.* (205 Calif. 54, 269 Pac. 915 (1928)), it was stated that the stockholders have in a certain sense an ownership in the water rights of the corporation, to the extent that they are equitably entitled to a proportionate distribution of the water which it acquires by appropriaion or otherwise. Other California decisions concerning the ownership of the water rights as between mutual companies and their shareholders are discussed in "Mutual irrigation companies in California and Utah," Farm Credit Admin., Coop. Div. Bul. 8 (1936), p. 212 et seq.

[72] For discussions of these questions, see Wiel, S. C., Water Rights in the Western States, 3d ed., vol. II, pp. 1235–1248; Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. III, pp. 2645–2714; Long, J. R., A Treatise on the Law of Irriga-

## Purposes for Which Rights May Be Acquired

### The Appropriative Right May Be Acquired for a Beneficial Purpose Only

The terms "beneficial purpose" and "beneficial use," which are so inherently a part of water law, do not lend themselves readily to accurate definition.[73] However, whether a given purpose or use is or is not beneficial under a definite set of circumstances, has been passed upon in many cases.

The statutes generally authorize the appropriation of water for a beneficial purpose, but most of them do not enumerate the purposes. Some of them require specific information in case of an application for a permit to use water for irrigation, and other data in case of use for power or for some other specified purpose, these requirements being primarily administrative. Still other provisions deal with preferential uses, as noted hereinafter (p. 337).

The usual purposes for which rights to the use of water may be acquired are mining, manufacturing and industrial uses generally, development of hydro-electric power, propagation of fish, irrigation, stock-watering, municipal, and domestic uses. All these have been held to be beneficial uses within the meaning of the statutory term. There can be little question about any proposed use which has as its object the substantial benefit or improvement of the appropriator's lands or which renders them usable, and which is a reasonable use in view of all the circumstances. It may be noted in this connection that the California Supreme Court has held, in a recent case,[74] that the use of an appreciable quantity of water in the winter for flooding land for the sole purpose of exterminating gophers and squirrels, in an area in which the need for water is great, is not a reasonable beneficial use under an appropriative right for irrigation; and that the Idaho Supreme Court [75] affirmed a finding to the effect that the flooding of lands in the winter for the purpose of forming a thick cap of ice, to promote the retention of moisture in the soil well into the growing season, was not a beneficial use. The Oregon court [76] declined to sanction the use of 40 second-feet of water for the purpose of carrying off debris during the irrigation season, pointing out that thereby about 1,600 acres of land would be deprived of water for irrigation, which would be a waste; but considered that such use would be beneficial during the nonirrigating season at such times as there were no demands for storage purposes. In a recent decision [77] the Montana court has

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tion, 2d ed., pp. 483–524; Hutchins, W. A., Mutual Irrigation Companies in California and Utah, Farm Credit Administration, Cooperative Division, Bul. 8 (1936); Hutchins, W. A., Commercial Irrigation Companies, U. S. Dept. Agr. Tech. Bul. 177 (1930).

Among the decisions on miscellaneous points in organization-consumer relationships not cited in these texts and bulletins or in this present discussion, are: *Harsin* v. *Pioneer Irr. Dist.* (45 Idaho 369, 263 Pac. 988 (1927)); *Yellowstone Valley Co.* v. *Associated Mortgage Investors* (88 Mont. 73, 290 Pac. 255 (1930)); *Brady Irr. Co.* v. *Teton County* (107 Mont. 330, 85 Pac. (2d) 350 (1938)); *Eldredge* v. *Mill Ditch Co.* (90 Oreg. 590, 177 Pac. 939 (1919)); *In re Silvies River* (115 Oreg. 27, 237 Pac. 322 (1925)); *Tedford* v. *Wenatchee Reclamation Dist.* (127 Wash. 495, 221 Pac. 328 (1923)).

[73] "The term 'beneficial use' is not defined in the Constitution. What is beneficial use, after all, is a question of fact and depends upon the circumstances in each case." *Denver* v. *Sheriff* (105 Colo. 193, 96 Pac. (2d) 836 (1939)). It was stated further that the factors which enter into the determination of beneficial use in case of a great and growing city are more flexible than those relating to the use of water on agricultural land.

[74] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.* (3 Calif. (2d) 489, 45 Pac. (2d) 972 (1935)).

[75] *Blaine County Inv. Co.* v. *Mays* (49 Idaho 766, 291 Pac. 1055 (1930)).

[76] *In re Deschutes River and Tributaries* (134 Oreg. 623, 286 Pac. 563, 294 Pac. 1049 (1930)).

[77] *Osnes Livestock Co.* v. *Warren* (103 Mont. 284, 62 Pac. (2d) 206 (1936)).

stated that "it is not clear that" the use of water for the purpose of maintaining a swimming pool or fish pond would not be a beneficial use and hence the basis of a valid appropriation. The Colorado court has held [78] that water diverted and used for the propagation of fish is devoted to a useful purpose for which a valid appropriation may be made.

Beneficial use of water for irrigation is not confined to use on cultivated lands; appropriations are made for the irrigation of uncultivated lands producing wild hay and pasture.[79] If the productivity of the land is materially increased by the irrigation, such use is a beneficial use for which a valid appropriation may be made.[80]

The Supreme Court of Utah has held that a valid appropriation of water cannot be made when the beneficial use will belong equally to all who seek to enjoy it, for the purpose and meaning of an appropriation is to take that which was before public property and reduce it to private ownership; hence no appropriation may be made for the irrigation of unsurveyed, uninclosed, unoccupied public domain for the sole purpose of producing food for wild waterfowl which, when propagated and raised, must be accessible to any person who may see fit to hunt upon that land.[81] This is a different matter from appropriating water for the irrigation of crops on occupied public land, even though the appropriator never acquires title to the land, or on rented private land, for the occupancy or rental gives exclusive possession of the crops. The Utah court has also held that an appropriation from a spring for watering range cattle is not valid where others enjoy the same privilege, as an appropriation involves control to the exclusion of the public.[82]

Recreational uses, particularly of a nonconsumptive character, when sponsored by a State, municipality, or some quasi-public entity, have been protected by those in charge of enforcing State regulations; and the water codes of two States authorize the appropriation of water for such purposes without restricting the privilege to public organizations. The Texas statute, in addition to the usual uses, includes public parks, game preserves, and recreation and pleasure resorts among the purposes for which water may be appropriated.[83] The Texas statute relating to preferred uses lists "recreation and

[78] *Faden* v. *Hubbell* (93 Colo. 358, 28 Pac. (2d) 247 (1933)).

[79] *Pyke* v. *Burnside* (8 Idaho 487, 69 Pac. 477 (1902)); *Sayre* v. *Johnson* (33 Mont. 15, 81 Pac. 389 (1905)); *Smyth* v. *Neal* (31 Oreg. 105, 49 Pac. 850 (1897)); *Rodgers* v. *Pitt* (129 Fed. 932 (C. C. D. Nev., 1904)).

The Colorado statute and decisions concerning irrigation of meadow land are referred to above. (See p. 303.)

[80] *Rudge* v. *Simmons* (39 Idaho 22, 226 Pac. 170 (1924)). There appears to be no question as to this in any of the Western States. The utility of irrigation water depends upon application to beneficial use without waste, with no restriction upon the kind of crop one may desire to raise. *In re Robinson* (61 Idaho 462, 103 Pac. (2d) 693 (1940)).

[81] *Lake Shore Duck Club* v. *Lake View Duck Club* (50 Utah 76, 166 Pac. 309 (1917)).

[82] *Robison* v. *Schoenfeld* (62 Utah 233, 218 Pac. 1041 (1923)).

[83] Vernon's Tex. Stats., 1936, Rev. Civ. Stats., art. 7470a. In *Diversion Lake Club* v. *Heath* (126 Tex. 129, 86 S. W. (2d) 441 (1935)), a lake had been formed by the construction of a dam by an irrigation company across a statutory stream, pursuant to an appropriative right; subsequently an owner of land on both sides of the lake procured a permit from the State board of water engineers for the purpose of appropriating and using the impounded water for a game preserve and recreation and pleasure resort. It was held that the character of the water was not changed, by the construction of the dam, from public to private, and that the right of the public to fish therein was not thereby destroyed. However, the court stated that the refusal to allow an exclusive right under these circumstances did not render the section of the statute relating to appropriations for game preserves and pleasure resorts wholly inoperative, "for one may appropriate public water for such purposes and divert it to his land and impound and use it there to the exclusion of the public."

pleasure" last, and "navigation" next to last, in the order of preference.[84] The South Dakota statute as amended in 1939 includes fire protection and public recreational purposes among the beneficial uses for which water may be appropriated.[85]

The California court, in a decision rendered in 1939,[86] recognized the storage of water for "flood control, equalization and stabilization of the flow and future use" as a beneficial use of water for which an appropriation may be made and must be made. The right of a city to store excess waters upstream for the present and prospective needs of its inhabitants was involved in this case, as against a downstream riparian owner whose riparian and appropriative rights were declared and protected by decree. The right to appropriate water for flood control only, as against a subsequent upstream appropriator for consumptive use, was not in issue. This matter is further discussed in the latter portion of this chapter in connection with specific operations for controlling the flow of water (p. 415; see also p. 324).

### Beneficial Use Has Come To Be Modified by the Requirement of Reasonableness, Measured by All the Circumstances of a Particular Case Including Local Customs of Diverting, Distributing, and Using Water

A provision found in several State water codes is that beneficial use shall be the basis, the measure, and the limit of all rights to the use of water. This, whether so expressly declared or not, is a fundamental characteristic of the appropriative right.

Waste of water is entirely out of harmony with the irrigation economy of the West. One's right to the use of water under the appropriation doctrine extends to no more water than can be beneficially used, for the purposes contemplated, at any time. Any excess must be left in or at least returned to the source of supply for use by the next appropriator in line of priority; and the same rule applies to all the appropriators, regardless of the seniority of their rights. The California Supreme Court, in emphasizing that the constitutional restriction[87] against waste of water rests upon *all* users of water, recently stated:[88]

> An accepted definition of the term "waste," as applied to the use of water, may be said to be: "To use needlessly or without valuable result; to employ prodigally or without any considerable return or effect, and to use without serving a purpose." (Webster's New International Dict., 2d ed.) The term is necessarily relative.

Technique in the use of water in the West, in both its engineering and agricultural phases, has greatly improved with the passing of the years. Early methods of diverting, distributing, and applying water to various uses were not evolved with the idea of conservation uppermost, for the supply of water generally then exceeded the demand. Various early decrees measured the right of an appropriator by the capacity of his ditch, rather than by the quantity of water needed for his purposes. However, increasing demands upon the available water supplies resulted long ago in revision of the earlier standards and led to the rule that the appropriative right is to be measured by beneficial

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[84] Vernon's Tex. Stats., 1936, Rev. Civ. Stats., art. 7471.
[85] S. Dak. Code, 1939, sec. 61.0102, as amended by Laws 1939, ch. 289.
[86] *Meridian* v. *San Francisco* (13 Calif. (2d) 424, 90 Pac. (2d) 537 (1939)).
[87] Calif. Const., art. XIV, sec. 3.
[88] *Meridian* v. *San Francisco* (13 Calif. (2d) 424, 90 Pac. (2d) 537 (1939)).

use of the water. For example, it was stated in a Nevada decision rendered in 1871 [89] that counsel on both sides conceded that the quantity of water appropriated is the least quantity that can be carried in the ditch; yet the same court four years later [90] held that if such ditch capacity is greater than necessary to irrigate one's land,

he must be restricted to the quantity needed for the purposes of irrigation, for watering his stock and for domestic purposes,

although the ditch capacity would limit the appropriation if the capacity were not more than sufficient for the purposes named; and the Nevada water code as enacted in 1913 [91] provides that the water right shall be restricted to the quantity of water necessary,

when reasonably and economically used for irrigation and other beneficial purposes, irrespective of the carrying capacity of the ditch; * * *

The measure of ditch capacity has been superseded throughout the West by the rule of beneficial use.[92] It is sometimes held that the ditch capacity limits the appropriation if the capacity is less than the appropriator's requirements; but this seems to be simply one of the yardsticks by which the limit of beneficial use is measured, for obviously, in perfecting an appropriation, beneficial use cannot be made of more water than the ditch will carry.

The trend, furthermore, now and for some time past has been toward adding the term "reasonable" to beneficial use of water; that is, not only must the use be beneficial to the appropriator, but it must be reasonable in relation to use by others who have access to the same source of supply. Reasonableness and economy of use are not by any means a recent development, for the terms appeared in some early decisions which imposed the requirement of beneficial use; [93] but reasonableness has been increasingly emphasized in recent years.[94]

Reasonable use of water obviously is not subject to any fixed measure of quantity, for it is a relative as well as a variable term. The use of 5 acre-feet per acre may be beneficial to a particular appropriator if he can apply that quantity of water to land without waterlogging it and can produce more crops than with the use of 3 acre-feet per acre; but the increased production with the additional 2 acre-

[89] *Ophir Silver Min. Co.* v. *Carpenter* (6 Nev. 393 (1871)).

[90] *Barnes* v. *Sabron* (10 Nev. 217 (1875)).

[91] Nev. Comp. Laws, 1929, sec. 7897 (Laws 1913, ch. 140, sec. 8).

[92] The adoption in western jurisdictions of this measure of ditch capacity and its later abrogation in favor of beneficial use are discussed at some length by Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, p. 495–511. See also Kinney, S. C., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, p. 1555–1567.

Note that in the earliest Montana decision on this point, *Caruthers* v. *Pemberton* (1 Mont. 111 (1869)), the appropriation was measured by the capacity of the ditch without running over its banks, near the point of diversion; and that in the most recent case, *Galahan* v. *Lewis* (105 Mont. 294, 72 Pac. (2d) 1018 (1937)), it was stated that the appropriator's needs and facilities, if equal, measure the extent of his appropriation, and that if his needs exceed the capacity of his means of diversion, then the capacity of the ditch measures the extent of the right. The South Dakota court stated in 1921 that the appropriative right is limited by the capacity of the ditch and by the amount of water actually needed. *Cook* v. *Evans* (45 S. Dak. 31, 185 N. W. 262 (1921), 45 S. Dak. 43, 186 N. W. 571 (1922)).

" 'The extent of an appropriator's right is limited not by the quantity of water actually diverted by him nor by the capacity of his ditch but by the quantity which is, or may be, applied by him to beneficial uses.' (26 Cal. Jur., p. 94.) This principle has been so well established by the decisions in this state, as well as in other jurisdictions where the right of appropriation exists, as to require no further citation of authority." *Thorne* v. *McKinley Bros.* (5 Calif. (2d) 704, 56 Pac. (2d) 204 (1936)).

[93] *Barnes* v. *Sabron* (10 Nev. 217 (1875)); *Shotwell* v. *Dodge* (8 Wash. 337, 36 Pac. 254 (1894)); *Roeder* v. *Stein* (23 Nev. 92, 42 Pac. 867 (1895)).

[94] The trend is indicated by statements in such cases as *Sterling* v. *Pawnee Ditch Extension Co.* (42 Colo. 421, 94 Pac. 339 (1908)); *Doherty* v. *Pratt* (34 Nev. 343, 124 Pac. 574 (1912); *Little Cottonwood Water Co.* v. *Kimball* (76 Utah 243, 289 Pac. 116 (1930)); *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.* (3 Calif. (2d) 489, 45 Pac. (2d) 972 (1935)); *Rocky Ford Canal Co.* v. *Cox* (92 Utah 148, 59 Pac. (2d) 935 (1936)).

feet may not be such as to render its use reasonable when the need of water by other appropriators for their own reasonable use is considered. As noted in the abstracts of appropriation laws in the appendix, statutory limitations upon the quantity of water per acre that is subject to appropriation are prescribed in a number of the States. These limitations represent an effort to define by legislation the maximum allowable beneficial use, and usually the provisions are directly or impliedly limited by the requirement that the right of an appropriator shall be further governed by a measure of use that is actually beneficial; in other words, the apparent intent of the law is that the appropriation shall be measured by beneficial use, even if such use is less than the statutory maximum. Frequently, in administrative practice, it is found that the statutory maximum is the quantity actually acquired by the appropriator, owing to the natural tendency of the latter to apply for the maximum and to exert every effort to obtain a permit or license for that quantity upon proof that he has put it to beneficial use. Reasonableness of use depends upon factors other than mere benefit to the appropriator; and reasonable beneficial use, therefore, is a highly variable term.

The difficulty or impossibility of prescribing a fixed standard of reasonable beneficial use has been recognized in a number of the decisions, and it is generally agreed that it must be arrived at upon full consideration of all the circumstances of each case. This may be illustrated by reference to a few decisions:

The Supreme Court of Oregon stated in a leading case [95] that wasteful methods common in the early days could not be tolerated when improved methods had come into use and water had become scarce. The Nevada Supreme Court stated [96] that while local conditions must determine the quantity of water to be diverted in order to get the needed quantity to the irrigated land,

> an appropriator has no right to run water into a swamp and cause the loss of two-thirds of a stream simply because he is following lines of least resistance.

A more reasonable method, if possible, must be devised to avoid such loss, even though it should occasion additional expense. That court also observed in another case that the quantity of water needed under a proper standard of use necessarily varies from year to year with seasonal changes.[97] The California Supreme Court has recently stated: [98]

> Preliminarily, it should be stated that, whatever quantity an appropriator has actually diverted in the past, he gains no right thereto unless such water is actually put to a reasonable beneficial use. (26 Cal. Jur. 93, sec. 286. ) What is a beneficial use, of course, depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.

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[95] *Hough* v. *Porter* (51 Oreg. 318, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909)).

[96] *Doherty* v. *Pratt* (34 Nev. 343, 124 Pac. 574 (1912)).

[97] *Gotelli* v. *Cardelli* (26 Nev. 382, 69 Pac. 8 (1902)).

[98] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.* (3 Calif. (2d) 489, 45 Pac. (2d) 972 (1935)).

A Federal court stated [99] that while the court cannot, in the absence of any law upon the subject, compel water users to adopt any particular system, nevertheless where the method is extravagant and wasteful and results in a use greater than the claimants are entitled to under their appropriations, it "might" give the excess to later appropriators. The Utah Supreme Court has stated [1] that where land can be irrigated with reasonably efficient systems of canals and laterals, it is the duty of the appropriators so to prepare their land that it may be irrigated with reasonable economy in the use of water, and to provide themselves with reasonably efficient means for diverting and applying the water to their land; and it is their responsibility to use the water in the customary manner and at the usual season of the year. The Idaho Supreme Court has said [2] that a prior appropriator is entitled to the use of water only to the extent that he has use for it when economically and reasonably used. That court, a few years later, declined to apply the term "waste" to the excess water required to irrigate steep land and the drainage therefrom, over that required for land more nearly level.[3] From the evidence in that case it appeared that the appropriator had adopted the methods of irrigation commonly employed in the locality, and that "any means which would lessen the excess would be so expensive as to be prohibitive." In a Nebraska decision rendered in 1939,[4] it was stated that prevailing customs and methods of applying water to the land in the interest of good husbandry in the territory in which it is to be used, and not the latest and most approved scientific method, are to be followed in determining the duty of water; and the maximum duty fixed by statute was held to have no application to a valid appropriation which had vested prior to the enactment, at a time when the appropriation was not limited by law as to quantity except that it must be for some useful and beneficial purpose and within the limits of the capacity of the diversion works. And in a Wyoming decision rendered in the same year the State supreme court held that the statutory limit of an appropriative right refers only to rights adjudicated under the laws of the State, not the former Territory, and stated that:[5]

> We cannot hold that the legislature has declared that the use of a volume of water in excess of one cubic foot per second for 70 acres of land under an adjudication granting a larger quantity is *prima facie* evidence of waste.

The factors which enter into the reasonableness of a method of diversion of water from the source and conveyance to the place of use, apply with equal force to a method of applying the water to the use for which it is appropriated. (See p. 306.) It appears, then, that under the current rule reasonableness in the diversion, distribution,

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[99] *Rodgers* v. *Pitt* (129 Fed. 932 (C. C. D. Nev. 1904)). It was stated, however, that the system of irrigation in common use in the vicinity, if reasonable and proper under existing conditions, is to be taken as the standard, although a more economical method might be adopted.
[1] *Hardy* v. *Beaver County Irr. Co.* (65 Utah 28, 234 Pac. 524 (1924)).
[2] *Washington State Sugar Co.* v. *Goodrich* (27 Idaho 26, 147 Pac. 1073 (1915)).
[3] *Beasley* v. *Engstrom* (31 Idaho 14, 168 Pac. 1145 (1917)).
[4] *Enterprise Irr. Dist.* v. *Willis* (135 Nebr. 827, 284 N. W. 326 (1939)).
[5] *Quinn* v. *John Whitaker Ranch Co.* (54 Wyo. 367, 92 Pac. (2d) 568 (1939)).

and use of water is essential to the right of appropriation; that this is to be measured by the circumstances of each case, in the consideration of which the weight of local customs is important; and that the necessity for conservation of water, important as it is generally recognized to be, has not yet become such a controlling consideration as to require the wholesale abandonment of established practices and their replacement by "diversion systems by which the last drop may be taken from the stream." [6]

### Domestic Use of Water by Farmers and Farming Communities Implies a Use for the Preservation and Maintenance of the Household, Including the Watering of Domestic Animals, and Probably Extends to the Irrigation of Family Gardens

The question as to what constitutes domestic use of water in farming communities appears to have been considered more generally in decisions involving riparian rights than in those concerning appropriations of water for domestic purposes. The right to the use of a stream for the sustenance of the riparian owner and his family is inherent in the riparian right in the jurisdictions which recognize the riparian doctrine. Likewise there appears to be no question that water may be appropriated under the general doctrine of appropriation for domestic use; but the riparian cases seem to constitute most of the authority as to what the use actually contemplates. An appropriation of water by an individual for domestic purposes, as compared with a city's appropriation for municipal purposes and the supplying of its inhabitants with water, or with the aggregate of community uses generally, would ordinarily be so small in quantity as to have by itself little effect upon the supply of water available for all appropriators from the same source and therefore not likely to raise the specific question as between appropriators as to what is embraced in the term domestic use. Furthermore, in practice, it is common for appropriators to use for household purposes a portion of the water appropriated for irrigation, this necessarily being a small fraction of the whole.

It is implicit in this discussion that domestic use by individuals or small groups in farming communities is distinguished from large uses of water by municipalities and their inhabitants. Public water districts, municipalities, and public-utility corporations may appropriate water for such public uses as fire protection, sprinkling of streets, watering of parks, and use in public buildings, and for the personal use of the citizens in connection with their industrial buildings and plants, homes, and lawns, under contractual arrangements with consumers. Controversies have arisen over the application of the term domestic use as applied to these public or semipublic uses, notably under the constitutional and statutory provisions purporting to make domestic use a preferred use of water (see discussion of preferred uses, below in this chapter, p. 354), but the question here concerns the essentially small domestic uses in farming communities for which separate appropriations are made.

Domestic use, then, as distinguished from use in municipalities, means primarily the use of water for drinking and other household

[6] *State ex rel. Crowley v. District Court* (108 Mont. 89, 88 Pac. (2d) 23; 121 A. L. R. 1031 (1939)).

purposes. There are various statements in the decisions to the effect that it includes water for domestic animals; but this inclusion is usually by way of stating, in substance, "domestic use and the watering of animals," for at the common law the right to water cattle in a stream flowing through one's land appears to have been as much a part of the landowner's prerogative as his right to use the stream for drinking and culinary purposes.[7] The Idaho appropriation statute defines "domestic purposes" as including water for the household and for domestic animals kept with and for the use of the household; [8] and it also provides that whenever any waters are appropriated or used for "agricultural or domestic" purposes under a sale, rental, or distribution thereof, the term "domestic purposes" shall not be construed to include any manner of land irrigation.[9] The Texas statute gives first preference in the appropriation of water to "domestic and municipal uses, including water for sustaining human life and the life of domestic animals;" [10] and the South Dakota statute relating to the location of township artesian wells and the use of water therefrom defines domestic purposes as "household use, the supply of domestic animals kept with and for the use of the household and farm, and the watering and sustaining of trees, grass, flowers, and shrubbery about the house of the consumer in an area not exceeding one-half acre of land." [11] In an Oregon decision [12] an application to appropriate water for "domestic and farm power purposes and domestic supplies" was held to include the watering of milk cows, horses, and hogs. It would appear, in general, that domestic use includes not only water required for the immediate preservation of life and the maintenance of normal household operations, but also the use of water for animals needed for the operation of the farm and for the sustenance of the farm family.

The watering of entire herds of stock is a different matter. While some of the decisions on the riparian owner's right to water his cattle have not drawn a distinction based upon the number of animals, the California Supreme Court, in discussing such an owner's right to exhaust a stream, raised the question as to whether under some circumstances "the exhaustion of an entire stream by large bands of cattle" ought to be permitted.[13] In any event, the watering of herds of cattle or sheep is more properly classified as a stock-watering purpose, as distinguished from a domestic purpose, and a separate appropriation of water may be made for that purpose. This is discussed in the latter portion of this chapter in connection with the relation of structures to water rights (pp. 419–420). It is true that the watering of his entire herd is necessary to the livelihood of the rancher, but so is the irrigation of his alfalfa and grain fields and his orchards. As the line must be drawn somewhere, the logical test as to whether the watering of animals is or is not a domestic use would seem to be,

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[7] Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 740, p. 795 et seq. See also *Montrose Canal Co.* v. *Loutzenhizer Ditch Co.* (23 Colo. 233, 48 Pac. 532 (1896); *Lux* v. *Haggin* (69 Calif. 255, 10 Pac. 674 (1886)); *Stanford* v. *Felt* (71 Calif. 249, 16 Pac. 900 (1886)); *Hough* v. *Porter* (51 Oreg. 318, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909)).

[8] Idaho Code Ann. 1932, sec. 41–111.

[9] Idaho Code Ann. 1932. sec. 41–814.

[10] Vernon's Tex. Stats. 1936, Rev. Civ. Stats., art. 7471.

[11] S. Dak. Code 1939, sec. 61.0731.

[12] *In re Schollmeyer* (69 Oreg. 210, 138 Pac. 211 (1914)).

[13] *Lux* v. *Haggin* (69 Calif. 255, 10 Pac. 674 (1886)).

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whether the animals to be watered are required for immediate farm and family sustenance purposes.

The question also arises as to whether domestic use includes the irrigation of family gardens. There is apparently little authority on this point in cases on the appropriation of water. As noted heretofore (p. 321) the Idaho statute concerning the appropriation of water for "agricultural or domestic purposes" under a sale, rental, or distribution thereof, provides that "domestic purposes" shall not be construed to include "any manner of land irrigation." [14] Gould,[15] in discussing the right of the riparian proprietor to consume all the water of a stream for "ordinary" purposes on his riparian land, defines such purposes as those supplying his natural wants, including domestic purposes of the home or farm, such as drinking, washing, or cooking, and for his stock; and states further:

> The term "domestic purposes" extends to culinary and household purposes, to the watering of a garden, and to the cleaning and washing, feeding and supplying the ordinary quantity of cattle.

The Oregon Supreme Court stated that the purposes giving rise to the riparian doctrine were domestic use, including the watering of domestic animals and stock necessary for subsistence, and the watering of garden and other produce reasonably necessary for the riparian owner's domestic consumption, and distinguished these essentially family uses from the irrigation of large areas for the production of agricultural commodities.[16] The Arizona statute providing for preferences, when two or more pending applications to appropriate water conflict, states that the first preference is domestic and municipal uses, "domestic uses to be construed to include gardens not exceeding one-half acre to each family." [17] A Colorado statute provides that water appropriated for domestic purposes is not to be used for irrigation, except that a city or town may use domestic water for sprinkling streets, extinguishing fires, and household purposes.[18] The South Dakota statute has been noted above. As shown in chapter 4, small domestic, stock, and lawn and garden uses are exempted from the provisions of the Oregon ground-water appropriation statute. (The Nevada and New Mexico ground-water statutes and the Texas artesian-control statute contain certain exemptions in case of domestic uses generally, as noted in chapter 4.) Under the Washington water code an appropriation for individual household and domestic use may include the irrigation of a family garden.[18a]

Doubtless the watering of small gardens the produce of which is used solely for immediate family consumption, and which is therefore necessary for the life of the family and hence for the maintenance of the household, would generally be considered as included in the definition of domestic use for which water is appropriated; although an exception is noted under the circumstances stated in the Idaho statute to which reference has been made. Clearly the watering of commercial vegetable gardens would not be so included, but would be

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[14] Idaho Code Ann. 1932, sec. 41–814.

[15] Gould, J. M., A Treatise on the Law of Waters, 3d ed., sec. 205, p. 396 and 397.

[16] *Hough* v. *Porter* (51 Oreg. 318, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909)).

[17] Ariz. Rev. Code 1928, sec. 3285.

[18] Colo. Stats. Ann. 1935, ch. 90, sec. 24.

[18a] Wash. Rem. Rev. Stats., 1931, sec. 7399.

classed as an irrigation purpose, for a use of water in that connection would constitute irrigation on a commercial scale.

### The Lawful Use of Water for Domestic Purposes Constitutes the Exercise of a Water Right

It is important to note that the lawful use of water for domestic purposes is the exercise of a water right of some form—riparian, appropriative, ground-water, or other individual water right, or the right inherent in the public to drink from flowing streams. Therefore, such right must be exercised in relation to the rights of others in the particular source of supply from which the domestic water is taken.

The question of one individual's right to take water from a flowing stream, for the use of his family and for a few horses and cows, will seldom arise, particularly so long as there is a good flow in the stream. If he lives in a riparian-rights jurisdiction, this taking is within his right. If all riparian rights in the jurisdiction have been abrogated, and if he has not made an appropriation of water, he literally has no such exclusive right to any of the flow as to enable him to require upstream users to release water for his needs. Any abstraction of the water on his part is then at the sufferance of downstream appropriators, whose appropriative rights entitle them to enjoin any upstream diversion which materially injures them. While, then, the question is not likely to arise so long as there is an ample supply in the stream, nevertheless if a taking without proper authorization can be proved to result in injury to the holders of valid rights, it is undoubtedly subject to injunction. As noted in the appendix, the statutes of some States grant the public certain rights in this connection: Kansas, to the effect that any person may take water from any stream for filling receptacles for his own domestic use; New Mexico, to the effect that travelers may take water from certain natural sources for their own use and that of a few animals, and that the requirements of the water appropriation statute do not apply to stockmen who construct tanks or wells for watering stock. Certain exemptions in favor of domestic use are found in the ground-water appropriation statutes of Nevada, New Mexico, and Oregon and in the artesian-well control statute of Texas, as noted above.

This matter is discussed in a recent decision of the Supreme Court of Utah.[19] Sheepmen had grazed large herds in the upper part of a watershed for more than 40 years, and had watered them at springs and in flowing streams without making a statutory appropriation. The court stated that while water—

> is flowing naturally in the channel of the stream or other source of supply, it must of necessity continue common by the law of nature, and therefore is nobody's property, or property common to everybody. And while so flowing, being common property, everyone has equal rights therein or thereto, and may alike exercise the same privileges and prerogatives in respect thereto, subject at all times of course to the same rights in others, and to the special rights to divert and use which have theretofore attached, vested or been recognized by law. * * * And so, while water is still in the public, everyone may drink or dip therefrom or water his animals therein, subject to the limitations above noted as to the rights of the appropriator as fixed by law to his quantity and quality. This right of the public, as well as the rights of the appropriator, were confirmed by the State Constitution in article 17 * * *.

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[19] *Adams* v. *Portage Irr. Res. & Power Co.* (95 Utah 1, 72 Pac. (2d) 648 (1937); 95 Utah 20, 81 Pac. (2d) 368 (1938)).

The court went on to hold that until there had been a lawful diversion or appropriation of water from a natural channel, or artificial interference with the flow for storage in the channel, the appropriator could not assert any rights in and to the water itself; consequently so long as he receives at his point of diversion the quantity and quality of water to which his appropriation entitles him, he has no control over or concern with what any one else may do on or with the stream or what uses they may make of it. The appropriative right is a preferential right to insist as against the public that the required quantity of water come down; and coincident with that right, the public has a right to insist that no more than his quantity come to him. Consequently—

Any excess in the stream, or any increase therein over his preferential right, is subject to appropriation or to the general rights of the public therein.

The question may well arise in case of a new community the members of which do not proceed to initiate water rights. Whether the community is located on a stream and plans to make small individual diversions for domestic purposes, or is located away from a stream and plans to install small individual wells for home and garden use, the cumulative effect of such withdrawals of water may result in sensible diminution in the supply available for holders of established rights. The water law applicable to the common source of supply may then be invoked. If so, the members of the community will be held to their reasonable proportion of the total water supply if they are diverting from ground water in a reasonable-use jurisdiction; or they may be allowed, on the other hand, to make unlimited use of ground waters for this purpose if the common-law rule of absolute ownership obtains in that State, or of stream waters if they live on riparian land in a riparian-doctrine State; or again, they may be required to appropriate water from the stream or from the ground supply, and will be held to the priorities so acquired, if appropriative rights apply to the source in question.

### An Appropriation May Be Made for the Storage of Water

The storage of water is a means of making spring flood flows available for late-season use, when the direct flow of streams is usually low, and of carrying water over from years of abundant precipitation to supply the deficiencies of subsequent drought seasons. It is a means of conservation of water, as well as a feature of flood protection; hence appropriations may be made for storage as well as for direct use of water. The storage is of course a means to an end—the application of the water to beneficial use, such as the irrigation of land, or the passing of the water through a plant for the generation of electrical energy. As noted in the first part of this chapter and further discussed in the latter portion, the California Supreme Court has recently stated that the storage of water for "flood control, equalization and stabilization of the flow and future use" is among the beneficial uses of water for which an appropriation may be made and must be made.[20] The Oregon Supreme Court, in the statutory adjudication *In re Willow Creek*,[21] stated that water

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[20] *Meridian* v. *San Francisco* (13 Calif. (2d) 424, 90 Pac. (2d) 537 (1939)). See pages 316 and 415 herein.

[21] 74 Oreg. 592, 144 Pac. 505 (1914), 146 Pac. 475 (1915).

awarded for direct irrigation might be stored for later use if such operation did not materially interfere with prior rights.

The appropriative procedure in some States, of which Utah is an example, involves a single filing for both storage and beneficial use of the water, the reservoir being part of the distribution system. In some other States, for example Wyoming, two permits are required—a primary permit, by the person proposing to divert and store water, and a secondary permit, by those who propose to apply the water to beneficial use. In addition, in Wyoming, a supply ditch permit is required if the reservoir is away from the channel of the stream from which water is diverted. The storage priority dates from the filing of the application, as in case of direct-flow priorities. (See statutory provisions of each State in the appendix.)

Until recently, there had been a question in Colorado as to the relative preferences of direct-flow and storage rights on a given stream. These rights are acquired on different bases, and in stream administration the groups are kept distinct. It was held in *Handy Ditch Co.* v. *Greeley & Loveland Irrigation Co.*[22] that an appropriator cannot claim storage rights for even temporary periods under an appropriation for direct irrigation. The first opinion in *People ex rel. Park Reservoir Co.* v. *Hinderlider*,[23] in 1935, upheld a judgment sustaining a demurrer, the result of which would have been to deny a reservoir with senior priority the right to store water at a time at which ditches with direct-flow priorities junior in time to the reservoir priority, needed the water for direct irrigation; but this decision was reversed in 1936 on representation of the case, with leave of court but without granting a rehearing, the effect of the reversal being to deny preference to either group otherwise than on a basis of priority. The individual priority of an appropriation therefore governs, regardless of its classification as a direct-flow or a storage right. (See Nebraska statutory provision, p. 444 below, par. 2.5.)

## Rights-of-Way for Ditches and Structures

The acquisition of a right of access to the watercourse from which it is proposed to divert water is especially important in case of an appropriative right, where the place of use is not necessarily on riparian land and where, therefore, the water must probably be conveyed across the lands of others from the point of diversion to the place of use and in many enterprises will be stored in reservoirs pending future use. This problem, however, is one of effectuating the use of water, rather than an element of the right of use or ownership of water, and as stated in the Preface, it is not one of the special problems to which this study has been directed. A chapter on rights-of-way over both private and public lands, with discussions of the pertinent Federal statutes including the Federal Water Power Act, appears in the recent work by Prof. S. T. Harding on the practical application of legal principles governing water rights.[24]

[22] 86 Colo. 197, 280 Pac. 481 (1929).
[23] 98 Colo. 505, 57 Pac. (2d) 894 (1936).
[24] Harding, S. T., Water Rights for Irrigation: Principles and Procedure for Engineers, ch. IX, pp. 124–137.

## Implications of the Exclusive Character of the Appropriative Right

### The Measure of the Appropriative Right Is Specific

The right of an individual to appropriate water, being exclusive instead of correlative with that of other individuals, is necessarily specific in its provisions. That is, as heretofore stated (p. 298), it carries a date of priority, is stated as a definite number of second-feet or acre-feet, refers to a defined point of diversion, and covers a stated season during which the water may be diverted. It usually relates to specified uses to which the water is to be applied, and in many States the irrigation use attaches to certain lands only, with described boundaries.

### The Right Carries a Fixed Priority

A fundamental element of the doctrine of appropriation is that priority as to time gives the superior right. This is sometimes stated: "First in time, first in right." The one who first initiates an appropriation acquires, if he completes or perfects the appropriation according to law, a first and exclusive right to the extent of that appropriation. And each succeeding appropriation on a stream has priority over all appropriations subsequently made.

The date of priority, then, is of outstanding and often of vital importance.

> Property rights in water consist not alone in the amount of the appropriation, but, also, in the *priority* of the appropriation. It often happens that the chief value of an appropriation consists in its *priority* over other appropriations from the same natural stream. Hence, to deprive a person of his priority is to deprive him of a most valuable property right. * * * [25]

Under the so-called "doctrine of relation," the priority of an appropriation dates from the taking of the initial step required by statute in making the appropriation, provided reasonable diligence has been pursued in completing the appropriation by applying the water to beneficial use. This principle affords priority to the one who first begins his appropriation, if he follows it diligently throughout, over another who may have initiated his appropriation at a date later than that of commencement of the first appropriation but who has completed it at a date earlier than that of the completion of the first appropriation. The priority of an appropriation which has not been completed with reasonable diligence dates from the time of completion, rather than initiation of the project. In a State such as Idaho, where a valid appropriation may be made either by complying with the statutory procedure or by diverting and applying water to beneficial use without applying for a permit, the priority of one who complies with the statute dates from the beginning of the appropriation, and the priority of one who does not, dates from the time of completion.[26]

[25] *Nichols* v. *McIntosh* (19 Colo. 22, 34 Pac. 278 (1893)).
This language was quoted with approval in the very recent case of *Vonberg* v. *Farmers Irr. Dist.* (132 Nebr. 12, 270 N. W. 835 (1937)).

[26] *Washington State Sugar Co.* v. *Goodrich* (27 Idaho 26, 147 Pac. 1073 (1915)); *Reno* v. *Richards* (32 Idaho 1, 178 Pac. 81 (1918)).

The question as to what constitutes reasonable diligence is a matter of fact to be determined by the court from all the circumstances. Under the several water codes governing the acquisition of rights under State administrative procedure, the date of application to the State engineer for a permit to appropriate water establishes the priority as of that date, subject to compliance with all further requirements of the statute and administrative regulations; and the matter of diligence is controlled by requiring construction work to be commenced and diligently prosecuted to completion and the water applied to beneficial use within definite periods fixed by the statute or by the State engineer, with extensions of time for good cause shown. The action of the State officer in canceling or declaring an application forfeited for noncompliance with law or in exercising whatever discretion the statute allows him in supervising the acquisition of an appropriative right is subject to review in the courts.

If one acquires and perfects an appropriation of the entire flow of a river, no one else may divert any of the water while the first appropriator is using it under the terms of his appropriation. If he appropriates only a portion of the stream, later comers may appropriate the balance.

There may be a large number of individual appropriators on a given stream. Their rights are listed in the order in which they are acquired. When the quantity of water physically available in the stream is not sufficient to satisfy all these priorities, as they are termed, it is given to the earliest ones only. If at a given time the flow of the stream is 100 second-feet, and the four earliest appropriations are for 30 second-feet each, the three earliest will be given a total of 90 second-feet, and the fourth will receive the 10 second-feet left over. As the volume of the stream drops, the diversion gates of the appropriators are closed in the reverse order of their priorities, always reserving sufficient water to fill the earlier ones completely; as the volume increases, the diversion gates are opened again, in the order of priority, to the extent thus made possible.

A single individual may have several different appropriations or priorities for one farm or tract of land, served through one diversion headgate. He may, for example, have the first, sixth, and ninth rights on a stream, secured, usually, for different portions of his farm. Such priorities are served in order, just as though held by different individuals for different farms. The fact that the same ditch by means of which water is diverted under a prior appropriation is also used to divert water under later appropriations, does not in any way affect the fact that the latter were new, successive, and several appropriations.[27] Furthermore—

> Any person or number of persons may have an interest in, or become the exclusive owner or owners of, different water rights, each of which rights may have had their inception at different times, and in such cases the order of their respective priorities must necessarily depend upon the dates of the initiation of each particular right.[28]

The priority of an appropriation does not depend upon the location of one's point of diversion. The first appropriation may be made at a point near the headwaters of a stream, or near its mouth, or at any

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[27] *Simpson* v. *Bankofier* (141 Oreg. 426, 16 Pac. (2d) 632 (1932), 18 Pac. (2d) 814 (1933)).

[28] *Whited* v. *Cavin* (55 Oreg. 98, 105 Pac. 396 (1909)).

intermediate place; and later appropriations are junior in all respects, regardless of whether their points of diversion are upstream or downstream from the diversion of the senior appropriator. Consequently an appropriator must allow sufficient water to pass his headgate to supply fully the requirements of all downstream appropriators whose priorities are senior to his own, before he may legally divert any water under his own right; notwithstanding his own need for water at any particular time, his headgate must be kept closed if the flow of the stream at that point at such time is not more than enough to supply all lower prior rights. In view of the vital necessity of water in an arid region, it may be appreciated that disputes over the opening and closing of headgates have usually been bitter and frequently have been accompanied by violence and bloodshed. From this has come the desirability of adjudications of water rights and the appointment of State officials or court commissioners with authority to regulate diversions and lock headgates, supported by adequate funds for properly policing the stream systems.

### The Appropriator's Right, of Which the Priority Is an Essential Element, May Be Defended and Protected as a Property Right Against Acts Which Interfere With Its Proper Exercise

It is fundamental, of course, that a right of property is entitled to protection in the courts. The appropriative water right is a special kind of property right, the lawful enjoyment of which depends upon having water of the proper quality and in the proper quantity at the place of use throughout the periods of time contemplated by the appropriation, so far as the naturally available supply permits. Protection therefore is necessary against interference of two kinds with the exercise of the right: Interference with the appropriator's lawful acts in diverting water from the stream and conveying it to the place of use; and interference with the natural flow of water in the stream above his point of diversion, by those junior in right or those without valid right, of such character as to prevent him from receiving water at his headgate in accordance with the strict terms of his appropriation. This rather elemental need of protecting the right of appropriation was developed in the very earliest years of the appropriation doctrine in the West, but owing to the variety of circumstances under which infringements were complained of, the rule has had to be stated and restated in a large number of court decisions. It is a well-settled general rule, stated in the texts on water law,[29] and supported on abundant authority. Some of the more important aspects of protection afforded the right of prior appropriation are discussed in the following pages.

### The Right of Protection Extends in General to All Sources of Water Supply

A principle of the doctrine of prior appropriation is that the interest of the appropriator attaches to the stream from his point of diversion to the source of the stream, and that consequently an

[29] Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, sec. 782, p. 1361; Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 337, p. 358; Farnham, H. P., The Law of Waters and Water Rights, vol. III, sec. 674, p. 2089; Gould, J. M., A Treatise on the Law of Waters, 3d ed., sec. 229, p. 454; Long, J. R., A Treatise on the Law of Irrigation, 2d ed., sec. 134, p. 234; 27 R. C. L. 1277, sec. 187.

In the very early case of *Hoffman* v. *Stone* (7 Calif. 46 (1857)), it was held that action would lie for the diversion of water away from the first appropriator.

appropriative right is entitled to protection from unauthorized destruction of or interference with the flow in all sources of water supply of the stream on which the right is acquired. Protection is extended as against impairment of quality as well as quantity of the water. In applying this general principle of protection to specific sources, however, modifications sometimes appear. The questions of sources in diffused surface waters and ground waters are treated in chapters 3 and 4.

The principle is well established that water flowing in the tributary streams, above the point of diversion on the stream on which the right is acquired, is as much a part of the appropriator's supply as is the water flowing in the main stream named in the appropriation; accordingly an attempted diversion of water from an upstream tributary, at a time when needed by prior appropriators below on the main stream, will be enjoined.[30] The need of this protection is obvious; unlimited acquisition of rights on tributaries would eventually deprive the main-stream prior appropriators of their water supply and thus destroy their water rights. The need of having protection against unauthorized diversions downstream and from lower tributaries is just as great, and is equally afforded, when the result of the junior diversion below "is to require the prior appropriator to surrender the right to additional water for the purpose of supplying appropriations senior to his below the point where such tributary joins the main stream." [30a] The test in any case is the extent of actual injury to the prior appropriative right resulting from unauthorized diversions by others.

The nature of this property right is thus elaborated by the Montana Supreme Court, in a fairly early decision: [31]

> Each person owning a valid water right in Lewis and Clarke county is the owner of a certain incorporeal hereditament, to-wit, the right to have the water flow in Prickly Pear creek from the head thereof, and from the head of each tributary thereof above his place of diversion, in sufficient quantity to the head of his ditch or place of diversion, and to have it of such quality as will meet his needs as protected by his water right; that is, he owns an easement in the stream and its tributaries above his point of diversion. He also has the right to require appropriators subordinate to him and his water right, who have appropriated and who take water from the stream or its tributaries below his point of diversion, to forbear using such water when such use will deprive appropriators prior to him, downstream, of the use of water to which they are entitled; otherwise he might be required to forbear the use of water to which he is entitled in order to supply the appropriator first in order of priority. This interest in the stream and its tributaries is an easement, and is part of and incident to the water right, to-wit, the property sought to be condemned.

As the presumption is that the flow of a tributary contributes to the flow of the main stream, the upstream junior appropriator has the burden of rebutting the presumption if he asserts that the tributary

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[30] Wiel., S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 337, p. 358; Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, sec. 649, p. 1137 et seq.

For typical statements in court decisions, see *Strickler* v. *Colorado Springs* (16 Colo. 61, 26 Pac. 313 (1891)); *Malad Valley Irr. Co.* v. *Campbell* (2 Idaho 411, 18 Pac. 52 (1888)); *Josslyn* v. *Daly* (15 Idaho 137, 96 Pac. 568 (1908)); *Helena* v. *Rogan* (26 Mont. 452, 68 Pac. 798 (1902)); *Strait* v. *Brown* (16 Nev. 317 (1881)); *Low* v. *Schaffer* (24 Oreg. 239, 33 Pac. 678 (1893)); *Rasmussen* v. *Moroni Irr. Co.* (56 Utah 140, 189 Pac. 572 (1920)); *Moyer* v. *Preston* (6 Wyo. 308, 44 Pac. 845 (1896)).

[30a] *Platte Valley Irr. Co.* v. *Buckers Irr., Mill. & Impr. Co.* (25 Colo. 77, 53 Pac. 334 (1898)).

[31] *Helena* v. *Rogan* (26 Mont. 452, 68 Pac. 798 (1902)).

flow if left alone would not reach the main stream.[32] (See discussion of quantities of water useful to the prior appropriator, below, p. 334.)

### The Appropriator Is Entitled To Have So Much of the Stream Flow to His Point of Diversion as Is Necessary to Satisfy His Prior Right

One of the principles of the doctrine of prior appropriation is that the holder of the right is entitled to have the water flow in the stream and its tributary sources to his point of diversion, substantially undiminished in quantity and unpolluted in quality, so far as such flow is needed to satisfy his prior right under the specific terms of his appropriation.[33] The Supreme Court of the United States well stated this principle and its practical application in one of the very early decisions on the appropriation doctrine:[34]

> What diminution of quantity, or deterioration in quality, will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case, considered with reference to the uses to which the water is applied. A slight deterioration in quality might render the water unfit for drink or domestic purposes, whilst it would not sensibly impair its value for mining or irrigation. In all controversies, therefore, between him and parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant. But whether, upon a petition or bill asserting that his prior rights have been thus invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction.

This right of prior appropriation attaches to the flow of the stream in its natural condition at the time the appropriation is made.[35] Junior appropriators have no right so to interfere with the flow of water, by detaining and releasing it at irregular intervals and thus causing fluctuations of flow within wide limits, as to interfere seriously with the use of the water by downstream prior appropriators and thus cause them substantial damage, even though the total quantity flowing to the headgates of the latter over a 24-hour period is not diminished.[36] A mere temporary or trivial irregularity which does not cause real

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[32] Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, sec. 649, p. 1138.

Where there is evidence of subflow in a stream, the burden of proving that the water will not reach a downstream prior appropriator is upon the upstream junior appropriator who asserts that such is the case (*Jackson* v. *Cowan,* 33 Idaho 525, 196 Pac. 216 (1921)).

[33] 27 R. C. L. 1277, sec. 187. The California Supreme Court recently stated, in *Joerger* v. *Pacific Gas & Elec. Co.* (207 Calif. 8, 276 Pac. 1017 (1929)): "One of the essential elements of a valid appropriation is that of priority over others. Under this doctrine he who is first in time is first in right, and so long as he continues to apply the water to a beneficial use, subsequent appropriators may not deprive him of the rights his appropriation gives him, by diminishing the quantity or deteriorating the quality of the water. So far as the rights of the prior appropriator are concerned any use which defiles or corrupts the water so as to essentially impair its priority and usefulness for the purpose for which the water was appropriated by the prior appropriator is an invasion of his private rights for which he is entitled to a remedy both at law and in equity."

[34] *Atchison* v. *Peterson* (87 U. S. 507 (1874)). For a very recent case, see *Ravndal* v. *Northfork Placers* (60 Idaho 305, 91 Pac. (2d) 368 (1939)).

The early application of the rule is found in *Bear River & Auburn Water & Min. Co.* v. *New York Min. Co.* (8 Calif. 327, 68 Am. Dec. 325 (1857)); *Weaver* v. *Eureka Lake Co.* (15 Calif. 271 (1860)); *Phoenix Water Co.* v. *Fletcher* (23 Calif. 481 (1863)); *Natoma Water & Min. Co.* v. *McCoy* (23 Calif. 490 (1863)).

[35] Farnham, H. P., The Law of Waters and Water Rights, vol. III, sec. 674, p. 2089.

[36] *Carson* v. *Hayes* (39 Oreg. 97, 65 Pac. 814 (1901)); *Lone Tree Ditch Co.* v. *Rapid City Elec. & Gas Light Co.* (16 S. Dak. 451, 93 N. W. 650 (1903)); *Logan, Hyde Park & Smithfield Canal Co.* v. *Logan City* (72 Utah 221, 269 Pac. 776 (1928)).

See also the early case of *Natoma Water & Min. Co.* v. *McCoy* (23 Calif. 490 (1863)).

injury would not be a ground of action;[37] but it is otherwise where in using the flow for generating power the fluctuation ranges from 1 to 15 second-feet each 24 hours, thus rendering impractical the proper diversion and apportionment of water between canal company appropriators and among the numerous individual water users under the companies.[38]

It follows that the prior appropriator is not to be deprived of his right of reasonable beneficial use of the water; or to be materially restricted in the reasonable exercise of the right, in favor of later appropriators higher up on the stream, on the ground that the water could be put to better use up there. Numerous conflicts have arisen concerning the relative claims of upstream and downstream water users, both appropriative and riparian;[39] but where rights of appropriation only were involved, the prior appropriator has been protected in the exercise of his valid right wherever situated on the stream. (For adjustments of rights on interstate streams, see the discussion of interstate matters below, p. 403 and following.)

From an economic standpoint, the requirement that an entire stream be permitted to flow past large areas of good irrigable land in order to irrigate lands of less value on the lower reaches of the stream may be subject to criticism; nevertheless those downstream prior appropriative rights are established property rights which the courts have uniformly protected. The holders may not waste the water—on the contrary they have been held to an increasing measure of reasonable beneficial use consistent with the usual custom of the country; but the power of the State to regulate uses of water in the interest of the public welfare has not been extended to the abrogation of established rights in favor of higher or better uses without compensation, except where the possibility of abrogation has been a part of the appropriation right when acquired by the individual. (See discussion of preferential uses of water, below in this chapter, p. 353.) It should be noted, however, that notwithstanding the existence of early downstream rights, later development in many areas throughout the West has been made possible as the result of storage of flood waters which were of no beneficial use for direct irrigation under established appropriative rights. Furthermore, junior rights both upstream and downstream have been enriched as the result of return water from irrigation. Return flow is a common phenomenon in Western irrigated regions and many water rights are predicated wholly or partly upon it.[40] For example, on streams such as the Provo in Utah, downstream development occurred first, and return flow from junior upstream diversions not only satisfied the requirements of earlier downstream appropriators but actually benefited them by prolonging the seasonal supply. On the other hand, on the South Platte in Colorado, upstream development occurred first and the increasing return flow made progressive downstream development possible and eventually added materially to the value of the junior downstream rights.

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[37] *Phoenix Water Co.* v. *Fletcher* (23 Calif. 481 (1863)); *Carson* v. *Hayes* (39 Oreg. 97, 65 Pac. 814 (1901)).

[38] *Logan, Hyde Park & Smithfield Canal Co.* v. *Logan City* (72 Utah 221, 269 Pac. 776 (1928)).

[39] See discussion of the conflict between upper-level and lower-level stream interests by Wiel, S. C., Fifty Years of Water Law, Harvard Law Review, Vol. L, No. 2, pp. 252–304.

[40] Hutchins, W. A., Policies Governing the Ownership of Return Waters from Irrigation, U. S. Dept. Agr. Tech. Bul. 439 (1934).

Again, the conservation of natural resources would undoubtedly be promoted by diverting stream flows above the points at which water is lost in great quantities in the stream channels and is not susceptible of subsequent recovery for economic use. But water must be permitted to take its natural course in the stream to the appropriator's headgate, even if much of the flow is lost in transit. The principle is thus stated in *Morris* v. *Bean*:[41]

> * * * In the abstract there would be more people benefited by allowing the defendants to take all the water. Its flow through a sandy and gravelly stretch of something like eight or ten miles, and perhaps farther, is, in a measure, a waste, but equity does not consist in taking the property of a few for the benefit of the many, even though the general average of benefits would be greater. * * *

Regardless of heavy losses in the stream bed, then, the prior appropriator is entitled to the flow to the extent of his appropriation. To require 100 second-feet to be released upstream to supply 5 second-feet to the early priority downstream may appear unreasonable, and from the public standpoint, wasteful; but under the doctrine of prior appropriation it is the latter's right.

However, so far as the downstream appropriation is concerned, the requirement in this example that the natural flow of 100 second-feet be not interfered with is a means to an end, not an end in itself. The sole purpose of the requirement is to protect the prior appropriator. Therefore, as shown below in discussing rights to the use of waste, salvaged, and developed water (p. 372), those who have made improvements for the purpose of recovering natural losses in stream beds have been accorded the first right to the waters thus salvaged, provided always that the prior rights of the downstream appropriators were properly safeguarded. In the above illustration, then, one would be permitted to divert the entire 100 second-feet upstream and to apply 95 second-feet to his own beneficial use, if adequate provision were made for delivering 5 second-feet to the prior appropriator, or to make use of the entire 100 second-feet if a substitute supply of 5 second-feet of substantially the same quality were made available to the latter—necessarily at the expense of the person who seeks to make these changes. The Supreme Court of Nevada stated:[42]

> If waste by seepage and evaporation can be prevented by draining swamps and depressions or by substituting ditches, flumes, or pipes for wide, sandy and numerous channels, or by other means, let this desired improvement and economy be at the expense of the later claimant, who is desirous of utilizing the water thereby to be saved; or at least without detriment to existing rights, whether up or down the stream.

This matter of waste in a natural stream channel above the appropriator's point of diversion, which may result under some circumstances from the requirement that the natural flow be not interfered with to the detriment of the prior appropriator, is not to be confused with waste resulting from the appropriator's own acts in conveying the water from the stream and putting it to use. Control of the

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[41] 146 Fed. 423 (C. C. D. Mont. 1906). See also the recent Nebraska decision in *State ex rel. Cary* v. *Cochran* (138 Nebr. 163, 292 N. W. 239 (1940)), to the effect that the duty of the State administrative officials is to enforce priorities, not change them, and that they may not withhold water upstream for the use of junior appropriators at times when a usable quantity can be delivered to prior users below, simply because great losses will result in transit in the stream bed. This matter is referred to below (see pp. 335 and 357).

[42] *Tonkin* v. *Winzell* (27 Nev. 28, 73 Pac. 593 (1903)).

water after diversion from the stream is in the appropriator, whose responsibility is to take all reasonable measures to prevent waste. This responsibility is discussed elsewhere (see pp. 306, 316, and 367).

**But the Right of Protection Apparently Is Limited to Quantities of Water Useful to the Prior Appropriator**

Some of the decisions suggest or state a limitation upon this right of protection, viz, that the quantity which would reach the prior appropriator's headgate must be a *useful* quantity, i. e., susceptible of beneficial use for the purpose for which the right was acquired, inasmuch as an appropriative right is founded and maintained upon a basis of beneficial use.[43] The appropriator obviously cannot be upheld in insisting that an upstream junior claimant release the entire stream if the evidence shows clearly that no water would get down to the prior user's diversion, for this would result in an unconscionable waste of water. Nor, apparently, can he require this if the quantity of water which would reach him without interference would be insufficient to be of practical value. No decisions of appellate courts have come to attention in which a contrary principle has been adopted.

A Federal court stated, in the well-known decision in *Union Mill & Mining Co.* v. *Dangberg*, that:[44]

There must be a beneficial use before any protection can be invoked. * * * In the appropriation of water, there cannot be any "dog in the manger" business by either party, to interfere with the rights of others, when no beneficial use of the water is or can be made by the party causing such interference.

The decision in *Telluride* v. *Blair* (Colorado)[45] held that the appropriation was "available whenever, by reason of the flow, there is sufficient water for such beneficial use."

The decision in the Montana case of *Raymond* v. *Wimsette*[46] contains a number of observations on this matter. The court disagreed with the contention of counsel that if there were 45 inches of water at a junior appropriator's headgate, and that if all of this were allowed to flow down the stream only 1 inch would reach a prior appropriator, then the latter would be entitled to an injunction compelling the upstream junior appropriator to leave all the water in the stream. The water right was stated to be:

* * * not of that absolute character, in view of the law which pertains to the ownership of things. One of the primary facts upon which the water right is founded, and without which it cannot exist, is the power of the appropriator to utilize the water which he claims for some lawful and beneficial purpose.

The findings as to quantities of water were not complete, but it appeared that while 45 inches of water flowing at defendant's ranch would not reach plaintiff's point of diversion, a greater quantity upstream would carry the flow down to plaintiff's ranch 15 miles below. The court then said:

What volume of water would be necessary to carry the flow down to plaintiff's ranch is not found, and cannot be ascertained from the evidence. If, however, for example, seventy-five inches of water flowing past defendant's ranch would carry twenty-five inches thereof to plaintiff, and defendant was allowed to take

[43] 27 R. C. L. 1278, sec. 188.
[44] 81 Fed. 73 (C. C. D. Nev. 1897).
[45] 33 Colo. 353, 80 Pac. 1053 (1905).
[46] 12 Mont. 551, 31 Pac. 537 (1892).

forty-five inches, it is apparent that, in effect, he would be taking away from plaintiff the twenty-five inches to which he was rightfully entitled, under the conditions stated. And probably, in such a case as we have here, more complete and exact justice would be arrived at by finding what volume of water was necessary in said creek, at defendant's ranch, to carry any useful quantity thereof to plaintiff, situated as these litigants are, and also providing in the decree that defendant could only take the water when the volume thereof was reduced so low that none of it would reach plaintiff's point of diversion; finding, of course, the quantity necessary to produce one or the other of these conditions. But a review of the record shows that no such findings were asked. Perhaps plaintiff and his counsel understood that such findings would be of no practical consequence, for, when the volume of water rose sufficiently to flow down to plaintiff's point of diversion, the supply may be sufficient for plaintiff, notwithstanding defendant was allowed to take forty-five inches. It may be from that practical view of the case no such findings were desired.

The defendant was found to have a prior right to the use of 45 inches, and was not allowed to take more than 45 inches from the creek under any conditions. This decision was subsequently cited by the Montana Supreme Court [47] to support the statement that an appropriator cannot complain if another user upstream takes waters during times when they would otherwise be lost.

In the more recent Utah decision in *Dameron Valley Reservoir & Canal Co.* v. *Bleak*,[48] it is stated:

The law is now well settled that, where the water is diverted from a stream by an upper user, a lower user cannot legally complain unless the upper user is using an excessive quantity of water which, if permitted to flow in the stream, would reach the lands of the lower user and by him could be put to a beneficial use.

In the recent interstate case of *Washington* v. *Oregon* [49] in the United States Supreme Court, the evidence showed that in time of water shortage, even if certain dams in the stream within Oregon were removed, only a small quantity of water would reach the downstream users within Washington. The Supreme Court stated:

To restrain the diversion at the bridge would bring distress and even ruin to a long established settlement of tillers of the soil for no other or better purpose than to vindicate a barren right. This is not the high equity that moves the conscience of the court in giving judgment between states.

The defense that the water would be lost before reaching the prior

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[47] *Beaverhead Canal Co.* v. *Dillon Elec. Light & Power Co.* (34 Mont. 135, 85 Pac. 880 (1906)). See note 50 below concerning the Montana Supreme Court's recent holding that the upstream junior appropriators must show affirmatively that their acts do not prevent the downstream senior appropriators from receiving the water to which they are entitled: *Irion* v. *Hyde* (110 Mont. 570, 105 Pac. (2d) 666 (1940)).

[48] 61 Utah 230, 211 Pac. 974 (1922). See also: *Cleary* v. *Daniels* (50 Utah 494, 167 Pac. 820 (1917)); *Fenstermaker* v. *Jorgensen* (53 Utah 325, 178 Pac. 760 (1919)).

[49] 297 U. S. 517 (1936).

A Federal court has recently stated:

"While ordinarily a prior appropriator has a paramount right to divert water from the stream and a junior appropriator may not divert water unless the waters flowing in the stream are in excess of the amount which the prior appropriator has the right to divert, if, due to seepage, evaporation, and channel absorption or other physical conditions beyond the control of the appropriators, the water flowing in the stream will not reach the diversion point of the prior appropriator in sufficient quantity for him to apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water. The paramount right of the prior appropriator does not justify him in insisting that the water be wasted and lost by denying its use to the junior appropriator under such circumstances." *Albion-Idaho Land Co.* v. *Naf Irr. Co.* (97 Fed. (2d) 439 (C. C. A. 10th, 1938)).

See also *State ex rel. Johnson* v. *Stewart* (163 Oreg. 585, 96 Pac. (2d) 220 (1939)), concerning the right to place dams in watercourses for the purpose of controlling soil erosion, where they do not materially interfere with the right of the lower appropriator.

appropriator must, however, be clearly established. The Supreme Court of Colorado considered such a defense thus:[50]

> The final question relates to the testimony on the subject that the water which defendants divert from the Big Thompson, if permitted to flow by their headgates, would not reach the headgate of the ditch of plaintiff. There is testimony to the effect that on account of the character of the bed of the Big Thompson, considerable time would be required for the water passing the headgates of the ditches of defendants to reach the river, and that in flowing down a considerable quantity would be lost through percolation. There is no evidence that the waters would not reach the river, and although it may flow down the Big Thompson slowly, and a considerable volume be lost, inasmuch as it would eventually reach the river, and could there be utilized by plaintiff, we do not think that this defense has been established.

#### It Follows That Protection Is Afforded Against Only Those Interferences Which Result in Material and Substantial Injury to the Prior Appropriator

While the prior appropriator is afforded protection in the courts against interferences with the flow of water which actually injure him in the exercise of his water right, he has no cause of action where the interferences complained of result in only temporary or minor irregularities in the flow. See Gould,[51] Kinney,[52] and Farnham.[53] The limitation is stated in many of the court decisions, and appears to be a settled rule of law.

To constitute an actionable injury to the prior appropriator, therefore, it would appear that there must be a *material* or *substantial* interference with the exercise of his right. Mere inconvenience, in other words, is not a material injury; and the complainant, to be entitled to relief, must demonstrate that he has suffered a real loss as a result of the interference complained of.

Just what constitutes such a substantial interference cannot be subject to any mathematical definition of general application, but necessarily depends upon the facts in a given case. A crop failure which clearly results from interference with one's appropriative right is obviously a most substantial injury; and a reduction in the crop yield because of insufficiency of water required for maximum production, or because of delay in applying the water, on account of unlawful upstream diversions, may likewise result in serious loss to the water user. But a delay in irrigating which is not shown to have affected the crop yield materially, or to have induced other

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[50] *Lower Latham Ditch Co.* v. *Louden Irr. Canal Co.* (27 Colo. 267, 60 Pac. 629, 83 Am. St. Rep. 80 (1900)).

In the very recent decision in *Irion* v. *Hyde* (110 Mont. 570, 105 Pac. (2d) 666 (1940)), the Montana Supreme Court held that upstream junior appropriators, to justify a diversion when the prior appropriators downstream needed the water, must be in a position to show affirmatively that under all the conditions such diversion would not reduce or limit the receipt of water by the downstream prior users. If they can show that no water would reach the latter whether or not they impounded or diverted water upstream, their acts would not be detrimental to the prior appropriators. "That is the limit of the meaning attributable to the court's statement on this question in Raymond v. Wimsette, * * *." In this instance it appeared that in the 9-mile stretch of creek bed between the two dams there were some 275 pot holes, the filling of which required a substantial quantity of water, and that no water could reach the lower dam from the upper dam when the creek bed was dry until after the pot holes had been filled.

See also *State ex rel. Cary* v. *Cochran* (138 Nebr. 163, 292 N. W. 239 (1940)), concerning the function of State administrative officers in determining whether water released upstream would reach the downstream prior appropriators in usable quantities. This is referred to hereinafter (p. 357).

[51] Gould, J. M., A Treatise on the Law of Waters, 3d ed., sec. 231. p. 460.

[52] Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, sec. 801, p. 1399–1400.

[53] Farnham, H. P., The Law of Waters and Water Rights, vol. III, sec. 674, p. 2089.

losses or costs, but which simply upset the irrigator's plans for the time being, would not be actionable under the general rule. These are all matters of proof, upon which are based the findings of extent and materiality of the alleged injury, and if the plaintiff is found to be entitled to relief, the judgment awarding damages and probably an injunction against further injury.

A very recent case in Oregon involved the right of an owner of land to construct dams or permit them to be constructed by beavers in watercourses for the purpose of controlling soil erosion. The supreme court stated: [54]

After giving the matter our best consideration, we think that defendant would have the right to construct dams or permit them to be constructed by beavers to control the erosion, without diverting the water over the land or from the diversion works of another appropriator, and restore the bed of the stream to its original condition as near as may be, if he can do so without materially interfering with the right of the lower appropriator Johnson.

This is a question that depends largely upon the facts and we do not presume to determine it as a matter of law.

To deny our water users the right to control such streams and prevent the erosion that would soon take place would mean the utter destruction of much of our most valuable irrigated lands throughout the state. It is the duty of the landowner to prevent the construction of dams to a point where diversion from the channel will occur, but the landowner has a right to use or permit such dams for the purpose of erosion control, where they do not divert water from the channel or from the diversion works of another appropriator. It is shown that if the erosion is permitted to continue the water would be drained from the lands bordering on the creek and they would become dry and worthless.

The Utah Supreme Court has recently stated [55] that the right of the public to take water from a stream for camp purposes is a lawful right, the water being common property, unless in so doing one is appreciably decreasing the quantity or deteriorating the quality of waters to the use of which others have priorities.

### A Junior Appropriator Is Entitled to Protection Against Injury Resulting From Enlargement of Uses of Water by Senior Appropriators Beyond the Scope of the Senior Appropriations at the Time the Junior Appropriation Was Made

The appropriative right, while exclusive, is a relative right in the sense that it must be exercised with respect to all other appropriations of water from the same source of supply, whether they be prior or later in time. Protection of such right, therefore, is extended not only to the first appropriator but to all subsequent ones as well; and it operates in favor of every appropriator as against the enlargement of rights senior as well as against the unwarranted exercise of those junior to his own. It is only the exercise of one's specific right, and no more, that is afforded protection. In the distribution of water each junior right on a stream is filled at a given time from the surplus remaining in the stream above the aggregate quantities of water required to satisfy all prior rights—it may at such time require the entire surplus. If the appropriator diverts from the stream more water than he is entitled to, he must return the surplus to the stream for the use of subsequent appropriators, for no enlargement of his

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[54] *State ex rel. Johnson* v. *Stewart* (163 Oreg. 585, 96 Pac. (2d) 220 (1939)).

[55] *Adams* v. *Portage Irr. Res. & Power Co.* (95 Utah 1, 72 Pac. (2d) 648 (1937), 95 Utah 20, 81 Pac. (2d) 368 (1938)).

rights can be made so as to interfere with the vested rights of others. Excessive use is not within his priority.[56]

It follows that the junior as well as the senior appropriator may insist upon substantial maintenance of the stream conditions existing at the time he made his own appropriation and that the earlier comers shall not enlarge their use of water beyond the terms of their appropriations if the effect of such enlargement is to interfere with the proper exercise of his junior right.[57] This is settled law. If one wishes to enlarge his right, he must make a new appropriation covering such enlargement, which is oftentimes done; but the new appropriation necessarily is junior to all rights which have been acquired since his first appropriation was made.[58] In other words, if one holds the first and third rights on a stream, but not the second right, he cannot merge his two appropriations and thus advance the third priority ahead of the intervening second priority held by someone else. Otherwise there would be no point in using the term "priorities" to designate successive appropriations.

## Preferential Uses of Water

### The Constitutions and Statutes of Many States Grant Various Preferences in the Use of Water

The constitutional and statutory provisions are summarized below, by States, followed by a general discussion of important features of the question of preferential rights to water.

*Arizona.*—A statute provides that during periods of scarcity of water the owners of lands shall have precedence of the water for irrigation according to the dates of their appropriation or occupation of the lands.[59] This has been construed, as applied to private ditches, as a declaration that not mere priority of diversion, but priority of use and appropriation upon particular lands is to govern in determining conflicting rights.[60]

When an application to appropriate water or the proposed use conflicts with vested rights, is a menace to the safety, or against the interests and welfare of the public, the State water commissioner is required to reject the application. An application may be approved for less water than applied for, if substantial reasons exist therefor. Rights to use water for power development are limited to 40 years, subject to a preference right of renewal under laws existing at the date of expiration. Applications contemplating the generation

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[56] *Clough* v. *Wing* (2 Ariz. 371, 17 Pac. 453 (1888)); *Senior* v. *Anderson* (130 Calif. 290, 62 Pac. 563 (1900)); *Simons* v. *Inyo Cerro Gordo Min. & Power Co.* (48 Calif. App. 524, 192 Pac. 144 (1920; hearing denied by supreme court)); *Fort Lyon Canal Co.* v. *Chew* (33 Colo. 392, 81 Pac. 37 (1905)); *Twaddle* v. *Winters* (29 Nev. 88, 85 Pac. 280 (1906), 89 Pac. 289 (1907)); *Manning* v. *Fife* (17 Utah 232, 54 Pac. 111 (1898)); *Gunnison Irr. Co.* v. *Gunnison Highland Canal Co.* (52 Utah 347, 174 Pac. 852 (1918)); *Johnston* v. *Little Horse Creek Irr. Co.* (13 Wyo. 208, 79 Pac. 22 (1904)).

[57] *Baer Bros. Land & Cattle Co.* v. *Wilson* (38 Colo. 101, 88 Pac. 265 (1906)); *Faden* v. *Hubbell* (93 Colo. 358, 28 Pac. (2d) 247 (1933)); *Proctor* v. *Jennings* (6 Nev. 83 (1870)); *Jensen* v. *Birch Creek Ranch Co.* (76 Utah 356, 289 Pac. 1097 (1930)). See discussions in the following texts: Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, sec. 784, p. 1366, and sec. 803, p. 1404; Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 302, p. 313; Long, J. R., A Treatise on the Law of Irrigation, 2d ed., sec. 133, p. 233.

[58] *Lobdell* v. *Simpson* (2 Nev. 274 (1866)); *Ophir Silver Min. Co.* v. *Carpenter* (4 Nev. 534 (1868)).

[59] Ariz. Rev. Code 1928, sec. 3320.

[60] *Biggs* v. *Utah Irr. Ditch Co.* (7 Ariz. 331, 64 Pac. 494 (1901)).

of electrical energy exceeding 25,000 horsepower must be approved by the legislature.[61]

The statute also provides that when two or more pending applications to appropriate water conflict, and the source of water is not sufficient for all, preference shall be given by the commissioner according to the relative public values of the proposed uses, which are designated thus: (1) Domestic and municipal uses, domestic uses to be construed to include gardens not exceeding one-half acre to each family; (2) irrigation and stock watering; (3) water power and mining.[62]

It is also provided that acceptance of a permit to appropriate water includes the condition that no value in excess of the amount paid to the State shall be claimed for the water right in the public regulation of rates or charges for water service, or in the acquirement of the rights and property of the permittee or his successors by the State or a city, county, municipal water or irrigation district, or political subdivision.[63]

Reservation of unappropriated water in favor of municipalities to meet their growing requirements is also authorized. This is done by approving applications for municipal uses to the exclusion of all subsequent appropriations, if, upon consideration by the commissioner, the estimated needs of the municipality so demand.[64]

*California.*—The water commission act requires the commission to allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated. The act declares that it is the established policy of the State that the use of water for domestic purposes is the highest use of water, and the next highest use irrigation; and requires the commission, in acting upon applications to appropriate water, to be guided by this declaration of policy and to reject an application when in its judgment the proposed appropriation would not best conserve the public interest.[65] (The duties of the State water commission are now vested in the State engineer as chief of the State division of water resources.)

It is further provided that at any time after 20 years from the granting of a license, the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State may purchase the works and property for effectuating the rights granted under the license, at a price agreed upon or as determined in eminent domain proceedings, this being an express condition of the appropriation; no value in excess of the total amount paid to the State to be claimed for the permit or license.[66]

Reservations in favor of municipalities are provided for by declaring that the application for a permit thereby for domestic purposes shall be considered first in right, irrespective of its priority in time, provided that such application shall not authorize the appropriation of water for other than municipal purposes. If permission to appropriate is granted a municipality for any quantity of water in excess

[61] Ariz. Rev. Code 1928, secs. 3285 and 3290.
[62] Ariz. Rev. Code 1928, sec. 3285.
[63] Ariz. Rev. Code 1928, sec. 3287.
[64] Ariz. Rev. Code 1928, sec. 3285.
[65] Deering's Gen. Laws of Calif., 1937, vol. 2, act 9091, sec. 15.
[66] Deering's Gen. Laws of Calif., 1937, vol. 2, act 9091, sec. 20.

of existing municipal needs, the commission, pending the use of the entire appropriation, may issue permits for the temporary appropriation of the excess waters over and above municipal uses from time to time, or may authorize the municipality to become a public utility as to the surplus, subject to the jurisdiction of the railroad commission. When the municipality desires to use the excess waters covered by its appropriation, it must compensate for the facilities so rendered valueless for use under the temporary appropriations.[67]

*Colorado.*—The constitution provides that the right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. It is also provided that priority of appropriation shall give the better right as between those using the water for the same purpose; but that when the waters of a natural stream are not sufficient for all those desiring the use, those using the water for domestic purposes shall have the preference over claimants for any other purpose, and those using water for agricultural purposes shall have the preference over those using it for manufacturing purposes.[68]

A statute provides for dividing water pro rata among consumers from a ditch or reservoir if it is not entitled to a full supply at a certain time.[69]

A statute enacted in 1931[70] provides that if a city with population of 200,000 or more thereafter leases water not needed for immediate use, no rights shall become vested to a continued leasing or to a continuance of conditions concerning return water from irrigation so as to defeat the right to terminate the leases or change the place of use.

*Idaho.*—The constitution contains provisions similar to those of Colorado noted above, with these exceptions and additions: The right to divert unappropriated waters is subject to the power of the State to regulate and limit the use thereof for power purposes. The preference accorded domestic purposes is subject to such limitations as may be prescribed by law. And in any organized mining district, those using water for mining or associated milling purposes shall have preference over users of the same for manufacturing or agricultural purposes. However, it is provided that the usage by such subsequent appropriators shall be subject to the provisions of law governing condemnation of property for public or private use.[71]

The constitution also accords superiority of right to the use of water among agricultural settlers under a sale, rental, or distribution of water, in the numerical order of their settlements or improvements; but provides that such priority of right in time of water shortage shall be subject to such reasonable regulation as to quantity of water and time of use as the legislature may prescribe.[72]

The water code provides that the commissioner of reclamation, upon receipt of an application to appropriate water involving the development of more than 500 theoretical horsepower, or involving more than 25 second-feet for any other purpose, shall give notice thereof; if no protest is filed, the commissioner may approve the application if in

[67] Deering's Gen. Laws of Calif., 1937, vol. 2, act 9091, sec. 20.
[68] Colo. Const. art. XVI, sec. 6.
[69] Colo. Stats. Ann. 1935, ch. 90, sec. 18.
[70] Colo. Stats. Ann. 1935, ch. 163, sec. 398.
[71] Idaho Const. art. XV, sec. 3.
[72] Idaho Const. art. XV, sec. 5. See: *Mellen* v. *Great Western Beet Sugar Co.* (21 Idaho 353, 122 Pac. 30 (1912)); *Brose* v. *Nampa & Meridian Irr. Dist.* (24 Idaho 116, 132 Pac. 799 (1913)).

proper form; if a protest is filed, a hearing is held. The commissioner may appoint an engineer or other competent person to make an investigation on behalf of the State and to testify as to the facts found. Where such proposed use is found by the commissioner to be such that it will reduce the quantity of water under existing rights, or if the water supply is found to be insufficient, or if certain other findings are unfavorable the commissioner may reject the application or may issue a permit for less than the quantity of water applied for.[73]

The water code also provides that during a scarcity of water, unadjudicated rights in a water district shall be deemed inferior to adjudicated or decreed rights, and that the watermaster shall close all headgates of ditches having no adjudicated rights if necessary to supply those having adjudicated rights.[74]

*Kansas.*—It is provided by statute that in the portion of the State west of the 99th meridian all natural waters shall be devoted, first, to irrigation in aid of agriculture, subject to ordinary domestic uses, and second, to other industrial purposes. Further, no diversion may impair or divest a prior vested appropriative right for the same or a higher purpose without condemnation and compensation. Natural lakes and ponds on the surface, having no outlet, are to be deemed parcel of the lands on which they stand, subject to the use of the proprietors.[75] Where appropriations of water made under the authority granted to the State board of agriculture conflict, they take precedence in the following order: Domestic and transportation water supply, irrigation, industrial uses, water power.[75a]

*Nebraska.*—The constitution contains a provision similar to that of the Colorado constitution noted above, with these exceptions and additions: The stated appropriative right shall never be denied, except when such denial is demanded by the public interest. It is also provided that no inferior right may be acquired by a superior right without just compensation.[76] The constitutional provisions relating to water were adopted in 1920.

The department of roads and irrigation is required to approve each application to appropriate water if there is unappropriated water in the proposed source of supply and if the perfected appropriation will not otherwise be detrimental to the public welfare. However, an application may be approved for a less amount of water or land than applied for.[77]

The holder of an approved application for water power must enter into a contract with the State for leasing the use of all water so appropriated, the lease to run for a period of not more than 50 years. On the expiration of a lease the value of improvements must be appraised by the department, subject to appeal to the court, and the value of the improvements as finally determined is to be paid to the lessee by any subsequent lessee.[78]

*Nevada.*—The State engineer is required to reject an application to appropriate water if there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with

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[73] Idaho Code Ann. 1932, sec. 41–203, amended by Laws 1935, ch. 145.
[74] Idaho Code Ann. 1932, sec. 41–507.
[75] Kans. Gen. Stats. Ann. 1935, secs. 42–301 and 42–305.
[76] Nebr. Const., art. XV, sec. 6.
[77] Nebr. Comp. Stats. 1929, sec. 81–6317.
[78] Nebr. Comp. Stats. 1929, sec. 81–6318.

vested rights, or threatens to prove detrimental to the public interests, and may issue a permit for a less amount of water than named in the application.[79]

*New Mexico.*—One of the earliest statutes of the Territory of New Mexico provided that no inhabitant should have the right to construct a mill or other obstruction in the course of water for irrigation of lands, as the irrigation of fields should be preferable to all others.[80]

A statute passed in 1889 provides that in unincorporated towns or villages in which the population exceeds 3,000, the inhabitants, the State, and other owners of public buildings therein, shall have a prior right to the use of so much of the water of streams flowing through or near such communities as necessary for domestic and sanitary purposes and protection of property against damage by fire.[81]

The State engineer, in his discretion, may approve an application to appropriate water in a less amount than applied for. He is required to reject an application if in his opinion there is no unappropriated water available; and he may refuse to consider or approve an application if in his opinion the approval would be contrary to the public interest.[82]

*North Dakota.*—The State engineer is required to reject an application to appropriate water if in his opinion there is no unappropriated water available. He may refuse to consider or approve an application if in his opinion the approval would be contrary to the public interest.[83] A statute enacted in 1939 provides that the granting of water rights by the State engineer shall be subject to the approval of the State water conservation commission.[84]

*Oklahoma.*—The Oklahoma planning and resources board is required to reject an application to appropriate water if in its opinion there is no unappropriated water available. It may refuse to consider or approve an application if in its opinion the approval would be contrary to the public interest.[85]

*Oregon.*—An early statute provides that when the waters of a natural stream are not sufficient for the service of all desiring their use, those using the water for domestic purposes shall, subject to limitations prescribed by law, have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over users for manufacturing purposes.[86]

It is the duty of the State engineer to approve applications to appropriate water which conform to the provisions of the act, including a requirement that an application shall not be approved if the proposed use conflicts with existing rights. However, if in the judgment of the State engineer a proposed use of water may prejudicially affect the public interest, he must refer the application to the State reclama-

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[79] Nev. Comp. Laws 1929, secs. 7948 and 7950.
[80] N. Mex. Stats. Ann., Comp. 1929, sec. 151–404.
[81] N. Mex. Stats. Ann., Comp. 1929, sec. 151–405.
[82] N. Mex. Stats. Ann., Comp. 1929, secs. 151–133 and 151–134.
[83] N. Dak. Comp. Laws 1913, sec. 8257.
[84] N. Dak. Laws 1939, ch. 256, sec. 16.
[85] Okla. Stats. 1931, sec. 13068; Stats. Ann. (1936), title 82, sec. 25. The conservancy act provides for preferences in the use of water of a conservancy district in the following order: First, domestic and municipal water supply; second, manufacturing processes, production of steam, refrigerating, cooling, condensing, and maintaining sanitary conditions of stream flow; third, irrigation, power development, recreation, fisheries, and other uses. (Okla. Stats. 1931, sec. 13271; Stats. Ann. (1936), title 82, sec. 577.)
[86] Oreg. Code Ann. 1930, sec. 47–1403.

tion commission for consideration and hearing. The commission in making its determination is required to have due regard for conserving the highest use of such water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing, or any other beneficial use for which the water may have a special value to the public, and also the maximum economic development of the waters involved; and must order the rejection of an application found prejudicial or require its modification to conform to the public interest.[87]

The water code provides that in any valuation for rate-making purposes, or in any proceeding for the acquisition of rights and property under any license or statute of the United States or under Oregon laws, no value shall be recognized or allowed therefor in excess of the actual cost to the owner of perfecting the right under the statute.[88]

Each certificate issued for power purposes, other than to the United States, the State, or a municipality thereof, shall contain provisions that after the expiration of 50 years from the granting of the certificate or upon the expiration of any Federal power license, and after not less than 2 years' written notice, the State or any municipality may take over the works and appurtenances for applying such water to beneficial use, upon payment of not to exceed the fair value of the property taken, plus reasonable damages to valuable, serviceable, and dependent property of the certificate holder not taken as may be caused by the severance. The value and severance damages are to be determined by agreement or by proceedings in equity in the circuit court. The right of the State or any municipality to condemn such property is expressly reserved.[89]

It is further provided that application for municipal water supplies may be approved to the exclusion of all subsequent appropriations, if in the judgment of the State engineer the exigencies of the case so demand.[90] Municipal water supplies are further safeguarded by various provisions, notably the requirement that no rights acquired under the act shall impair the rights of any municipal corporation to waters theretofore taken; requiring the State engineer to reject, or grant subject to municipal use, all applications where in his judgment the appropriation impairs a municipal water supply; requiring municipal corporations, on request of the State engineer, to furnish statements of the amount and source of their water supplies and probable increases or extensions of the same; [91] and the provisions of the hydroelectric act noted below.

The hydroelectric act of 1931, which does not apply to developments by the United States or to certain municipalities and utility districts, provides for the appropriation of water for power purposes under the jurisdiction of the Hydroelectric Commission of Oregon, of which the State engineer is exofficio a member and secretary. Licenses may be issued for not to exceed 50 years, municipal corporations and public-utility districts being granted certain preference rights; and the State or any municipality may at any time take over the project upon payment of fair value as defined in the act. This value includes sums paid to the State or the United States in acquir-

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[87] Oreg. Code Ann. 1930, sec. 47–503, as amended by Laws 1937, ch. 235.
[88] Oreg. Code Ann. 1930, sec. 47–508, as amended by Laws 1939, ch. 56.
[89] Oreg. Code Ann. 1930, sec. 47–508, as amended by Laws 1939, ch. 56.
[90] Oreg. Code Ann. 1930, sec. 47–503, as amended by Laws 1937, ch. 235.
[91] Oreg. Code Ann. 1930, sec. 47–1501.

ing the right. The right of condemnation by the State and any municipality is also expressly reserved. Furthermore, when the whole net investment has been amortized and repaid, the project becomes the property of the State, and successive renewals for not more than 5 years each are provided for in the event that amortization is not completed within the period of the initial license.[92]

*South Dakota.*—The State engineer in his discretion may approve an application for a less amount of water than applied for. He is required to reject an application if in his opinion there is no unappropriated water available, and he may refuse to consider or approve an application if in his opinion the approval would be contrary to the public interests.[93]

The statute provides that no appropriation of water in excess of 25 horsepower for power purposes shall be for a period longer than 50 years. Such appropriation shall be subject to the right of the State to regulate rates. The appropriator and his assigns have the prior right of reappropriation.[94]

*Texas.*—The statute declares that in the allotment and appropriation of water, preference be given in the following order: (1) Domestic and municipal uses, including water for domestic animals; (2) water for processes to convert materials into forms of greater usefulness and higher value, including developments of electric power by means other than hydroelectric; (3) irrigation; (4) mining and mineral recovery; (5) hydroelectric power; (6) navigation; (7) recreation and pleasure. It is later provided that as between applicants for rights to use waters, preference shall be given, not only in the foregoing order, but also to those applications contemplating the maximum utilization of waters.[95] Priority over all other applicants is accorded one who seeks to appropriate water for storage by channel dams for irrigation, mining, milling, manufacturing, development of power, water for cities and towns, or stock raising.[96]

Another section gives the owner of land through which water flows, a prior right to appropriate water, as against an applicant for permit to appropriate such water for mining purposes, if exercised within 10 days after the notice of application.[97]

The board of water engineers must grant a permit if the proposed application is for a purpose enumerated in the statute, does not impair existing water rights, and is not detrimental to the public welfare; but must otherwise reject the application, and must do so if there is no unappropriated water in the proposed source of supply. An application may be approved or rejected in whole or in part.[97a]

It is also provided that all appropriations or allotments subsequent to enactment of the statute, for other than domestic or municipal purposes—

> shall be granted subject to the right of any city, town or municipality of this State to make further appropriations of said water thereafter without the necessity of condemnation or paying therefor, for domestic and municipal purposes as herein defined in paragraph numbered "1" of Art. 7471 as herein amended any law to the contrary notwithstanding.[98]

[92] Oreg. Laws, 1931, ch. 67.
[93] S. Dak. Code, 1939, secs. 61.0125 and 61.0126.
[94] S. Dak. Code, 1939, sec. 61.0152.
[95] Vernon's Tex. Stats., 1936, Rev. Civ. Stats., arts. 7471 and 7472c.
[96] Vernon's Tex. Stats., 1936, Rev. Civ. Stats., art. 7545.
[97] Vernon's Tex. Stats., 1936, Rev. Civ. Stats., art. 7467.
[97a] Vernon's Tex. Stats. 1936, Rev. Civ. Stats., arts. 7503, 7506, 7507, and 7510.
[98] Vernon's Tex. Stats., 1936, Rev. Civ. Stats., art. 7472.

The foregoing provision, however, does not apply to any stream which constitutes or defines the international boundary between the United States and Mexico.[99]

*Utah.*—The statute provides that in time of scarcity of water, while priority of appropriation shall give the better right as between those using the water for the same purpose, the use for domestic purposes, without unnecessary waste, shall have preference over use for all other purposes, and the use for agricultural purposes shall have preference over all other uses except domestic uses.[1]

Utah formerly provided for a system of "primary" and "secondary" rights,[2] and for "prior" rights to the low-water flow.[3] These provisions were repealed in the irrigation code of 1903,[4] which provided for prorating the flow at the annual low-water stage. This latter provision was eliminated in the 1919 law.[5]

The State engineer is required to approve an application to appropriate water if, among other requirements, there is unappropriated water in the proposed source, and the proposed use will not impair existing rights or interfere with the more beneficial use of the water, and to reject the application if it does not meet all the requirements. Approval or rejection must be withheld, pending an investigation, if the State engineer has reason to believe that the proposed appropriation will interfere with the more beneficial use of the water for irrigation, domestic or culinary purposes, stock watering, power or mining development or manufacturing, or will prove detrimental to the public welfare.[6]

*Washington.*—The statute provides for the condemnation of any property or rights necessary for the storage of water or application to beneficial use—

> and including the right and power to condemn an inferior use of water for a superior use.[7]

The court, in the condemnation proceedings, is to determine what use will be for the greatest public benefit, and that use is to be deemed a superior one. However, no person may be deprived of the use of water reasonably necessary for the irrigation of his land then under irrigation, by the most economical method of artificial irrigation measured by the standards of the vicinity, in favor of another irrigation use. The court is to determine what is the most economical method of irrigation.

When an application is made to appropriate water for power development, the supervisor of hydraulics must find whether the proposed development is likely to prove detrimental to the public interest, having in mind the highest feasible use of public waters. It is also provided that the supervisor shall reject an application to appropriate water if there is no unappropriated water in the proposed source, or where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, having due

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[99] Vernon's Tex. Stats., 1936, Rev. Civ. Stats., art. 7472a.
[1] Utah Rev. Stats., 1933, sec. 100–3–21.
[2] Utah Laws, 1880, ch. XX.
[3] Utah Laws, 1897, pp. 220–221.
[4] Utah Laws, 1903, ch. 100.
[5] Utah Laws, 1919, ch. 67, sec. 10.
[6] Utah Rev. Stats., 1933, sec. 100–3–8, as amended by Laws 1939, ch. 111.
[7] Wash. Rem. Rev. Stats., 1931, sec. 7354.

regard to the highest feasible development of the use of waters belonging to the public. Any application may be approved for a less amount of water than applied for, if substantial reason exists for such action.[8]

*Wyoming.*—The constitution provides that no appropriation shall be denied except when such denial is demanded by the public interests.[9]

The statute classifies water rights by defining preferred uses as including rights for domestic and transportation purposes; and the preferred uses are further classified as (1) drinking, (2) municipal, (3) steam engines and general railway use, (4) culinary, laundry, bathing, refrigeration, and heating plants. It is likewise declared that the use of water for irrigation is to be preferred to any use through "turbine or impulse water wheels" for power purposes. Existing rights that are not preferred may be condemned to supply water for preferred uses.[10]

Procedure is provided for changing a use to a preferred use under the direction of the board of control, embracing a public notice, inspection, and hearing if necessary. If the change of use is approved, just compensation must be paid.[11]

The State engineer is required to reject an application to appropriate water if there is no unappropriated water in the proposed source, or where the proposed use conflicts with existing rights or threatens to prove detrimental to the public interest.[12]

*In General.*—The statements and implications in the foregoing constitutional and statutory provisions involve several important questions as to preferential uses of water: Denial of the right to appropriate water where the proposed appropriation would not best serve the public interest, thus not only protecting existing rights but giving preferential rights to the unappropriated water to future appropriations which will conform to the public welfare; choosing between pending applications to appropriate water, to the exclusion of one applicant or at least to the subordination of his priority; reservations of water for the future requirements of municipalities, thus subordinating future appropriations for other purposes; the change of an existing use to a preferred class; and the matter of compensation for impairment of a vested right in favor of a preferred right. These questions will be discussed in order.

Other preferences may be noted, but it is not believed that they require particular discussion. For example: Withdrawals of unappropriated water from appropriation have been made in special cases by legislative act in the interest of the public welfare. Other withdrawals have been authorized to be made under executive order. Various States have passed statutes to facilitate Federal reclamation, by allowing the withdrawal of waters from appropriation for periods of years for the benefit of the United States in connection with projects under consideration.

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[8] Wash. Rem. Rev. Stats., 1931, sec. 7382, amended by Laws 1939, ch. 127.
[9] Wyo. Const., art. VIII, sec. 3.
[10] Wyo. Rev. Stats., 1931, sec. 122–402.
[11] Wyo. Rev. Stats., 1931, sec. 122–403.
[12] Wyo. Rev. Stats., 1931, sec. 122–406.

**Restrictions Upon the Acquisition of Appropriative Rights, in the Interest of the Public Welfare**

The Constitution of Colorado, as noted, provides that the right to appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied; that of Idaho also so provides, but contains a qualification that the State may regulate and limit the use of water for power purposes; and those of Nebraska and Wyoming provide that no appropriation shall be denied except when such denial is demanded by the public interest. The statutes in a number of States require or authorize the denial by the administrative officer of an application to appropriate water if there is no unappropriated water in the proposed source, or if the proposed appropriation would conflict with vested rights or be otherwise detrimental to the public welfare. Administrative action in rejecting an application is subject to review in the courts.

The requirement that no permit shall be granted to the impairment of a vested right is simply a statement of general law. In States in which the riparian right is recognized, a permit to appropriate water is subject to existing riparian rights; and whether or not riparian rights exist, the permit has a priority which is junior to those of all established appropriative rights. Permits are necessarily subject to existing vested rights. The Arizona Supreme Court stated [13] that an action of the State water commissioner in granting a permit, insofar as it conflicts with vested rights, is absolutely void. The Texas court has stated that the board of water engineers has no authority under the statute to pass upon the validity of existing rights; [14] and the Utah court, that the State engineer does not determine the rights of parties to the proceeding.[15] It is evident that the administrative agency is expected to ascertain for the purpose of granting a permit whether existing rights will be impaired, but that this action is not a determination of such rights.

The section of the California statute [16] in which the administrative agency is directed to reject an application which in its judgment "would not best conserve the public interest," also authorizes the State agency to impose upon intending appropriators such terms and conditions as in its judgment will best develop, conserve, and utilize the waters sought to be appropriated, and declares it to be the established policy of the State that the use of water for domestic purposes is the highest use and irrigation the next highest. The view taken by the division of water resources as to this legislative direction and authorization is thus expressed in one of its opinions and orders: [17]

> Considering Section 15 in connection with the other sections of the Water Commission Act and also in the light of the many Superior Court Decisions which have in past years construed the fundamental principles of the doctrine of appropriation of water, it is our interpretation of Section 15 that the Division is authorized to insert terms and conditions relative to the use of water by an applicant which are directly pertinent to the manner of his use and the time of his use in order to insure the most beneficial use by him which can reasonably be expected under all the circumstances involved and which may

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[13] *Salt River Valley Water Users' Assn.* v. *Norviel* (29 Ariz. 499, 242 Pac. 1013 (1926)).
[14] *Motl* v. *Boyd* (116 Tex. 82, 286 S. W. 458 (1926)).
[15] *Eardley* v. *Terry* (94 Utah 367, 77 Pac. (2d) 362 (1938)).
[16] Deering's Gen. Laws of Calif., 1937, vol. 2, act 9091, sec. 15.
[17] Calif. Dept. Public Works, Division of Water Rights, Opinion and Order, Mokelumne River Applications, April 17, 1926.

be designed to carry out and safeguard positive provisions of the act but that the act does not impower the Division to impose any conditions which as a legislature it might consider applicable or even to speculate upon what might or might not prove to be of general public welfare and then act according to its best estimate as to what the future development of this state may prove to be in the public interest. Outside of a manifest and indisputable certainty as to what is against public welfare we would hesitate to deny an application as not best conserving the public interest.

The Division does not hesitate when issuing a permit to insert such conditions as in its judgment are advisable to afford protection to prior rights, to restrict the permittee to unappropriated water, and to safeguard public welfare generally insofar as compatible with its conceptions of the underlying principles of the appropriation doctrine, the Water Commission Act and Section 15 thereof and the constitution and codes of the State.

In acting upon an application to appropriate water for power purposes, the California division imposed this condition:

The right to store and use water for power purposes under this permit shall not interfere with future appropriations of said water for agricultural or municipal purposes.

In upholding this action of the division, the supreme court stated [18] that unless and until the statutory conditions are met, the applicant obtains no property right or any other right against the State. If a permit is issued with qualifications as to the use of water, the State authority is not exercising judicial authority if it imposes in the public interest the restrictions and conditions provided for in the act. The State agency may not arbitrarily refuse the granting of a permit when all the prerequisite facts set forth in the statute are present, and mandamus will then lie to compel the issuance; but unless all the conditions are present, the water authority may grant a qualified permit consonant with such conditions or may, if justified, reject the application altogether.

The Supreme Court of Idaho held that the statute granting the State engineer power to cancel permits when the conditions are not complied with does not confer judicial power, the acts being administrative; [19] and that the statute authorizing contests of applications does not attempt to confer judicial power on an administrative official.[20]

The Supreme Court of Nebraska has held that the State board of irrigation (now the department of roads and irrigation) has a large discretion in granting a right to make an appropriation and that it may grant a qualified and limited right if the public welfare so demands.[21] It was further stated that the State had made the department the guardian of the public welfare in the appropriation of water, and had vested in that agency the power to impose conditions dictated by public policy; that there was no doubt of its power and duty to determine such questions. In this instance the action of the department in granting a permit, subject to the restriction that power generated under it should not be transmitted or used outside the State, was upheld.

An Oregon case [22] arose over the action of the State engineer in referring certain applications to the board of control (now the

[18] *East Bay Municipal Utility Dist.* v. *State Department of Public Works* (1 Calif. (2d) 476, 35 Pac. (2d) 1027 (1934)).

[19] *Speer* v. *Stephenson* (16 Idaho 707, 102 Pac. 365 (1909)).

[20] *Twin Falls Canal Co.* v. *Huff* (58 Idaho 587, 76 Pac. (2d) 923 (1938)).

[21] *Kirk* v. *State Board of Irr.* (90 Nebr. 627, 134 N. W. 167 (1912)).

[22] *Cookinham* v. *Lewis* (58 Oreg. 484, 114 Pac. 88, 115 Pac. 342 (1911)).

State reclamation commission) for a finding as to whether the permits contemplated would be a menace to the safety and welfare of the public, and the action of the board in directing the State engineer to refuse the applications of parties who had not secured final contract with the desert land board for the reclamation of the lands and to approve the application of one who had secured such contract. This action of the board was sustained by the supreme court, as it was deemed that the questions concerning the reclamation of public lands were sufficiently of public concern to be properly considered by the administrative officers in determining whether the approval of applications would be a menace to the public welfare. The prior filing was held to give no priority of right if granting the permit would not be in the public interest.

The requirement that a permit shall not be granted if there is no unappropriated water in the proposed source of supply raises a question of administrative policy. It is commonly stated that the usual flow of many western streams has been overappropriated; and when on a given stream an application to appropriate water is filed, the records in the State engineer's office may disclose no reasonably anticipated supply above the requirements of existing claimants. However, unless complete water-supply studies have been made on that stream system, there may well be a question as to whether the absence of unappropriated flood flows and return-water supplies is so clearly established as to justify the denial of an application to appropriate. This permit, if granted, can attach only to whatever supply may be found above the requirements of holders of vested rights. Thus arises the question of better public policy—to deny the application, with the possibility that the conclusions of the administrative officer may be wrong and a proposed beneficial use of water thereby prevented, or to grant the application and allow the intending appropriator to take the risk of failure of his project if no water supply proves to be available. The United States Supreme Court, in the interstate case of *Wyoming* v. *Colorado*,[23] referred to an assertion by counsel that permits issued by the State engineer of Wyoming constituted "solemn adjudications" by the State engineer that the supply was adequate to cover them, and stated:

> But in this the nature of the permits is misapprehended. In fact and in law they are not adjudications, but mere licenses to appropriate, if the requisite amount of water be there. As to many nothing is ever done under them by the intending appropriators. In such cases there is no appropriation; and even in others the amount of the appropriation turns on what is actually done under the permit. In late years the permits relating to these streams have contained a provision, saying: "The records of the State Engineer's office show the waters of (the particular stream) to be largely appropriated. The appropriator under the permit is hereby notified of this fact, and the issuance of this permit grants only the right to divert and use the surplus or waste water of the stream and confers no rights which will interfere with or impair the use of water by prior appropriators." It therefore is plain that these permits have no such probative force as Colorado seeks to have attributed to them.

The fact that the permits were valid only to the extent of water available to cover them was reasserted in the decision in *Ide* v. *United States*.[24]

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[23] 259 U. S. 419 (1922).
[24] 263 U. S. 497 (1924).

The Supreme Court of Utah stated that an applicant is entitled, as a matter of legal right, to have his application approved if unappropriated water exists in the stream;[25] and the California Supreme Court has made a recent statement to the same effect, when all the prerequisite facts set forth in the statute are present.[26] A fairly recent decision of the Utah Supreme Court favors the granting of applications to appropriate water unless it clearly appears, beyond any reasonable doubt, that there is no unappropriated water in the source of supply. It was stated:[27]

> The state engineer has not the facilities to inquire into and determine the extent of existing rights, except in a very general way. * * * Since the policy of the law is to prevent waste and promote the largest beneficial use of water, new appropriations should be favored and not hindered. In a doubtful case, when the conclusion is not clear, it is more consistent with sound policy and with the general scheme of the law, to approve the application to appropriate and afford the new claimant the legal status and the opportunity to proceed in due order of law and have the disputed questions definitely and authoritatively determined, rather than to shut off such determination by the denial of his application.

However, an even more recent decision of that court[28] stated that under the statute the State engineer is required to determine whether there is unappropriated water, but not to determine the rights of parties to the proceeding.

> It seems clear to us that the Legislature intended that when the application is filed, the state engineer is called upon to determine preliminarily whether there is probable cause to believe that an application can be perfected, having due regard to whether there is unappropriated water available for appropriation, whether it can be put to a beneficial use, and whether it can be diverted and so used without injuring or conflicting with the prior rights of others. If he determines there is such probability, the application is approved and the applicant then proceeds to demonstrate by an actual use of the rights sought to be acquired that he is entitled to such rights.

In that case the State engineer had denied the application, but the district court reversed his order and granted plaintiff any water obtained by conserving and increasing the flow of the stream. The supreme court held that the lower court, having determined that there was unappropriated water in the proposed source, must reverse the decision of the State engineer and allow the applicant to proceed in perfecting his right; but that the court should not decree to the applicant the use of the alleged increase in flow without requiring him to comply with the law of appropriation.

The Supreme Court of Texas has stated[29] that the board of water engineers in acting upon an application to appropriate water has no authority to pass upon the validity of existing rights, but has the duty of rejecting applications where there is no unappropriated water in the proposed source of supply. It was further stated that the determination of such question is clearly administrative, as it would be arrived at by adding up the quantities of water previously appropriated, as shown on the board's records, and subtracting the total from the quantity previously determined to be furnished by the stream.

[25] *Brady* v. *McGonagle* (57 Utah 424, 195 Pac. 188 (1921)).
[26] *East Bay Municipal Utility District* v. *State Department of Public Works* (1 Calif. (2d) 476, 35 Pac. (2d) 1027 (1934)).
[27] *Little Cottonwood Water Co.* v. *Kimball* (76 Utah 243, 289 Pac. 116 (1930)).
[28] *Eardley* v. *Terry* (94 Utah 367, 77 Pac. (2d) 362 (1938)).
[29] *Motl* v. *Boyd* (116 Tex. 82, 286 S. W. 458 (1926)).

The Colorado system of appropriative rights does not include the securing of permits from the State engineer. The criterion of the right to appropriate is the existence of unappropriated water in the proposed source of supply. Idaho has a permit system, but it is not exclusive; appropriations made by diverting water and applying it to beneficial use, without making application to the State for a permit, are equally valid. (See ch. 2, p. 87–88.)

Summing up, the right to appropriate water in Colorado cannot be denied, nor can it be denied in Idaho except insofar as the regulation of use of water for power purposes is concerned. In various other States legislation authorizes the State administrative agency to restrict the acquisition of appropriative rights in the interest of the public welfare, and although supreme court decisions on this point have not been numerous, the exercise of administrative discretion has been generally upheld in the courts. The ascertainment of whether or not there is unappropriated water in the proposed source of supply is an administrative determination for the guidance of the administrative agency and is not a judicial determination of existing rights.

### Preferences as Between Pending Applications to Appropriate Water

The question of choosing between pending applications to appropriate water may be decided under the general statutory requirement that an application be denied if it conflicts with the public interest, or else strictly according to priority of filing; or the preference as between proposed conflicting uses of different character may be stated by statute.

The Arizona statute above noted specifically states that when two or more pending applications conflict, the order of preference shall determine the right to make the appropriation. This is an administrative matter, to be decided according to the prescribed policy. The statute does not refer to priorities in the distribution of water under appropriative rights on the basis of preferences in use.

The Texas provision for preferences, as modified by the provision concerning maximum utilization of waters, likewise is clearly an expression of policy to be followed in the granting of applications to appropriate water as between pending applicants. However, the original provision may conceivably be interpreted as applying to a given application to appropriate water even if there are no other pending applications on file.

The California provision is likewise such an administrative matter in acting upon applications to appropriate water. However, it does not state that the preference shall determine only as between conflicting applications, but that the stated policy shall guide action upon applications to appropriate generally. As noted above, in discussing restrictions upon the acquisition of appropriative rights, the issuance of a permit for power purposes, conditioned upon the future exercise of rights to the use of water upstream for higher uses, has been upheld by the California Supreme Court.[30]

Nor do the provisions of Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and

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[30] *East Bay Municipal Utility District* v. *State Department of Public Works* (1 Calif. (2d) 476, 35 Pac. (2d) 1027 (1934)).

Wyoming concerning appropriations likely to prove detrimental to the public interest, refer specifically to determinations as between pending applications, although the question is likely to arise in cases in which two or more applications not yet acted upon conflict.

The New Mexico Supreme Court had for decision a case in which two applications had been filed to appropriate water from a stream, the earlier filing having been rejected by the Territorial engineer for the principal reasons that the cost per acre would be twice that of the cost under the second application, and because the second project would enable people living in the vicinity to purchase water at a lower price and was better within the available water supply.[31] It was held that the power of the Territorial engineer to reject an application if contrary to the public interest was not limited to cases in which the project would be a menace to the public health and safety, and stated that a project requiring water in excess of the amount appropriated is contrary to public interest. However, the fact alone that irrigation under one proposed project would cost more per acre than under another proposed project was stated to be not conclusive that the former project application should be rejected. Further, the question of what is public interest is one of fact, which should not be decided on the basis of an incomplete record; and the cause was remanded for the purpose of obtaining further facts essential to a decision.

The Nebraska Supreme Court affirmed the action of the State board in dismissing an application as detrimental to the public welfare;[32] stating that the board no doubt considered that in all probability the allowance of two or more conflicting permits to the use of all available water at or near the same point of diversion would result in defeating all projects. The New Mexico decision just referred to was cited.

### Reservations in Favor of Municipalities

The statutes of Arizona, California, Oregon, and Texas above noted provide for the reservation of water to meet the growing needs of municipalities. This is done in Arizona and Oregon at the time the municipality makes application to appropriate water, or in Oregon at the time the municipality notifies the State engineer of the probable increases or extensions in its use, and therefore does not have the effect of depriving existing users of any part of their appropriated supplies. It operates to prevent the accrual of subsequent rights, pending the time at which the municipality will require a larger supply than needed at the time of initiating the appropriation.

The California provision not only gives preference to the application of a municipality for domestic purposes, but authorizes a municipality to appropriate water in excess of its existing needs, the excess being subject to temporary appropriation by others pending the growth of municipal requirements. The temporary character of any such subsequent appropriation of reserved water is an express

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[31] *Young & Norton* v. *Hinderlider* (15 N. Mex. 666, 110 Pac. 1045 (1910)).

[32] *Commonwealth Power Co.* v. *State Board of Irr., Highways and Drainage* (94 Nebr. 613, 143 N. W. 937 (1913)).

condition of such appropriation. Furthermore, the holders of such temporary permits are entitled to compensation for the loss of use of their facilities when the municipality is ready to make use of the excess water temporarily so appropriated. Nothing is stated as to compensation for the value of the water right, and it is presumed that no such valuation would be allowed.

The Texas statute does not require the municipality to appropriate water in advance of its needs. On the contrary, it may make an appropriation at any future time, regardless of appropriations which may have been initiated after enactment of the statute for other than domestic or municipal purposes, and without the necessity of making compensation for their extinguishment. This operates as a reservation of unappropriated water for all future needs of municipalities, as against appropriations for irrigation, mining, etc., granted after the statute was enacted in 1931. However, the law expressly provides that all such other appropriations shall be granted subject to this reservation, so that all intending appropriators are on notice to this effect. As noted, this provision does not apply to an international boundary stream, that is, to the Rio Grande.

Concerning the Oregon statute that applications for the appropriation of municipal water supplies may be approved to the exclusion of subsequent appropriations, the supreme court said that:[33]

> * * * it is apparent that no precedence is given to a municipal corporation as such, as against prior claimants. Although intending to supply water to a town or its inhabitants, no private claimant has preference over another prior in time; all other things being equal. It is only when a contemplated use is a menace to the safety and welfare of the public that the application shall be referred to the board of control for consideration. It would seem from a proper construction of this section that priorities of appropriation constitute a species of property in the proprietor which cannot be taken from him except by the right of eminent domain upon suitable compensation first assessed and tendered.

In a very recent Colorado decision[34] concerning water rights of the city of Denver, the court stated that the factors entering into the determination of beneficial use in case of a great and growing city are more flexible than those relating to the use of water on agricultural land, and that the city by prudent management may acquire by appropriation an adequate supply of water for a reasonable time in the future, in addition to a sufficient volume for immediate use, with the right under certain restrictions to lease the use of water not needed for immediate use.

Even more recently the Idaho Supreme Court has held[34a] that a municipality, when acquiring water to supply its existing needs, may also acquire and hold rights to additional water for the purpose of supplying future needs. It was further held that a municipality may purchase lands, if necessary, to acquire water for its municipal needs, but is not required, after purchase, to irrigate the lands to which water rights had attached or to cause them to be irrigated in order to avoid a loss of the water rights on a charge of abandonment; the necessity of providing for future needs being vital to the life and existence of the community.

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[33] *In re Schollmeyer* (69 Oreg. 210, 138 Pac. 211 (1914)).

[34] *Denver* v. *Sheriff* (105 Colo. 193, 96 Pac. (2d) 836 (1939)).

[34a] *Bens* v. *Soda Springs* (— Idaho —, 107 Pac. (2d) 151 (1940)). Under Idaho Code Ann. 1932, sec. 49–1132, a municipal corporation is expressly authorized to supply excess water for use outside its limits. The court cited *Holt* v. *Cheyenne* (22 Wyo. 212, 137 Pac. 876 (1914)) to the effect that a city is not limited in the amount of its appropriation to the needs of its citizens at the time of adjudication of its water right, but may dispose of and apply the surplus water to a beneficial use up to the amount of its appropriation.

### Change to a Preferred Use

The Washington and Wyoming statutes provide for the condemnation of an inferior use of water in favor of a superior or preferred use. This is not simply a matter of preference in the use of a given water supply in time of scarcity; it is actually the change from an inferior to a preferred use, a permanent arrangement, justified in the interest of the public welfare.

The Supreme Court of Washington held that the use of water for domestic purposes is a public purpose when the domestic purpose desired is the foundation of an agricultural enterprise.[35] In that case the one desiring to use the water primarily for domestic purposes was allowed the right to condemn a water supply on another's land, not then being utilized by the landowner.

The Wyoming Supreme Court has held that a change to a preferred use conveys only the rights claimed under the existing use, and does not operate to subordinate the rights of other users to the preferred use if the rights of these other users are not likewise acquired or condemned.[36] In other words, changing a use to a preferred use does not alter its priority with respect to other priorities not involved in the proceedings.

### The Exercise of a Preferential Right in Several States Involves Compensation for the Impairment of a Vested Inferior Right. In Other States Compensation Is Not Mentioned in the Constitutional or Statutory Provisions, or Is Specifically Denied or Limited as Affecting Future Appropriations

The rule in several States is that a preferential right to use water, which has already been appropriated for an inferior purpose, is subject to the payment of compensation for the injury thus suffered by the holder of the inferior right, under the laws regulating the taking of property for public or private use. As to the basis for such rule, it may be noted that strict priority is a fundamental part of the doctrine of appropriation, and it was the necessity therefor that led to adoption of the doctrine. As stated by Kinney, the arid region doctrine of appropriation would not have been adopted in the West if there had been enough water to satisfy the wants of all.[37]

The rule is well settled that the "first in time is first in right," even to the extent of taking the entire flow of the particular stream and without regard to variations in the normal flow of the stream. Wiel says:[38]

> In times of natural or other deficiency, also, unless otherwise provided by statute, the prior appropriator may still claim his full amount; the loss must fall on the latter appropriators. * * * This is true even where (indeed, especially where) unusual scarcity or dry season causes the deficiency. * * *

This is unquestionably the case, for the rule of strict priority admits of no exception in times of scarcity of water but was designed to protect the first user under just such an eventuality; but in great emergencies such as recent periods of extreme and widespread drought, the rule has been temporarily set aside in certain intermountain regions

[35] *State ex rel. Anderson* v. *Superior Court* (119 Wash. 406, 205 Pac. 1051 (1922)).
[36] *Newcastle* v. *Smith* (28 Wyo. 371, 205 Pac. 302 (1922)).
[37] Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, sec. 780, p. 1355.
[38] Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 301, p. 311.

and the water distributed where it would do the most good, with the implied consent of the public.

As noted, the constitutions of Idaho and Nebraska, while granting preferences in time of scarcity, make the exercise of the right contingent upon payment of compensation to the inferior right thus extinguished or subordinated. The Supreme Court of Idaho has held that under this provision, a municipality cannot take water for domestic purposes, which has been previously appropriated for other beneficial uses, without fully compensating the owner.[39] In a very recent case [40] it is said that the constitutional preference in organized mining districts does not authorize or permit parties engaged in mining or any other occupation to fill up the natural channel of a public stream to the injury of any other water user. Concerning the Idaho statute giving the preference to decreed rights in water districts in time of scarcity, the supreme court has said: [41]

> * * * it was absolutely incumbent upon the watermaster, during a scarcity of water, to treat the unadjudicated rights of respondent as inferior and subordinate to the decreed rights of appellants, and first supply appellants' decreed rights. * * * Of this the respondent could not lawfully complain at any time before acquisition by it of a decreed award, as sought in this proceeding.

Hence it was held that the distribution of water under a decreed right in time of scarcity was not an adverse use, but a permissive use, based upon the watermaster's statutory duty. It may be noted that, while compensation is not provided for the exercise of this preference, there would be no way in which compensation could be arrived at without determining the priority of the right treated as inferior, and that would involve an adjudication which would raise the inferior claim to the class of preferred (adjudicated) rights. Hence the exercise of this preferential treatment does not involve the impairment of established rights.

The provision in the Nebraska constitution was inserted by amendment in 1920. An earlier statutory provision,[42] still in the law, granted the preference but without a proviso for compensation. Concerning this statutory preference, the Supreme Court of Nebraska stated in 1903 [43] that the term "domestic purposes" as used in the statute referred to the use of water permitted to the riparian owner at common law for such purposes as drinking and cooking and watering stock, involving no considerable diversion of water and no appreciable interference with the stream. Further,

> This right of the riparian owner the statute intended to preserve to him, and to protect against appropriations of water for other uses by canals, ditches, and pipe-lines, whereby large quantities would be abstracted. This is the only construction which will give any force to the statute.

Hence the statutory preference in favor of domestic purposes did not extend to furnishing water to a village for general municipal purposes, including water for sprinkling streets and for power for a lighting plant, nor for flushing sewers at a military post. In a decision rendered in 1914 [44] the court stated that it was not necessary to de-

[39] *Montpelier Mill Co.* v. *Montpelier* (19 Idaho 212, 113 Pac. 741 (1911)); *Basinger* v. *Taylor* (30 Idaho 289, 164 Pac. 522 (1917)).
[40] *Ravndal* v. *Northfork Placers* (60 Idaho 305, 91 Pac. (2d) 368 (1939)).
[41] *Big Wood Canal Co.* v. *Chapman* (45 Idaho 380, 263 Pac. 45 (1927)).
[42] Nebr. Comp. Laws, 1929, sec. 46–504.
[43] *Crawford Co.* v. *Hathaway* (67 Nebr. 325, 93 N. W. 781 (1903)).
[44] *Kearney Water & Elec. Powers Co.* v. *Alfalfa Irr. Dist.* (97 Nebr. 139, 149 N. W. 363 (1914)).

termine in that case how this provision of the statute should be applied as between conflicting applications to appropriate water, but that it must follow that vested rights of completed appropriations could not be destroyed without compensation.

The Colorado constitutional provision does not provide for compensation to the holder of the inferior right. However, the Supreme Court of Colorado has held that this section does not authorize the taking of water for domestic use from prior appropriators, without fully compensating the latter.[45] Furthermore, concerning the statute providing for prorating the supply to which a ditch or reservoir is entitled in time of shortage, the supreme court has said: [46]

> The most favorable view that can be taken of the statute is that in times of scarcity of water it may be resorted to to compel the prorating of water among consumers having priorities of the same, or nearly the same, date.

The Oregon and Utah statutes purport to give preference to certain uses of water in time of water shortage, and do not specifically require compensation to the appropriator whose right would thus be impaired. No decisions interpreting this feature have been found in the supreme court of either State; although in referring to another statute, as noted above (p. 352), the Oregon court stated that priorities of appropriation constitute a species of property which cannot be taken from the holder without compensation.[47] In any event, a question may well be raised as to whether under these general provisions such preferences can be exercised in such manner as to interfere with vested rights without making compensation for the injury. Likewise, although the Kansas statute requires condemnation in case of a diversion which impairs a vested appropriative right *for the same or a higher purpose*, a further question may be raised as to whether the rule would not apply also to the impairment of an *inferior* right. The Washington and Wyoming statutes definitely provide for condemnation and compensation when inferior uses are taken in favor of superior ones. Under the Washington provision, it would appear that the excess water over the quantity reasonably required for irrigation under the most economical method of artificial application prevalent in the vicinity is subject to condemnation for other irrigation uses, the court to determine the question of economical methods.

The California, Oregon, and Texas statutes are much more specific in their application to the matter of compensation for the impairment by public agencies of *future* appropriations. That is, compensation is limited to certain items in the California and Oregon statutes which authorize the extinguishment of future appropriations under designated circumstances; and it is denied in the Texas statute, which also designates the circumstances. These statutes are specific in their provisions—specific as to the rights that are subject to being taken, as to the public bodies that may take them, and as to the existence of the right of compensation and as to its extent. The intending appropriator is therefore apprised in advance as to the conditions of his appropriation, and it is the intent of the statutes that future appropriations for certain purposes shall be expressly subject to being taken under prescribed conditions for

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[45] *Sterling* v. *Pawnee Ditch Extension Co.* (42 Colo. 421, 94 Pac. 339 (1908)).
[46] *Larimer and Weld Irr. Co.* v. *Wyatt* (23 Colo. 480, 48 Pac. 528 (1897)).
[47] *In re Schollmeyer* (69 Oreg. 210, 138 Pac. 211 (1914)).

other purposes. Under the California act, all permits and licenses are required to enumerate the conditions to which they are subject as provided in the statute, and in Oregon each certificate of appropriation granted to a person or a private agency for power purposes must contain the provisions concerning the right of future extinguishment for public use. As heretofore noted, the action of the California administrative agency has been upheld in granting a permit for the storage of water for power purposes conditioned upon its not interfering with future appropriations for the preferred agricultural and municipal uses, and the decision does not discuss the matter of compensation for future extinguishment of the power right.[48]

Special limitations upon the duration of appropriations granted for power purposes appear in several statutes. For example, in Arizona the right is limited to 40 years, subject to a preference right of renewal under laws existing at the date of expiration; and a similar provision in the South Dakota statute limits the period to 50 years where the appropriation exceeds 25 horsepower, the appropriator having the prior right of reappropriation. In Nebraska the holder of an approved application must enter into a lease from the State for not over 50 years, and a subsequent lessee must compensate for the value of existing improvements. Licenses under the Oregon hydroelectric act are also limited to 50 years, and, as noted, compensation is provided in the event that the whole net investment has not been amortized.

It may be noted that the Arizona, California, and Oregon statutes place definite qualifications upon items that may be claimed in the valuation of water rights for specific purposes.

In the actual operation of irrigation enterprises it is not uncommon to find preferences granted for the irrigation of certain crops in times of water scarcity. For example, water will be delivered for the purpose of keeping trees alive, in preference to the complete requirements of annual crops. This practice is based upon the express or implied consent of the water users under the particular organization, rather than upon a settled rule of law.

Furthermore, the statutes authorizing the rotation of water during periods of low flow, heretofore noted in connection with periods of use in the exercise of appropriative rights (p. 301), contemplate simply a more efficient distribution and conservation of the available supply, and do not purport to divest any appropriator of the quantity of water to which he is entitled by virtue of his priority.

### There Is an Apparent Tendency Toward Modification of the Rule of Unreasonable Priority

It was suggested by Wiel,[49] in discussing the matter of exclusive versus correlative rights between appropriators, that there may be a modification of the rule of "unreasonable priority." This was written in 1911. He stated that each appropriator is a prior one as against all who are subsequent to him, and has, against the subsequent appropriators, an exclusive right to have the stream flow for his use to the extent of his appropriation. Further, that the general rule

[48] *East Bay Municipal Utility District* v. *State Department of Public Works* (1 Calif. (2d) 476, 35 Pac. (2d) 1027 (1934)).
[49] Wiel, S. C., Water Rights in the Western States, 3d ed., vol. 1, p. 329 et seq.

is against modifying the force of priority either in times of scarcity or where it extends to a whole stream, or under any other circumstances; but that statutes and court decisions then showed an increasing tendency toward some modification. In an article written in 1936, discussing the continuing conflict between upper-level and lower-level users of water of streams, Mr. Wiel has stated further: [50]

> At all events, adjusting uses that are now on hand seems to be getting more attention than additional development. In terms of law, the moderating principles of correlative rights and reasonable use seem to be outstripping exclusive rights by priority of appropriation in general esteem. This is the impression which, it is believed, an observer gets from the fifty years of water law here reviewed.

Conkling,[51] likewise, has stated recently that the doctrine of appropriation as interpreted by the courts has not been entirely satisfactory for complex conditions and that there is a tendency toward modification. He cites the inter-State compacts, the Central Valley project in California, the tendency toward "equitable allocation" of waters in cases between States before the United States Supreme Court, and other examples, and concludes that for the larger stream systems modifications will finally come about by which a more uniform and flexible distribution of the unstable water supply will be secured.

So far as the courts of last resort are concerned, little relaxation of the rule of strict priority of established appropriative rights as against each other is apparent from the decisions of the past two or three decades, aside from the equitable allocations between States and the increasing insistence upon reasonableness in the exercise of water rights. The principle of priority, within the general doctrine of appropriation, governs the State decisions now, as formerly.[51a] However, with the more and more complete utilization of water resources and greater emphasis upon both water and soil conservation that are characteristic of the present time, the trend pointed out by these writers may yet appear in the judicial decisions in some tangible modification of the strict doctrine in the greater interest of the public welfare.

Furthermore, while under our constitutional system it is elemental that private property cannot be taken for public use without compensation, it is equally well settled that the State in the exercise of its police power may regulate the use of private property in the interest of the public welfare. The use of water unquestionably is as much subject to regulation as is the use of land or other property. The California constitutional amendment imposing reasonableness upon all uses of water has been accepted by the courts of that State as a

[50] Wiel, S. C., Fifty Years of Water Law, Harvard Law Review, vol. I, No. 2, pp. 252–304.

[51] Conkling, Harold, Administrative Control of Underground Water: Physical and Legal Aspects, Proceedings American Society of Civil Engineers, vol. 62, No. 4, pp. 485–516, April 1936.

[51a] A very recent decision by the Nebraska Supreme Court concerned an action to compel State administrative officers so to administer a stream as to protect downstream prior appropriators from alleged unlawful diversions upstream by junior appropriators: *State ex rel. Cary* v. *Cochran* (138 Nebr. 163, 292 N. W. 239 (1940)). The court held that the State officers in administering the stream perform ministerial acts, even though they must first make findings of fact; that it is their duty to determine from all available means whether or not a usable quantity of water can be delivered to prior users downstream, which finding is final unless unreasonable or arbitrary; that if it is found that a given quantity of water could not naturally reach the downstream users, the officers may lawfully permit junior appropriators upstream to divert it; but that their function does not extend to allowing junior appropriators upstream to have the water simply because great losses would result in the stream bed in sending the water downstream, if it appears that a usable quantity can be delivered below. The function of the administrator, it was held, is to enforce priorities, not to change them.

mandate which must guide their decisions, as noted in chapter 2. Revision of standards which govern long-established uses of water is a slow process; yet existing legal machinery—constitutional and statutory declarations and judicial reinterpretations—appears adequate for overcoming a substantial measure of unreasonableness in priority rights when the interests of the public clearly demand it. Likewise, condemnation is available in the case of public improvements.

## Use of Natural Channel for the Conveyance of Appropriated Water

### The Rule Is That Water Appropriated and Diverted From a Stream May Be Conveyed Through a Natural Channel Without Loss of Ownership

Water diverted from a stream into ditches and reservoirs under a valid right of appropriation is no longer public water of the State, but ordinarily becomes the private property of the appropriator; and even if diverted for a public use it is under the control of the diverter during the process of distribution and delivery to consumers who are entitled to that use. The general rule is that water once validly reduced to control may be conveyed through a natural channel as a part of the distribution system, and may be discharged into a flowing stream and mingled with other waters to which the rights of other individuals attach, without loss of ownership. The stream thus employed for the purpose of conveyance may be the one from which water was originally diverted or may be a different stream entirely. (The question of diverting water out of the watershed is discussed below, p. 360.) Harding[52] states, concerning this:

> Water which has been reduced to ownership may be discharged into a natural watercourse and conveyed therein to the point of use without loss of ownership. Such water is not subject to appropriation by others while being conveyed in the natural channel. Such conveyance is called commingling and is frequently practiced. Water may be stored in an upstream reservoir and, when released, allowed to flow in the stream channel to the point of use. Water stored in a reservoir built on a stream channel commingles with the stream flow through the reservoir until the storage is used. Water may be brought from one drainage area and released into another watercourse for lower diversions. As long as such waters are not abandoned into the watercourse, such private water may not be taken by those having rights to the natural stream flow. One who stores water in a stream-channel reservoir, or who conveys private waters in a stream channel, is subject to all losses of such commingled water and can divert only the water released less any conveyance or other losses.

Such water is not abandoned where there is an intent to recapture it, and prior appropriators and riparian owners may not complain so long as they receive their full supply of water.[53]

### The Matter Is Provided for by Statute in the Western States

All of the Western States, as shown in the appendix, have statutory provisions authorizing the use of natural streams for the conveyance of water by persons entitled to its use, under certain limitations.

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[52] Harding, S. T., Water Rights for Irrigation, p. 34. The propriety of using a natural channel for the conveyance of water was recognized in the early California case of *Hoffman* v. *Stone* (7 Calif. 49 (1857)).

[53] 26 Calif. Jur. 349. See also discussions by Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, sec. 832, p. 1457; Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 38, p. 37.

The limitations usually are that the rights of others be not impaired, and that losses in transit be determined and deducted from the quantity rediverted; and the procedure in the majority of cases is under the supervision of the State water officials. The Nevada,[54] Oregon,[55] Texas,[55a] and Wyoming [56] statutes refer only to the conveyance of stored water; however, the Oregon Supreme Court in several cases has approved the conveyance, in natural channels, of water directly diverted from a stream,[57] and the Nevada court held invalid a contract purporting to dispose of waste waters on the ground that the water had been abandoned inasmuch as there was no intent to recapture the water when turned from control and allowed to find its way into a stream.[58] The right to use a natural stream for the conveyance of water reduced to control has been sustained elsewhere even before the enactment of statutes,[59] and there would seem to be no reason for denying the right in cases in which existing uses of the stream are not adversely affected.

The requirement that the means of diversion and distribution must be reasonably efficient applies to natural channels as well as to artificial conduits, so that such channel may not be used to convey water if it is in such shape that an excessive quantity will be lost.[60]

In a recent Nebraska case [61] a creek through which water was being conducted from one ditch to the point of delivery to another irrigation company did not have the capacity for this particular use, with the result that overflows caused substantial damage. The court pointed out that the statute authorizing the use of natural streams for such purpose specifically holds one responsible for all damage resulting from this use.

The Colorado,[62] Montana,[63] and Wyoming [64] statutes specifically authorize the exchange of stored water for direct flow, in cases in which reservoir sites may be located at lower levels than the land to be irrigated. This system of exchange is practiced extensively among the mutual irrigation companies on the Cache la Poudre River in Colorado, where it makes possible the storage of water in reservoirs located below the canals of the companies owning them, for eventual delivery to lower canals in return for late-season use by the upper canals of river water to which the lower canals are entitled by their early direct-flow rights.[65]

A New Mexico statute [66] authorizes the owner of irrigation works, where others are not injured, to deliver water into any ditch or watercourse to supply appropriations therefrom and to take in exchange, either above or below such point of delivery, an equivalent quantity less transmission losses. An individual relied upon this section in an

[54] Nev. Comp. Laws, 1929, secs. 8238, 7896 and 7963.
[55] Oreg. Code Ann., 1930, sec. 47–704.
[55a] Vernon's Tex. Stats., Rev. Civ. Stats., 1936, arts 7547 and 7548.
[56] Wyo. Rev. Stats., 1931, sec. 122–1504.
[57] *Simmons* v. *Winters* (21 Oreg. 35, 27 Pac. 7 (1891)); *McCall* v. *Porter* (42 Oreg. 49, 70 Pac. 820 (1902), 71 Pac. 976 (1903)); *Hough* v. *Porter* (51 Oreg. 318, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909)).
[58] *Schulz* v. *Sweeny* (19 Nev. 359, 11 Pac. 253 (1886)).
[59] E. g., this was done in *Herriman Irr. Co.* v. *Keel* (25 Utah 96, 69 Pac. 719 (1902)).
[60] *Stickney* v. *Hanrahan* (7 Idaho 424, 63 Pac. 189 (1909)).
[61] *Hagadone* v. *Dawson County Irr. Co.* (136 Nebr. 258, 285 N. W. 600 (1939)).
[62] Colo. Stats. Ann., 1935, ch. 90, sec. 103.
[63] Mont. Laws, 1937, ch. 39.
[64] Wyo. Rev. Stats., 1931, secs. 122–428 to 122–430.
[65] Hemphill, R. G., Irrigation in Northern Colorado, U. S. Dept. Agr. Bul. 1026 (1922).
[66] N. Mex. Stats. Ann., Comp. 1929, sec. 151–171.

effort to compel a public service corporation to convey water through its canal from a drainage ditch in which he had a water right, and deliver it to his land. The supreme court stated [67] that the corporation could not be compelled to carry water for hire under such circumstances, from a source other than that employed by the corporation; further, that the section, so far as it authorized the delivery of water from a junior ditch into a senior ditch and the diversion of water above or below the point of delivery into the senior ditch, without compensation to the owner thereof, was unconstitutional. However, so far as it authorized the delivery of water into and diversion from watercourses of water derived from other sources, it was unobjectionable on that ground.

### The General Rule, But With Some Exceptions, Is That Water May Be Appropriated for Use in a Watershed Other Than That in Which It Is Originally Diverted

The use of water under the riparian doctrine is commonly limited to lands lying within the watershed of the stream to which they are riparian, as noted in chapter 2. (See p. 40.) Under the appropriation doctrine, however, the right of use acquired in the flow of a stream is not limited to riparian lands nor to any other lands solely because of their location; hence it follows logically that the use is not generally restricted to the watershed, subject of course to the rule which applies to all features of the exercise of the appropriative right, namely, that the prior rights of others be not adversely affected. An early Colorado decision [68] recognized the right to divert water from a stream and to carry it across an intervening divide and thence down a different stream for the irrigation of lands lying in the valley of the latter; and diversions of water under appropriative rights are made for use in other watersheds in a number of the Western States.

There are some statutory restrictions upon the taking of water out of the watershed in which it naturally flows. A limitation in the Nebraska water code [69] is that the stream into which water from another stream is turned, must exceed 100 feet in width, in which event no more than 75 percent of the regular flow shall be taken. Another provision requires the owner of a ditch to return unused water to the stream from which it is taken, or to the Missouri River.[70] The Nebraska Supreme Court has recently construed these provisions as restricting the use of water, as an established State policy, to lands within the watershed, thus: [71]

> It is manifest, therefore, that section 46-620, Comp. St. 1929, construed in connection with section 46-508, as an express regulation governing the operation of irrigation canals and ditches, necessarily implies such location and construction of the matters regulated as will enable a full performance of the requirements specifically directed. This, as a practical matter, in view of existing conditions, necessarily limits the location of the canals to within the watershed of the stream that furnishes the source of supply.

The New Mexico water code provides in one section for the right to deliver water from one stream or drainage to another stream or

[67] *Miller* v. *Hagerman Irr. Co.* (20 N. Mex. 604, 151 Pac. 763 (1915)).
[68] *Coffin* v. *Left Hand Ditch Co.* (6 Colo. 443 (1882)).
[69] Nebr. Comp. Laws, 1929, sec. 46-508.
[70] Nebr. Comp. Laws, 1929, sec. 46-620.
[71] *Osterman* v. *Central Nebraska Public Power & Irr. Dist.* (131 Nebr. 356, 268 N. W. 334 (1936)).

drainage and recovery there,[72] and in another section makes it unlawful to divert waters from any public stream for use in another valley to the impairment of existing prior appropriations.[73] Texas also has a statute prohibiting the diversion of water from streams into those of other watersheds to the prejudice of rights in the watersheds from which taken, and providing procedure, before the board of water engineers, for acquirement of the privilege of making the diversion and hearing as to the rights to be affected, with an appeal to the court.[74]

An objection to taking water away from its watershed is that the benefit from return flow from lands irrigated with such water will accrue to the new watershed, and thus be lost to the lands lying within the original watershed. (Rights to the use of "foreign waters"—waters brought from another watershed—are discussed below, p. 375.) All appropriations are subject to existing rights, so that no appropriation will be sanctioned under any circumstances if it results in injury to the holders of existing rights by depriving them of water to which they are entitled. Hence a change in the place of use of appropriated water will not be upheld if the return flow into the stream from the new place of use will no longer be available to supply existing rights which depend upon it, whether the new location is within or without the watershed.[75] (See p. 381–382.)

The Supreme Court of Montana held [76] that a decree that does not specifically authorize a prior appropriator to take water permanently from the watershed must not be construed as giving that right; for each subsequent appropriator is entitled to have the water flow in the same manner as when he located his appropriation, and may insist that the prior appropriation be confined to whatever was actually appropriated or necessary for the purposes for which it was intended to use the water.

Under many circumstances, however, preexisting rights are not injured by a diversion out of the watershed under an appropriation originally made specifically for that purpose, such appropriation necessarily attaching only to the surplus in the stream flow above the requirements of the holders of these senior rights.

### Rights to the Use of Waste, Salvaged, and Developed Water

Streams commonly lose water into the underground reservoir in certain sections and gain water from that source at other points, and may lose water at one time and gain it at the same place at another time, as indicated in the discussion of classification of waters in chapter 1. Likewise stream water is lost by evaporation, and by consumption by water-loving vegetation growing in and close to the channel. Artificial work on the channel may reduce natural losses materially and thus make more water available for use than existed under natural conditions. These increases in stream flow, resulting from artificial improvements, are properly termed "salvaged" waters.

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[72] N. Mex. Stats. Ann., Comp. 1929, sec. 151–171.
[73] N. Mex. Stats. Ann., Comp. 1929. sec. 151–178.
[74] Vernon's Tex. Stats. 1936, Rev. Civ. Stats., arts. 7589 and 7590.
[75] Diversions out of the watershed, to the injury of those who had been making use of the return flow, were enjoined in: *Southern California Inv. Co.* v. *Wilshire* (114 Calif. 68. 77 Pac. 767 (1904)); *Scott* v. *Fruit Growers' Supply Co.* (202 Calif. 47. 258 Pac. 1095 (1927)).
[76] *Spokane Ranch & Water Co.* v. *Beatty* (37 Mont. 342, 96 Pac. 727 (1908)).

Another type of increase in available supply is called "developed" water. This is not water already in the stream and saved from loss, but is new water added to the stream by the efforts of man. Water discharged into a stream through drainage ditches, and which otherwise would have found its way to the channel at a later time, is not truly developed water, although sometimes so designated. Developed water is water which would not have augmented the stream flow under natural conditions. The discharge from a drainage system may consist both of water actually developed, and of water the flow of which was simply hastened by the drainage installation.

#### Waste Water May Be Appropriated Before It Has Returned to the Stream From Which Originally Diverted, Within Limitations, but as a General Rule the Original User Is Under No Obligation to Continue the Waste

Appropriations may generally be made of waste water which has been abandoned by the original appropriators, but with important qualifications. Generally, an independent right to the use of abandoned or waste water can be acquired only if the water has not yet returned to the stream from which it was diverted. If such water after abandonment has reentered a portion of the stream system from which it was originally appropriated, as noted in greater detail below, it becomes a part of that watercourse in legal contemplation as well as physically, and from the standpoint of rights of use, it is just as much a part of the flow as is the water with which it is mingled; hence appropriative rights which before the mingling have attached to the waters of the stream, attach with equal effect to the waste waters originally diverted from the stream and then abandoned into it, so that an independent appropriation cannot then be made of the waste waters as such. The Colorado courts have even held that such water belongs to the watercourse as soon as it leaves the land or project from which it is wasted, so that any right to intercept the waste waters while on their way from the irrigated land to the stream is subject to all prior rights to the use of the stream flow itself. Other limitations are noted below in connection with the waste from "foreign" waters into streams other than those from which they were originally diverted.

Chapters 2 and 4 show that several States have statutes dealing with rights to the use of waste water, mostly to the effect that ditches constructed for the purpose of utilizing such waters shall be governed by the same laws relating to priority as those diverting from natural streams, and sometimes giving the owner of land on which the waters occur the first right to their use. The Colorado statute [77] has been interpreted as giving the landowner no preference right to the use of waste, spring, and seepage waters which if not intercepted would flow to a natural stream, and as not depriving prior appropriators on the stream of rights to the use of such waters under such circumstances.[78] The Idaho statute [79] has been held applicable to the appropriation of water seeping from a canal which has its source in a watershed other than that in which the seepage occurs,[80] as well as to

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[77] Colo. Stats. Ann., 1935, ch. 90, sec. 20.

[78] *La Jara Creamery & Live Stock Assn.* v. *Hansen* (35 Colo. 105, 83 Pac. 644 (1905)); *Bruening* v. *Dorr* (23 Colo. 195, 47 Pac. 290 (1896)); *Haver* v. *Matonock* (79 Colo. 194, 244 Pac. 914 (1926)); *Nevius* v. *Smith* (86 Colo. 178, 279 Pac. 44 (1928, 1929).

[79] Idaho Code Ann., 1932, sec. 41–107.

[80] *Breyer* v. *Baker* (31 Idaho 387, 171 Pac. 1135 (1918)); an independent appropriation.

seepage and waste waters generally.[81] In this latter case the right to appropriate such waters was stated to be subject to the right of the owner of the land from which it flows to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture and apply it to beneficial use; and in the absence of abandonment or forfeiture of this right of use, the landowner may assert the right, which is not affected by his having made a previous use of the water. The Oregon court [82] has held that water released from a reservoir and allowed to find the natural level of the country is subject to appropriation under the statute; [83] and that a landowner needs no permit to use seepage water which rises on his own lands.[84] The Montana court [85] has recognized the right to appropriate waste waters under the statute [86] of that State. That court has also held that seepage from irrigated lands and from springs collected in a drainage ditch leading to one's lands is subject to appropriation by such landowner, the waters having escaped from the possession of the upper owner.[87]

The Supreme Court of Wyoming, in a decision rendered in 1940, referred to the statutes of several States which provide for the appropriation of seepage and waste water, under certain limitations, and said: [88]

> We have no such statute, and hence cases which hold that such water may be appropriated must be accepted in this state with caution. We are governed by our constitution and statutes. * * * If, then, we do not give any strained construction to these provisions, it would seem to be clear that only water in natural streams, springs or lakes are subject to appropriation.

After referring to various western decisions, it was further stated:

> These cases consider seepage and waste water as private water so long as it is on the lands from which it originates, and that seems to be correct. And they, accordingly, are agreed that, in the absence of a statute, such water cannot be appropriated, and we do not think that, in view of the fact that many appropriators in this state depend on return water, we can lay down a contrary rule.

Priorities will usually govern as between claimants to the waste water if it has not yet entered a watercourse, except where it legally belongs to the watercourse even before entering it (as in Colorado), in which case the claims are subordinate to prior rights which have attached to the watercourse. These waste-water appropriations, however, are not vested with all the attributes of a true appropriative right, for it appears to be settled that the waste-water claimant does not thereby acquire, solely by virtue of such appropriation, a vested right as against the original appropriator to have the practice of wasting water for his particular benefit continue. It is stated in the recent Wyoming decision above referred to, after discussing various western cases concerning the use of waste and seepage water:

> Each of these cases, it is true, involved a contest in which the owner of the land from which the percolating water was sought to be taken objected because

[81] *Sebern* v. *Moore* (44 Idaho 410, 258 Pac. 176 (1927)).
[82] *Vaughan* v. *Kolb* (130 Oreg. 506, 280 Pac. 518 (1929)).
[83] Oreg. Code Ann., 1930, sec. 47–1401.
[84] *Barker* v. *Sonner* (135 Oreg. 75, 294 Pac. 1053 (1931)).
[85] *Newton* v. *Weiler* (87 Mont. 164, 286 Pac. 133 (1930)).
[86] Mont. Rev. Codes, 1935, sec. 7093.
[87] *Wills* v. *Morris* (100 Mont. 514, 50 Pac. (2d) 862 (1935)).
[88] *Binning* v. *Miller* (55 Wyo. 451, 102 Pac. (2d) 54 (1940)).

of the use which he intended to make of it, and we have looked for cases in which such use was not possible or was limited, but we have found none. But the authorities seem to agree that the lower owner using such water merely takes his chances that the supply will be kept up; that he has no right thereto, no matter how long he may have used it.

A recent Nevada decision [89] emphasized the fact that such—

> taking and use of the water made up from the defendant's irrigation system did not constitute an appropriation as that term is used in our statutes, as he acquired no such usufruct right in the water as to entitle him to compel the continuation of the condition furnishing him with water.

It was held that taking did not impose upon the ditch owner any requirement that the flow of waste continue or prevent him from so draining his land as to cut off the flow; nor did the plaintiff appropriator of the waste acquire any right to the waters of the stream from which the defendant secured water which resulted in waste, notwithstanding an attempted appropriation thereof through the State engineer. The court stated that no permanent right can be acquired to the use of waste water by appropriation, prescription, estoppel, or acquiescence while escaping; that only a temporary right to whatever water escapes from the works or lands of others may thus be obtained. The California court stated [90] that permissive use of seepage and waste waters from a ditch gave no appurtenant ditch right to the user of those waters; further, that no permanent right to have a waste water supply continued could be acquired either by appropriation or prescription; and the Utah court has stated [91] that no right to water seeping or percolating from one tract to another, arising from irrigation on the upper tract, could be acquired by prescription or otherwise except by grant.[92] As stated by Wiel: [93]

> * * * it is only the specific water run to waste that is abandoned, not any of the incoming water; the owner's water-right in the flow and use of the natural

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[89] *Ryan* v. *Gallio* (52 Nev. 330, 286 Pac. 963 (1930)).

[90] *Joerger* v. *Pacific Gas & Elec. Co.* (207 Calif. 8, 276 Pac. 1017 (1929)).

The California District Court of Appeal held that waste waters are vagrant and fugitive, and so long as they remain so and are not controlled by the owner of the ditch from which they escape they are subject to appropriation and use by others, but no usufruct can be acquired therein (*Stepp* v. *Williams*, 52 Calif. App. 237, 198 Pac. 661 (1921)). See also *Huneeker* v. *Lutz* (65 Calif. App. 649, 224 Pac. 1001 (1924)).

[91] *Garns* v. *Rollins* (41 Utah 260. 125 Pac. 867 (1912)).

[92] If waste water runs upon one's land, "he may capture and use it; but that is the limit and extent of his right" (*Wedgworth* v. *Wedgworth*, 20 Ariz. 518. 181 Pac. 952 (1919)).

An appropriator of surface or waste water after discharge acquires a right to only whatever happens to be so discharged, not to a particular quantity; and the one wasting the water is under no obligation to permit any specific quantity of water to be discharged for the benefit of the appropriator of the waste (*Mabee* v. *Platte Land Co.*, 17 Colo. App. 476, 68 Pac. 1058 (1902)). See also *Burkart* v. *Meiberg* (37 Colo. 187, 86 Pac. 98 (1906)).

An upper owner need not continue to waste water into a ditch built on his land by a lower owner with the permission of the former for the purpose of collecting waste water (*Crawford* v. *Inglin*, 44 Idaho 663. 258 Pac. 541 (1927)).

Temporary use may be made of seepage water which escapes unavoidably from irrigated land. but if the irrigator used water excessively he had no title to the surplus; nor could a lower user acquire any ownership therein (*Hill* v. *American Land & Live Stock Co.*, 82 Oreg. 202. 161 Pac. 403 (1916)). See also *Tyler* v. *Obiague*, 95 Oreg. 57, 186 Pac. 579 (1920)).

After drainage waters have entered a stream they are subject to appropriation. but the appropriator can acquire no right as against the creator of the flow to require him to continue to supply such waters to the stream (*Hagerman Irr. Co.* v. *East Grand Plains Drainage Dist.*, 25 N. Mex. 649, 187 Pac. 555 (1920)).

However, where water had been wasted into a stream for 25 years by reason of defective appliances, appropriator thereof was allowed the right to continued use of that quantity after the appliances had been repaired (*Dannenbrink* v. *Burger*, 23 Calif. App. 587. 138 Pac. 751 (1913); rehearing denied by supreme court)). Likewise. where drainage waters had been allowed to flow into a watercourse for 24 years before attempted recapture. and appropriated by others; the drainage system in contemplation of law amounting to but a change in the channel of the watercourse (*West Side Ditch Co.* v. *Bennett*. 106 Mont. 422. 78 Pac. (2d) 78 (1938)). See also *Evans* v. *Prosser Falls Land & Power Co.* (62 Wash. 178, 113 Pac. 271 (1911)), in which the right of another to appropriate the waste through a leaky dam was not involved. but the owner was held to have no right to the waste as salvaged water after reconstruction of the dam.

[93] Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 56, p. 51.

stream remains unaffected and unlimited by anything that happens to the waste away from any stream. * * *

A right that exists at the sufferance of another may nevertheless be good as against third parties and therefore may have some value. In a recent California decision [94] in which the right to appropriate foreign water abandoned into a stream was acknowledged, the court stated that the existence of the right is not affected by the fact that there is no way to compel the original appropriator to continue such abandonment, although necessarily the value of the subsequent appropriative right is so affected. The Oregon Supreme Court has recently stated: [95]

Altho the right to such waste water that may be obtained for irrigation may be temporary, or rather the use of the water may be irregular and uncertain, still it may be very valuable. The right to such waste water is much the same as the appropriation and right to water in a small stream, which during a portion of the season runs low and practically dries up. The right still exists but there is no water to be used. * * * We see no reason why the right to waste or spring water may not be permanent, even tho the use thereof may be interrupted, that is, the right exists to be exercised when there is water available.

On the contrary, the Arizona Supreme Court has emphasized the precarious state of the water supply of one who had appropriated waste water from another's land, depending as it did upon the latter's diverting upon his land more water than he required, which was not within the terms of his appropriation, or upon a wasteful and profligate use of the water which the latter might remedy by making frugal and economic use without giving the other party a right to complain.[96]

Hence, the owner of the land from which the waste water flows may change his practices so as to reduce the waste, or to prevent it from flowing from his land.[97] He may even cease his use of water altogether, or may temporarily suspend the enjoyment of his appropriation without infringing any right of the person who has been appropriating the waste theretofore flowing from his land.[98] He may recapture and reuse the water before it flows from his land, if it can be done beneficially.[99] In some cases it has been said that he can apply the excess water for use on other land, as against a lower party who has been using it; [1] but this right clearly cannot be sustained as

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[94] *Crane* v. *Stevinson* (5 Calif. (2d) 387, 54 Pac. (2d) 1100 (1936)). See also *Bloss* v. *Rahilly* (16 Calif. (2d) 70, 104 Pac. (2d) 1049 (1940)).

[95] *Vaughan* v. *Kolb* (130 Oreg. 506, 280 Pac. 518 (1929)).

In a previous case it was stated that a user of seepage from irrigated lands secured a right to such an amount as would properly irrigate his land (*Hough* v. *Porter,* 51 Oreg. 318, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909)).

[96] *Lambeye* v. *Garcia* (18 Ariz. 178. 157 Pac. 977 (1916)).

[97] *Lambeye* v. *Garcia* (18 Ariz. 178, 157 Pac. 977 (1916)) ; *Sebern* v. *Moore* (44 Idaho 410. 258 Pac. 176 (1927)).

One is under no obligation, ordinarily, to continue wasting water (*Stevens* v. *Oakdale Irr. Dist.*, 13 Calif. (2d) 343. 90 Pac. (2d) 58 (1939)).

[98] *Lambeye* v. *Garcia* (18 Ariz. 178, 157 Pac. 977 (1916)).

[99] An appropriator may reclaim his own waste water, unless turned back into the original channel without the intention of recapturing it (*Woolman* v. *Garringer*, 1 Mont. 535 (1872)).

An appropriator is justified in recapturing water already once used by himself and remaining upon his land, and applying it again to beneficial use, and it would seem that he should be commended in doing so; it is not waste water while still on his land (*Barker* v. *Sonner,* 135 Oreg. 75, 294 Pac. 1053 (1931)). See also *Sebern* v. *Moore* (44 Idaho 410, 258 Pac. 176 (1927)).

The creator of an artificial flow of water is the owner of the same so long as it is confined to his property (*Hagerman Irr. Co.* v. *East Grand Plains Drainage Dist.*, 25 N. Mex. 649. 187 Pac. 555 (1920)).

[1] "He can use all his water, waste none of it. or apply it on other lands, and thereby prevent its flow into the ditch" (*Crawford* v. *Inglin,* 44 Idaho 663, 258 Pac. 541 (1927)). See also *Burkart* v. *Meiberg* (37 Colo. 187, 86 Pac. 98 (1906)).

It is said. in *West Side Ditch Co.* v. *Bennett* (106 Mont. 422. 78 Pac. (2d) 78 (1938)), that the fact that seepage water from irrigation of higher lands rises on one's land does not, of itself, necessarily give him the exclusive right thereto, so as to prevent others from

against other appropriators from the same original source of supply if it results in an enlargement of the terms of his original appropriation.[2] Contracts purporting to dispose of waste waters have been held invalid in cases in which it appeared that the original diverters had abandoned such waste waters and thereafter were attempting to assert rights of recapture.[3] It is said elsewhere that a landowner may consent to others acquiring rights in the waste waters on his lands and taking them elsewhere;[4] but here again it would seem clear that the rights of other appropriators from the same source of supply must be not infringed upon. This question is less likely to arise in case of the disposal of drainage waters from a large area, for a portion of the water applied in irrigating land necessarily sinks below the reach of the roots of plants, so that the fact that drainage has become necessary does not mean in all cases that the appropriative right has been exceeded.[5]

It has been stated in some cases that the right of the owner of land to cut off the flow of waste water to other lands is subject to the requirement that it be exercised in good faith, without malice. For example, in a recent Montana case,[6] some of the water in

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acquiring rights to its use. That, however, was a case in which the landowner had allowed the seepage to flow for many years into a channel the waters of which had been appropriated by others, and his right of recapture of the drainage waters flowing in his drainage ditch was then denied, the ditch having become in contemplation of law a natural channel.

[2] See *Manning* v. *Fife* (17 Utah 232, 54 Pac. 111 (1898)).

As stated, *In re North Powder River* (75 Oreg. 83, 144 Pac. 485 (1914), 146 Pac. 475 (1915)): "* * * it is not the water but the use of it for a particular purpose that is the limit of the right, and, when not needed for that purpose, the next person in priority of time is entitled to it, and a prior appropriator cannot sell it to a stranger to the injury of a subsequent appropriator."

[3] Water discharged from a flume for the purpose of getting rid of it, and left to find its way to the natural level of the country without intention to reclaim it, is abandoned water, and a contract purporting to dispose of it is invalid (*Schulz* v. *Sweeny,* 19 Nev. 359, 11 Pac. 253 (1886)).

After water is taken out of a watershed, used for placer mining, and allowed to drain into a gulch, the jurisdiction of the appropriators ceases. As it could not drain back into the stream from which diverted, it becomes waste, fugitive, and vagrant water, and an attempted sale of the water or its right of use is wholly void (*Galiger* v. *McNulty,* 80 Mont. 339, 260 Pac. 401 (1927)).

A city which releases or wastes overflow water from its reservoir and allows it to find the natural level of the country has no further interest in such water, if there is no intention to recapture or enjoy it, and can confer no right on anyone else to use it (*Vaughan* v. *Kolb,* 130 Oreg. 506, 280 Pac. 518 (1929)).

A district which allows water to waste upon land geographically within but legally outside the district boundaries cannot recover for the value of the water used on such lands, where no intention or attempt to retain or recapture the water is asserted (*Milner Low Lift Irr. Dist.* v. *Eagen,* 49 Idaho 184, 286 Pac. 608 (1930)).

[4] *Bidleman* v. *Short* (38 Nev. 467, 150 Pac. 834 (1915)).

A landowner is entitled to the use of water flowing down a gulch upon his land from higher irrigated land, pursuant to a contract with the district serving such land, as against a third party who attempts to enter upon his land and appropriate the water without easement, grant, or other right of entry (*Barker* v. *Sonner,* 135 Oreg. 75, 294 Pac. 1053 (1931)).

[5] A drainage district in Arizona, being vested by statute with legal title to all waters collected by means of its works, has the power of disposing of such waters as incidental to its general authority, and may make such disposal by sale or contract not inconsistent with the purposes of the statute. The waters collected in the drains are not subject to appropriation under the statute (*Wattson* v. *United States,* 260 Fed. 506 (C. C. A. 9th, 1919)).

Waters flowing in an artificial drain are not subject to appropriation under the statutes of New Mexico; nor are they in the absence of statute (*Hagerman Irr. Co.* v. *East Grand Plains Drainage Dist.,* 25 N. Mex. 649, 187 Pac. 555 (1920)).

Waste waters on one's land cannot be appropriated by another without lawful right of entry (*Barker* v. *Sonner,* 135 Oreg. 75, 294 Pac. 1053 (1931)).

See discussion in ch. 4, p. 186, concerning the right of a water users' association in Arizona to make use of drainage waters resulting from irrigation and pumped from underneath the lands of the shareholders.

Where ground waters physically tributary to a stream are held to belong to the stream, the right of the owners of lands to recapture ground waters resulting from irrigation would be subject to the prior rights of appropriators of the stream flow.

If waters flowing in drainage ditches are actually developed waters satisfying the test that they augmented the flow of Boise River, then to the extent of that augmentation landowners within the districts are as much entitled to the use of the waters as though the rights had been declared by a court of competent jurisdiction (*Nampa & Meridian Irr. Dist.* v. *Welsh,* 52 Idaho 279, 15 Pac. (2d) 617 (1932)).

[6] *Newton* v. *Weiler* (87 Mont. 164, 286 Pac. 133 (1930)).

controversy came from the lands of other parties, as well as that of the defendant, and the court stated that under the Montana statute waste waters may be appropriated and had been appropriated here; that defendant had the right to use his land as he pleased and to change the flow of the waste waters thereon in the reasonable enjoyment of his property, provided, however, that the use be made without malice or negligence. The Arizona Supreme Court has stated [7] that the use of the waste by the lower claimant does not obligate the upper owner to continue or maintain conditions so as to supply the appropriation of waste water at any time or in any quantity when acting in good faith.

It is undeniable, as aptly stated by Kinney, that: [8]

> Under the Arid Region Doctrine of appropriation, it is the duty of each appropriator to use all of the water appropriated for some beneficial use or purpose. * * * the original appropriators have the right, and in fact it is their duty to prevent, as far as possible, all waste of the water which they have appropriated, in order that the others who are entitled thereto may receive the benefit thereof.

The rights of junior appropriators, in other words, may be involved in a claim that waste waters shall continue to flow from irrigated lands. The appropriator's right to divert water for irrigation extends only to the quantity necessary for that purpose; "any excess of the amount so needed properly belonging to the natural stream or source of supply and should be left there." [9] He cannot give away, waste, or otherwise dispose of his surplus water to the injury of subsequent appropriators.[10] Some waste is of course inevitable in irrigation practice (see ch. 1, Classification of waste waters); nevertheless it is clearly to the interest of each appropriator that all senior appropriators from the same source of supply exercise their rights with the least practicable waste, and that no enlargement of the specific or implied terms of a given right to the detriment of junior stream appropriators result from the claim of a third party that excessive use of water shall continue for his benefit.[11]

The Supreme Court of Wyoming in the very recent case of *Binning* v. *Miller* [12] thus referred to the effect upon downstream appropriators

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[7] *Lambeye* v. *Garcia* (18 Ariz. 178, 157 Pac. 977 (1916)). To the same effect see *Green Valley Ditch Co.* v. *Schneider* (50 Colo. 606, 115 Pac. 705 (1911)); *Sebern* v. *Moore* (44 Idaho 410, 258 Pac. 176 (1927)).

[8] Kinney C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, sec. 661, p. 1150–1151.

[9] *Lambeye* v. *Garcia* (18 Ariz. 178, 157 Pac. 977 (1916)). The Supreme Court of Montana recently stated, in *Cook* v. *Hudson* (110 Mont. 263, 103 Pac. (2d) 137 (1940)), in connection with the claim of a right by prescription: "It is a fundamental principle of water right law that a prior right may be exercised only to the extent of the necessities of the owner of such prior right and when devoted to a beneficial purpose within the limits of the right. When the one holding the prior right does not need the water, such prior right is temporarily suspended and the next right or rights in the order of priority may use the water until such time as the prior appropriator's needs justify his demanding that the junior appropriator or appropriators give way to his superior claim."

[10] *Manning* v. *Fife* (17 Utah 232, 54 Pac. 111 (1898)); *Burkart* v. *Meiberg* (37 Colo. 187, 86 Pac. 98 (1906)).

[11] The user of excessive quantities of water has no title to the surplus, nor can a lower user acquire any ownership therein. "The latter would be in no better position than the receiver of stolen goods." The court will not require an upper user to continue to waste water for the benefit of the lower (*Hill* v. *American Land & Live Stock Co.*, 82 Oreg. 202, 161 Pac. 403 (1916)). To the same effect (*Tyler* v. *Obiague*, 95 Oreg. 57, 186 Pac. 579 (1920)).

"If, therefore, plaintiffs are using or wasting water in excess of the amount reasonably necessary to irrigate properly their lands, subsequent appropriators may, by a proper action, limit such use by the prior appropriator" (*Wall* v. *Superior Court*, 53 Ariz. 344, 89 Pac. (2d) 624 (1939)).

[12] *Binning* v. *Miller* (55 Wyo. 451, 102 Pac. (2) 54 (1940)).

of recognizing an appropriation of waste and seepage water that might concern them:

In view of our law relating to priority of right by virtue of appropriation, and in view of the fact that appropriators often depend on return water, we could in no event say that the intervener had any right to the water in this case, unless we knew definitely that appropriators further down the stream were not injured or did not object, and the only definite way in which we could know would be by bringing them into the case. We could not afford to lay down a rule which might compel a great number of appropriators to seek to come into a case or bring an independent action in order to determine the right to use seepage water. And there is a serious question whether we could afford to lay down a rule which would compel a great number of appropriators to come into a case and defend against a claim to use seepage water. It is probably safer, for the benefit of all, and for the sake of stability of water rights, to declare definitely that an appropriation of seepage water is void. Of course, if a party has once obtained possession of such water, and another party not entitled thereto should attempt to deprive him thereof, the possessor would doubtless have a cause of action. Wiel, supra, Sec. 55.

It was held in this case that the seepage over the course of years had built up a natural stream in the lower end of a draw, and an appropriation out of such stream was allowed, subject to the right of the owner of the land on which the seepage arose to make beneficial use of the seepage on the land for which the water was appropriated.

**Seepage From Irrigated Lands Becomes a Part of the Stream Into Which It Flows, at Least if There is no Intent on the Part of the Irrigator to Recapture It**

The downstream flow of many western streams has been augmented by seepage from the irrigation of upstream lands. This is a common phenomenon in irrigated valleys, and much development has been predicated wholly or partly upon the existence of return flow. The increase in flow does not consist of new water (unless brought in from another watershed), but is the reappearance of water previously diverted from the stream. The water may reenter the stream by natural percolation through the soil and through natural channels, or it may be gathered into and discharged through artificial drainage ditches. In any event, if there is no intent on the part of the irrigator to recapture this water, it becomes a part of the watercourse and inures to the benefit of downstream claimants in accordance with their rights to the natural flow. A number of decisions have been rendered to this effect;[13] and no decision has been found in which such water after

[13] For example: An appropriator may reclaim his own waste water unless turned back into the original channel without intention of recapture (*Woolman* v. *Garringer,* 1 Mont. 535 (1872)).

When artificial waters have been deposited in a natural stream and the creator of the flow has lost dominion over the same, such waters become a part of the waters of the stream and are subject to appropriation and use (*Hagerman Irr. Co.* v. *East Grand Plains Drainage Dist.,* 25 N. Mex. 649, 187 Pac. 555 (1920)). In this case the waters were still in the drainage ditch and were therefore held not subject to appropriation.

"Again, under the doctrine that the prior appropriator is entitled to the quantity of water appropriated from the stream, the prior appropriator is entitled to satisfy that right, and it is immaterial whether such satisfaction is to be had out of the waters that naturally flow in the stream and its tributaries above the head of its ditch, or come from waters which run into the stream by rains, snows, springs, or seepage" (*Marks* v. *Hilger,* 262 Fed. 302 (C. C. A. 9th, 1920)). The right of an appropriator to take more than his decreed right from a stream during flood season, claiming that the water was returned to the stream by seepage and was a benefit to lower appropriators, denied.

If the proprietor of land wishes to enjoy the use of seepage water, he must take it and use it before it leaves his premises. "If he allows it to escape into the channel of the stream, he cannot pursue it and retake it as against the appropriator of the waters of that stream" (*Brosnan* v. *Boggs,* 101 Oreg. 472, 198 Pac. 890 (1921)).

"Where, also, vagrant fugitive waters have finally collected and reached a natural channel and thus lose their original character as seepage, percolating, surface, or waste waters, and

entering a stream from which originally diverted was held subject to independent appropriation as against existing rights on the stream. (The case with respect to return flow from "foreign waters" is discussed below.) In *Clark* v. *Ashley*[14] a landowner claimed the water of springs arising on his land, which flowed in a well-defined channel to a creek on which appropriative rights had been secured by others. The court said:

> There was testimony that the volume of the springs had been increased by seepage from irrigated lands above them. This, if true, would not entitle the defendants to divert the spring water. The spring is one of the sources of the creek and it makes no difference, it seems to us, that the volume has been increased by the irrigation of land above.

Where the irrigator himself, or the irrigation project attempts to recapture the water, particularly after it has entered a watercourse, and therefore claims that the water has not been abandoned, a more difficult question is presented. In some jurisdictions, as noted in the following paragraph, the question of abandonment is immaterial. Elsewhere it is material and the question of intention becomes important. A case decided by the Supreme Court of Oregon in 1939[15] arose over the claim of an irrigation district that the return flow from its stored waters was not a part of the natural flow of the stream and that it was entitled to the use of such waters on lands with priorities junior to those of plaintiffs. The district had built a reservoir, after which the lands became waterlogged, the seepage returning to the stream from which the water had been originally diverted for the most part after the end of the irrigation season. Eight years after the completion of the reservoir a drainage system was installed. The court held that for 8 years the district had shown no intention of recapturing the seepage waters but on the contrary had abandoned them during that time; that the intent to recapture should exist at the time the water is discharged from the lands; and that the alleged attempt to recapture the return waters of which the flow was accelerated by the drains was not made within a reasonable time. It was further held that the fact that the seepage might consist of waters once held in a reservoir does not change the rule relating to the status of seepage upon returning to the stream;[16] there being no distinction, where water is used for irrigation, between natural flow and the flow from a reservoir, where allowed to escape without an intent to recapture. As soon as the water wasted back from the lands, upon being abandoned, it became a part of the flow of the stream which no one had a right to take from the river except by regular appropriation. The district had taken no

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flow with such regularity as above described, * * * the waters flowing in such natural channel constitute a watercourse within the meaning of the law of water rights" (*Popham* v. *Holloron*, 84 Mont. 442, 275 Pac. 1099 (1929)).

"The Las Animas Company would have the water officials and the courts make some distinction herein between seepage water and other water in the natural stream. The law makes none and nature forbids it" (*Las Animas Consol. Canal Co.* v. *Hinderlider*, 100 Colo. 508, 68 Pac. (2d) 564 (1937)).

"As soon as the water wastes back or percolates from lands now in the district or leaves the control of the owner of such lands, it becomes free, unappropriated water and a part of the stream flow and other users from the stream immediately acquire the right to have such water appropriated to their benefit" (*Jones* v. *Warmsprings Irr. Dist.*, 162 Oreg. 186, 91 Pac. (2d) 542 (1939)).

[14] 34 Colo. 285, 82 Pac. 588 (1905).

[15] *Jones* v. *Warmsprings Irr. Dist.* (162 Oreg. 186, 91 Pac. (2d) 542 (1939)).

[16] Citing *Comstock* v. *Ramsey* (55 Colo. 244, 133 Pac. 1107 (1913)), and *Trowel Land & Irr. Co.* v. *Bijou Irr. Dist.* (65 Colo. 202, 176 Pac. 292 (1918)).

steps to appropriate this return flow; and in any event existing claimants of the use of the stream were held to have immediately acquired the right to have the return flow appropriated to their benefit in the order of their priorities. Plaintiffs, as owners of rights next in point of time to that of one of the district ditches with an early priority, therefore were held to have the right to demand that the waste waters be applied to satisfy the requirements of that early district priority before their own gates should be closed to permit the filling of the district's one early right.

The several policies developed in the West concerning the ownership and rights of use of return waters from irrigation have been discussed at some length in a bulletin of the United States Department of Agriculture.[17] Briefly, the principle has been established in Colorado that return waters from a diversion under an appropriative right are a part of the stream flow from the time they escape from the premises or works of the appropriator, provided they would ultimately return to the stream system from which originally diverted if not artificially intercepted, and consequently belong to that stream system and are subject to the rights of appropriators thereon in the order of their priorities.[18] Diligence in attempting to recapture the waters after leaving the project boundaries is not material. In other words, such waters belong to the stream even before they commingle with the waters naturally flowing there. The Wyoming Supreme Court has held that a city had no further rights to the use of its sewage after allowing it to discharge directly into a stream from which the city derived its water supply under a prior appropriative right, as against a downstream appropriator; but that the city might discharge sewage into an irrigation ditch, under contract with the owner of the ditch, over the protest of a lower appropriator, as otherwise the city might be hampered in its problem of sewage disposal.[19] On the other hand, the United States Supreme Court recognized the right of a Federal project in Wyoming to recapture and reuse return waters within its boundaries.[20] A Federal decision arising in Idaho upheld the right of the Government, where it had not abandoned return flow and could identify it, to commingle it with other waters in a natural channel and convey it thence to a place of use.[21] A Federal decision in a case arising in Nebraska upheld the right of a Federal project, as against a company which was attempting to establish an ineffectual appropriation, to recapture seepage water on its way to the North Platte River and to deliver it to one under contract with

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[17] Hutchins, W. A., Policies Governing the Ownership of Return Waters from Irrigation. U. S. Dept. Agr. Tech. Bull. 439 (1934). The question of rights to the use of sewage is likewise discussed by the present author in Sewage Irrigation as Practiced in the Western States, U. S. Dept. Agr. Tech. Bull. 675 (1939), pp. 43–44.

[18] Development of the principle is found in *Water Supply & Storage Co.* v. *Larimer & Weld Res. Co.* (25 Colo. 87, 53 Pac. 386 (1898)); *Clark* v. *Ashley* (34 Colo. 285, 82 Pac. 588 (1905)); *Vogel* v. *Minnesota Canal & Res. Co.* (47 Colo. 534, 107 Pac. 1108 (1910)); *Comstock* v. *Ramsey* (55 Colo. 244, 133 Pac. 1107 (1913)); *Trowel Land & Irr. Co.* v. *Bijou Irr. Dist.* (65 Colo. 202, 176 Pac. 292 (1918)); *McKelvey* v. *North Sterling Irr. Dist.* (66 Colo. 11, 179 Pac. 872 (1919)), contra. but distinguished in *Fort Morgan Res. & Irr. Co.* v. *McCune* (71 Colo. 256, 206 Pac. 393 (1922)); *Pulaski Irr. Ditch Co.* v. *Trinidad* (70 Colo. 565, 203 Pac. 681 (1922)); *Las Animas Consol. Canal Co.* v. *Hinderlider* (100 Colo. 508. 68 Pac. (2d) 564 (1937)).

Waters which could not have added to the waters of the natural stream are not available to appropriators on that stream, as against an appropriator of the waters flowing in a drainage ditch made 2 years after the construction of the drain (*San Luis Valley Irr. Dist.* v. *Prairie Ditch Co. & Rio Grande Drainage Dist.*, 84 Colo. 99. 268 Pac. 533 (1928)).

[19] *Wyoming Hereford Ranch* v. *Hammond Packing Co.* (33 Wyo. 14, 236 Pac. 764 (1925)).

[20] *Ide* v. *United States* (263 U. S. 497 (1924)).

[21] *United States* v. *Haga* (276 Fed. 41 (D. Idaho, 1921)).

the United States in lieu of storage water or direct flow.[22] A case now pending in the Federal courts involves the right of the Federal North Platte Project to the use of return waters from waters appropriated for that project;[23] and the same question is involved in an original interstate suit pending in the United States Supreme Court,[24] as a corollary of the claim that the United States is the unqualified owner of all unappropriated waters of the North Platte River. Other decisions have involved the use of drainage and waste waters prior to their entrance into a watercourse, as noted heretofore in this discussion (see p. 362), and there is a Washington decision which approved the substitution of seepage for direct flow where the right to the use of the seepage was not in controversy.[25] Still other decisions concerning the status of return waters after their entrance into a watercourse have been previously noted. (See particularly footnote 13.)

This general subject has been comprehensively litigated in Colorado; but elsewhere there is an absence of judicial precedents adequately covering the many phases of this important feature of the utilization of water.

This question of the right to recapture return waters from a watercourse is not to be confused with the right to use a watercourse for the conveyance of appropriated water, heretofore considered. Where one has clear title to water, the general rule is that a natural channel may be used to convey it from one point to another. This right is recognized in Colorado as well as in other States; denial of the right to recapture return waters after they have left one's land is based, in Colorado, upon the point that the appropriator's interest in such waters has ceased and he no longer has any title to them.[26]

The question of rights to the use of return waters brought into an area from another watershed—sometimes termed "foreign waters"—is discussed below. (See p. 375.)

#### Natural Accretions to the Stream Become a Part of the Stream

The appropriative right applies to the natural flow of the stream and its tributaries, not only at the time of making the appropriation, but as augmented by subsequent natural causes. In *Beaverhead Canal Co.* v. *Dillon Electric Light & Power Co.*[27] a clear distinction was drawn between increases in flow resulting from artificial and from natural means, and it was stated:

> The prior appropriator of a particular quantity of water from a stream is entitled to the use of that water, or so much thereof as naturally flows in the stream, unimpaired and unaffected by any subsequent changes which, in the course of nature, may have been wrought. To the extent of his appropriation his supply will be measured by the waters naturally flowing in the stream and its tributaries above the head of his ditch, whether those waters be furnished by the usual rains or snows, by extraordinary rain or snowfall, or by springs or seepage which directly contribute.

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[22] *Ramshorn Ditch Co.* v. *United States* (269 Fed. 80 (C. C. A. 8th, 1920)). District court decision in 254 Fed. 842 (D. Nebr., 1918).

[23] *United States* v. *Tilley,* Equity No. 99, District Court, District of Nebraska, North Platte Division.

[24] *Nebraska* v. *Wyoming,* Original, Supreme Court (Oct. Term, 1934). See discussion of pleadings concerning ownership of unappropriated waters, p. 421, below.

[25] *State* v. *American Fruit Growers* (135 Wash. 156, 237 Pac. 498 (1925)).

[26] *Fort Morgan Res. & Irr Co.* v. *McCune* (71 Colo. 256, 206 Pac. 393 (1922)).

[27] 34 Mont. 135, 85 Pac. 880 (1906).

### The Right To Use the Portion of Stream Flow Salvaged by Means of Artificial Improvements Belongs to the One Making the Improvements

This is the general rule. It is based upon the principle that one should be entitled to the fruits of his labors, where the result is to make available a supply that otherwise would go to waste, and in which event no other party is being deprived of water which he is entitled to receive.

Thus a company which by the construction and use of a pipe line made it possible for a group of farmers to divert their water 7 miles upstream, was given the prior right to the quantity of water previously lost in the 7-mile stream channel.[28] One who built a pipe line to convey stream water over a stretch of the channel in which losses by seepage and evaporation had been heavy was given the right to use the quantity saved.[29] The same principle has been applied as between riparian proprietors.[30] In *Big Cottonwood Tanner Ditch Co.* v. *Shurtliff*[31] a water company, by virtue of constructing a pipe line and thus saving a large quantity of water formerly lost in an open ditch, was given the right to the water thus saved, as against the claim of a consumer that he was entitled to the quantity diverted at the headgate including that wasted in the ditch leading to his land. In an Idaho case[32] one salvaging and appropriating the waters of a tributary stream, which otherwise would have been lost by evaporation and would not have reached the main stream by subflow, was held entitled to the use of such waters as against a prior appropriator on the main stream. There are various other cases to the same effect.

The two features in these cases that bear upon the present discussion are: (1) The rights of other water users were properly safeguarded against injury resulting from the change; (2) after making provision for supplying these other users with the quantities of water to which they previously had valid claims, the ones making the improvements were awarded the first right to the water theretofore lost and now saved.

The Montana decisions have made the point that the rule does not apply to the mere act of removing obstructions to hasten the flow.[33] In the Idaho case of *Reno* v. *Richards*,[34] parties had removed obstructions from the channel, such as brush and fallen logs, excavated channels through sand bars and other obstructions, and built a ditch to carry the stream flow. It was held that as the court had found that a substantial increase in the flow had been thus effected, it should have determined as definitely as possible the amount of such increase and awarded the use thereof to the parties responsible for it. These decisions are not in conflict. Considering them together, the principle may be stated that the removal of obstructions which merely accelerates the flow, but without increasing the quantity of water available,

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[28] *Basinger* v. *Taylor* (36 Idaho 591, 211 Pac. 1085 (1922)).
[29] *Pomona Land & Water Co.* v. *San Antonio Water Co.* (152 Calif. 618, 93 Pac. 881 (1908)).
[30] *Wiggins* v. *Muscupiabe Land & Water Co.* (113 Calif. 182, 45 Pac. 160 (1896)).
[31] 56 Utah 196, 189 Pac. 587 (1919, 1920).
[32] *Hill & Gauchay* v. *Green* (47 Idaho 157, 274 Pac. 110 (1928)).
[33] *Beaverhead Canal Co.* v. *Dillon Elec. Light & Power Co.* (34 Mont. 135, 85 Pac. 880 (1906)).
See also *Smith* v. *Duff* (39 Mont. 382, 102 Pac. 984 (1909)); *Spaulding* v. *Stone* (46 Mont. 483, 129 Pac. 327 (1912)); *State ex rel. Zosel* v. *District Court* (56 Mont. 578, 185 Pac. 1112 (1919)); *West Side Ditch Co.* v. *Bennett* (106 Mont. 422, 78 Pac. (2d) 78 (1938)).
[34] 32 Idaho 1, 178 Pac. 81 (1918).

does not entitle the party doing the work to any greater claim on the flow; but that the removal of obstructions which effects an actual saving and therefore an increase in flow, entitles such party to the amount of the increase.

The Supreme Court of Washington declined to apply the principles of salvage-water rights to a case in which an irrigation company had replaced a leaky dam with a tight dam, thereby preventing a large quantity of water from wasting through its diversion works.[35] The company had made contracts to deliver water to various individuals, for which the natural flow including the waste through the original structure would have been sufficient; but after replacing the dam the company made a new contract to dispose of water equivalent to or exceeding the quantity saved by the tight dam. The court distinguished this saving from "salvage" resulting from an increase in the natural flow of the stream, this being merely a saving in the natural flow which formerly had gone to waste because of imperfect appliances. As the several individuals had contracted with reference to the natural flow, and not with reference to appliances, it was held that the company was liable for failure to deliver water out of the natural flow up to the terms of the individual contracts. Another case in which appropriators who, upon replacing their leaky dam and ditches, claimed the right to the water thereby saved, was decided by the California District Court of Appeal (rehearing denied by the supreme court).[36] The reconstruction was done after others for a period of 25 years had made use of the waters which had wasted back into the stream. It was held that the original appropriators had lost their right to the use of such waters. This was based upon the theory that the return waters, though once appropriated by the original diverter, had become upon return to the stream publici juris, and that the lower appropriators had used them long enough to establish a prescriptive title.

In a very recent Utah case [37] which arose on appeal from the order of the State engineer denying an application to appropriate water, the district court reversed the order and granted the plaintiff any water obtained by conserving and increasing the flow of the stream. The supreme court held that the district court should not have decreed to the applicant the use of the alleged increase in flow without requiring him to comply with the law of appropriation.

### The Right To Use New Water Added to a Stream Belongs to the One Responsible for Developing the New Supply

The principle applicable to the use of salvaged water applies as well to the use of new or developed water, and for the same reasons. Thus, in a recent Idaho case,[38] it was stated that if waters in the drainage ditches in question were actually developed waters satisfying the test that they augmented the flow of Boise River, then to the extent of that augmentation, landowners within the districts were as much entitled

[35] *Evans* v. *Prosser Falls Land & Power Co.* (62 Wash. 178, 113 Pac. 271 (1911)).
[36] *Dannenbrink* v. *Burger* (23 Calif. App. 587, 138 Pac. 751 (1913; rehearing denied by supreme court)).
[37] *Eardley* v. *Terry* (94 Utah 367, 77 Pac. (2d) 362 (1938)).
The Idaho Supreme Court, in *Nampa & Meridian Irr. Dist.* v. *Welch* (52 Idaho 279, 15 Pac. (2d) 617 (1932)), stated that the use of waters in drainage ditches, if actually developed waters, belonged to the landowners within the district as much as though the rights had been declared by a court of competent jurisdiction. Note that in Idaho a valid appropriation may be made by diversion and application to beneficial use, without following the State statutory procedure. (See p. 87.)
[38] *Nampa & Meridian Irr. Dist.* v. *Welsh* (52 Idaho 279, 15 Pac. (2d) 617 (1932)). See immediately preceding note and the text discussion concerning the statement by the Utah court that salvaged waters must be regularly appropriated.

to the use of such waters as though the rights had been declared by a court of competent jurisdiction. In Colorado, it has been held that those who drained lands adjacent to a lake, were entitled to the increase thus resulting over the original average, continuous flow from the lake;[39] and that the parties who constructed a feeder ditch to collect seepage which otherwise would not have drained into a stream, had made an independent appropriation from extraneous sources which entitled them to sell their stream priorities and to irrigate their land with the new water.[40] It has been held in Idaho that development of the flow of springs, which if shown to have no surface or underground connection with the stream into which they are made to flow after such development, entitles the party developing the water to use it.[41] This principle has likewise been applied in California to the increase in flow of a spring tributary to a stream, the party who enlarges the flow having a right to the increase.[42]

In a Colorado case [43] one who conducted water drained from mines, and originally inclosed in a basin with walls of granite practically impervious to water, thence to a stream and there made the first appropriation of such water, was decreed a right to the quantity so added to the stream, less the small quantity which would have drained naturally to the stream. This was based partly upon a section of the Colorado mining statute making water raised from mines the subject of appropriation; [44] but the court added that former decisions had granted such contributions to a natural stream to the one who made them, citing the *Platte Valley Irrigation Co. case* above referred to.

Water which is artifically drained into a stream from irrigated lands or from a swamp, but which would have found its way into the stream without the drain, the only purpose of which is to facilitate movement of the surface or seepage waters, is not developed water and cannot be claimed as such.[45] A claim will be substantiated only when the added waters constitute a new or independent source of supply, which would not otherwise have flowed into the stream.[46] Construction of a drainage system does not change the rule governing the rights to the use of such waters.

#### The Burden of Proof Is Upon the Party Who Claims the Right of Use of Waters Developed by Himself

The burden rests upon one who claims to have salvaged waters to show by competent evidence that the water salvaged by him had not theretofore been appropriated or used by others with prior rights.[47]

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[39] *Platte Valley Irr. Co.* v. *Buckers Irr. Mill. & Impr. Co.* (25 Colo. 77, 53 Pac. 334 (1898)).
[40] *Ironstone Ditch Co.* v. *Ashenfelter* (57 Colo. 31, 140 Pac. 177 (1914)).
[41] *St. John Irr. Co.* v. *Danforth* (50 Idaho 513, 298 Pac. 365 (1931)).
[42] *Churchill* v. *Rose* (136 Calif. 576, 69 Pac. 416 (1902)).
[43] *Ripley* v. *Park Center Land & Water Co.* (40 Colo. 129, 90 Pac. 75 (1907)).
[44] Colo. Stats. Ann., 1935, ch. 110, sec. 212.
[45] *Smith* v. *Duff* (39 Mont. 382, 102 Pac. 984 (1909)); *Spaulding* v. *Stone* (46 Mont. 483, 129 Pac. 327 (1912)); *West Side Ditch Co.* v. *Bennett* (106 Mont. 422, 78 Pac. (2d) 78 (1938)); *Jones* v. *Warmsprings Irr. Dist.* (162 Oreg. 186, 91 Pac. (2d) 542 (1939)).
[46] *State ex rel. Zosel* v. *District Court* (56 Mont. 578, 185 Pac. 1112 (1919)).
[47] *Smith* v. *Duff* (39 Mont. 382, 102 Pac. 984 (1909)); *Hill & Gauchay* v. *Green* (47 Idaho 157, 274 Pac. 110 (1928)).

This principle is well established, particularly where the development is in close proximity to the supply of streams on which claims to the use of water exist.[48] It is of equal importance in a case in which the developed water is mingled with water in a natural stream. The obligation is thus stated in *Spaulding* v. *Stone*:[49]

The burden thus made to rest upon the one who claims such developed supply includes also the obligation to establish by satisfactory proof the amount which he has developed, especially so when he has mingled his alleged new supply with that to which another is entitled, for he cannot justify an interference with a right which he does not question. While he may be entitled to the use of the natural channel of the stream out of which the prior appropriation has been made, or to change it, in order to serve his own convenience or save expense, he cannot for this reason impose any additional burden upon the prior appropriator. When he comes to divert from it his developed supply he must make his diversion in such a way as not to interrupt or diminish the natural flow, and must at his peril take no more than he is entitled to.

However, in a case in which the seepage resulting from irrigation with water brought from another watershed, was allowed to flow into a watercourse, the burden of proving that such waters had been abandoned was upon the party asserting such abandonment.[50]

### The Decisions as to Rights to the Use of Return Flow From "Foreign Waters" Are Not in Accord

The term "foreign waters" is applied to waters taken from one watershed for use in a different drainage basin. These waters are foreign, in that they are not naturally a part of the water supply of the area in which used. The fact that some States have placed limitations upon the practice of diverting waters from one watershed to another, has been stated above in discussing the use of natural channels for the conveyance of appropriated water. The decisions are in conflict as to the status of the return flow from such waters, and apparently are not sufficient in number to afford a basis for stating any general rule.

*Where claimed by original appropriator.*—A Washington decision gave the one who brought water from another watershed the right to the increase in flow of a spring attributable to the irrigation of his lands, even though the spring was tributary to a stream on which others had established appropriations.[51] It was held that such return waters belonged to the one responsible for the development, namely, the one who had brought in the new water. These waters on entering the stream had not been abandoned, according to the finding, and could be used on a neighbor's land under agreement with the owner of the spring, as against the claim of a downstream appropriator.

A very recent California decision upheld the right of an irrigation district to recapture from a creek, at a point within the boundaries of the district, seepage, waste, and spill waters which had drained into the creek from lands irrigated by the district with water brought from another watershed, as against downstream appropriators of water from this increased flow in the creek.[52] It was not until several years after these individuals had appropriated and

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[48] *Silver King Consol. Mining Co.* v. *Sutton* (85 Utah 297, 39 Pac. (2d) 682 (1934)).
[49] 46 Mont. 483, 129 Pac. 327 (1912).
[50] *Miller* v. *Wheeler* (54 Wash. 429, 103 Pac. 641 (1909)).
[51] *Miller* v. *Wheeler* (54 Wash. 429, 103 Pac. 641 (1909)).
[52] *Stevens* v. *Oakland Irr. Dist.* (13 Calif. (2d) 343, 90 Pac. (2d) 58 (1939)).

put to use the water which had flowed down the creek from the lands in the district that the district manifested an intention to recapture this waste water for its own use. The appropriators claimed no right to compel the district to continue importing the foreign flow—only that they could enjoin the district from recapturing it after it had drained into the creek channel. The court stated that as a general rule (with some probable exceptions) the producer of an artificial flow is not obligated to lower claimants to continue its maintenance, and that in this case the district might stop the flow entirely above the point where it left the works of the district or the boundaries of its lands, and in controlling the flow might make temporary use of a channel traversing its lands so long as normal conditions on the stream were not injuriously affected. Abandonment of specific portions of the used imported water to which all claim had been relinquished was distinguished from abandonment of the original water right and was held not to confer upon the downstream appropriators any right to compel a like abandonment in the future or to control the use of the imported water upon the district lands. Nor had any right been acquired by estoppel, in the absence of any showing of turpitude in the conduct of the district, nor by adverse possession.

On the other hand, a Montana decision held that a water company which brought in foreign water and delivered it to irrigators, lost all claim to the seepage from their lands. Such seepage had collected in a spring which constituted the source of a watercourse on which prior appropriative rights had been established. It then became a part of the natural stream.[53] This court, a few years earlier, had held that the jurisdiction of appropriators of water taken out of the watershed and used for placer mining, ceased when they allowed the waters to drain into a gulch.[54] The waters then became waste, fugitive, and vagrant waters, and an attempted sale on the part of the appropriators, of the water or the right of use, was wholly void.

*Where released by original appropriator with no intent to recapture.*—A Federal decision arising in Montana, and an early California decision, have held that waters not formerly part of a particular stream, but abandoned into the stream, become a part thereof and inure to the benefit of appropriators thereon, in order of priority.[55]

Other decisions have held that such waters do not become a part of the natural stream, but are in conflict as to the nature of the right to their use that can be acquired. A California decision in 1918 denied the right of a riparian owner to such abandoned waters.[56] The riparian had a right to the usufruct in the natural water only; when water had been artificially added, all parties were on an equal footing, and the one who first secured it took the corpus of that which existed in the stream solely by virtue of its abandonment. The court declined to follow the earlier case of *Davis* v. *Gale*, on the ground that that was a suit between appropriators and did not involve riparian rights. In the instant case, in denying a petition for rehearing, it was pointed out that the opinion specifically decided nothing

[53] *Rock Creek Ditch & Flume Co.* v. *Miller* (93 Mont. 248, 17 Pac. (2d) 1074 (1933)).
[54] *Galiger* v. *McNulty* (80 Mont. 339, 260 Pac. 401 (1927)).
[55] *Dern* v. *Tanner* (60 Fed. (2d) 626 (D. Mont., 1932)); *Davis* v. *Gale* (32 Calif. 26, 91 Am. Dec. 554 (1867)).
[56] *E. Clemens Horst Co.* v. *New Blue Point Min. Co.* (177 Calif. 631, 171 Pac. 417 (1918)).

as to rights in such waters as between appropriators or by prescription. However, in a very recent case [57] it was stated that the reservation in the *Horst case* last cited "implies recognition of the possibility of appropriation of foreign waters," and that in view of the later definition of State policy as expressed in the water commission act and the constitutional amendment regarding conservation and use of water, foreign waters are now subject to appropriation in California. It was further stated that the fact that, where such waters have been brought into a stream as the result of abandonment by another appropriator, there is no way to compel him to continue such abandonment, necessarily affects the value of the subsequent appropriation right, but does not affect the existence of the right subject to the limitation caused by the nature of the water supply in question. The principle of the *Horst case* was applied in denying the claim of a riparian owner to the return from foreign waters; but it was held that foreign waters from Merced River abandoned into a stream which flowed into San Joaquin River above the point at which Merced River flowed into San Joaquin River, were still a part of the waters of Merced River and were subject to the riparian right of an owner of land riparian to both Merced and San Joaquin rivers.

In a recent Montana case [58] water had been appropriated from Gold Creek, taken across a divide to Pioneer Creek for placer mining purposes, whence it ran down Pioneer Creek to its junction with Pikes Peak Creek and thence to the lower portion of Gold Creek from which originally diverted. Appropriators of water for agricultural purposes built a ditch leading from Pioneer Creek to Gold Creek at a point above the confluence of Pikes Peak Creek and Gold Creek. This was done after others had appropriated water from Pikes Peak Creek and had made use of these released waters. It was held that this released water was not subject to recapture by the connecting ditch as a part of the natural flow of Gold Creek; that the prior appropriators of the flow of Pikes Peak Creek were entitled not only to such flow but to the released water as well.

In a Colorado case, waters had been diverted from the Rio Grande into an area from which the seepage could not naturally drain back to the river. A drainage system was installed, through which the seepage waters from irrigation and local precipitation were returned artificially to the river, and an appropriation of such drainage waters at a point on the drainage ditch was allowed as against the claims of prior appropriators from the river.[59] An Idaho decision [60] likewise held that seepage from a canal, which has its source in a different watershed, is separately appropriable, under the statute [61] providing that ditches for the utilization of seepage shall be governed by the same laws relating to priority as ditches diverting from streams.

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[57] *Crane* v. *Stevinson* (5 Calif. (2d) 387, 54 Pac. (2d) 1100 (1936)). The California Supreme Court has stated still more recently that it is settled in California that so-called foreign waters are subject to appropriation: *Bloss* v. *Rahilly* (16 Calif. (2d) 70, 104 Pac. (2d) 1049 (1940)). An appropriation of foreign water by a lower riparian owner is good as against an upper riparian owner. In answer to a contention that section 11 of the water commission act had made foreign waters the subject of riparian rights, it was held that that section, read in the light of all other provisions of the act "constitutes no more than an affirmation of the existing rights of riparian owners in and to the natural flow and it may not be construed as enlarging the rights of riparian owners so as to give them in effect riparian rights in foreign water as well as in the natural flow."

[58] *Mannix & Wilson* v. *Thrasher* (95 Mont. 267, 26 Pac. (2d) 373 (1933)).

[59] *San Luis Valley Irr. Dist.* v. *Prairie Ditch Co. & Rio Grande Drainage Dist.* (84 Colo. 99, 268 Pac. 533 (1928)).

[60] *Breyer* v. *Baker* (31 Idaho 387, 171 Pac. 1135 (1918)).

[61] Idaho Code Ann., 1932, sec. 41–107.

A Washington decision held such waters to be of a vagrant or fugitive character, subject to taking by the first person who can do so, and not waters to which a permanent right may be acquired.[62] The first taker in any one year could acquire no exclusive right to such waters in the following year.

Thus the decisions variously hold that abandoned waters of this character are and are not a part of the stream into which released, and, if not a part of the stream, that exclusive appropriative rights can and cannot be acquired to their use.

## Right To Change the Point of Diversion, Place of Use, and Character of Use

### Such Changes Are Ordinarily Permitted, Provided the Rights of Others Are Not Impaired by the Change

It has long been the general rule (with some exceptions hereinafter noted) that the appropriator may change the point of his diversion of water from the stream, or may change the place of use or even the purpose of his use of the water, so long as the rights of others are not thereby impaired.[63] The exercise of this privilege in many States, however, as noted below in this discussion and in the appendix, must now conform to procedure set forth in the statutes which govern the appropriation of water, at least so far as the changes relate to rights acquired after the enactment of the statutory provisions and to the use of waters governed by the water code.

The appropriator is entitled to have the stream conditions maintained substantially as they existed at the time he made his appropriation. This applies equally to senior and junior appropriators; the junior appropriator initiates his right in the belief that the water previously appropriated by others will continue to be used as it is then being used, and therefore has a vested right, as against the senior, to insist that such conditions be not changed to the detriment of his own right. (See p. 336.) This applies specifically to a change in place of use or diversion the effect of which will be to injure the holders of established rights.[64] It is therefore a condition precedent to the right to make any change in diversion, place of use, or character of use, that the rights of existing water users be properly safeguarded from injury resulting from the change. Some of the examples of injury against which protection is afforded are noted below.

Changes in the point of diversion, place of use, or character of use of water, which are made in conformity with any statutory requirements that may exist and which do not injure the rights of others, do not affect the validity of the appropriation, or forfeit the water right, or work an abandonment, or alter the priority of the appropriation; nor does a proposal to make such change affect the appropriation in

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[62] *Elgin* v. *Weatherstone* (123 Wash. 429, 212 Pac. 562 (1923)).

[63] Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, sec. 856, p. 1500.

The principle was extended to appropriated ground waters in *San Bernardino* v. *Riverside* (186 Calif. 7, 198 Pac. 784 (1921)). See also *Lodi* v. *East Bay Municipal Utility Dist.* (7 Calif. (2d) 316, 60 Pac. (2d) 439 (1936)).

[64] *Crockett* v. *Jones* (47 Idaho 497, 277 Pac. 550 (1929)).

any way.[65] As noted below (p. 381), the Wyoming statute provides that water rights in the natural *unstored* flow of streams may not be detached from the place of use without loss of priority.

It was stated by the Oregon court in an adjudication case [66] that a change in point of diversion and place of use may be made if others are not injured, but that a change "as to subsequent appropriators, will not carry with it the priority of appropriation." However, in view of subsequent decisions, it is believed that this broad statement should be limited to the facts there under consideration, which involved the claim by an appropriator of water for power purposes of the right to convey to others, for irrigation, the use of water not needed for power during certain months and which had never been used for that purpose during such months. The right to the use of such water, it was held, could not be conveyed by the appropriator to another, for it was subject to use by the appropriator next in priority when not needed by the original claimant. Hence, the purchaser could not change the point of diversion, purpose of use, or claim of priority. It was further stated that the Oregon rule recognizing changes in diversion or use concerned changes for the convenience of the original appropriator within the purview of his initial appropriation, and not changes of use for a purpose wholly foreign thereto. More recent decisions show clearly that such changes in Oregon for the appropriator's own use do not affect his priority; [67] and the recent decision in *Broughton* v. *Stricklin* [68] held that a proposal to change the place of use of water for power purposes to another point for irrigation purposes is not an abandonment of the water right. Furthermore, the Oregon water code provides that changes in point of diversion, place of use, and character of use may be made in compliance with the provisions of the act "without losing priority of the right theretofore established." [69]

Most States have statutes authorizing appropriators to make such changes, subject to prescribed limitations. These changes do not contemplate any increase in the quantity of water diverted under the original appropriation; nor would an increase be authorized solely by virtue of a change in point of diversion, place of use, or character of use.[70] An enlargement in the diversion of water is the subject of a new right.

**Point of Diversion**

The right to change the point of diversion is authorized by statute in all Western States except Arizona and Wyoming. It has been

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[65] For statements in recent cases relating to this general principle see: *Hand* v. *Carlson* (138 Calif. App. 202, 31 Pac. (2d) 1084 (1934; hearing denied by supreme court)); *Anderson* v. *Baumgartner* (4 Calif. (2d) 195, 47 Pac. (2d) 724 (1935)); *In re Johnson* (50 Idaho 573, 300 Pac. 492 (1931)); *Peck* v. *Simon* (101 Mont. 12, 52 Pac. (2d) 164 (1935)); *Broughton* v. *Stricklin* (146 Oreg. 259, 28 Pac. (2d) 219 (1933), 30 Pac. (2d) 332 (1934)); *In re Alpowa Creek* (129 Wash. 9, 224 Pac. 29 (1924)); *In re Ahtanum Creek* (139 Wash. 84, 245 Pac. 758 (1926)); *Van Tassel Real Estate & Livestock Co.* v. *Cheyenne* (49 Wyo. 333, 54 Pac. (2d) 906 (1936)); *Ramsay* v. *Gottsche* (51 Wyo. 516, 69 Pac. (2d) 535 (1937)).

[66] *In re North Powder River* (75 Oreg. 83, 144 Pac. 485 (1914), 146 Pac. 475 (1915)).

[67] *In re Hood River* (114 Oreg. 112, 227 Pac. 1065 (1924)); *In re Silvies River* (115 Oreg. 27, 237 Pac. 322 (1925)); *In re Deschutes River and Tributaries* (134 Oreg. 623, 286 Pac. 563, 294 Pac. 1049 (1930)).

[68] 146 Oreg. 259, 28 Pac. (2d) 219 (1933), 30 Pac. (2d) 332 1934).

[69] Oreg. Code Ann., 1930, sec. 47–712.

[70] *Williams* v. *Altnow* (51 Oreg. 275, 95 Pac. 200, 97 Pac. 539 (1908)); *In re Deschutes River and Tributaries* (134 Oreg. 623, 286 Pac. 563, 294 Pac. 1049 (1930)); *Van Tassel Real Estate & Livestock Co.* v. *Cheyenne* (49 Wyo. 333, 54 Pac. (2d) 906 (1936)).

recognized in decisions in those States.[71] The right is subject to the restriction that no injury be thereby inflicted upon others. Many of the statutes require the approval of the State administrative officials, which contemplates an inquiry into the matter of impairing existing rights. In Texas no permit is required to make an alteration or extension of a ditch in which an increased appropriation is not involved, but a detailed statement must be filed for the information of the board of water engineers.[72] The Colorado procedure requires a petition to the court from which the original decree issued, with proof of notice to all interested parties.[73]

In one of the earliest Montana water-right cases[74] it was held that a senior appropriator had no right to change his point of diversion to a place above an upstream junior appropriator's diversion for a mill, and thus deprive the latter of the use of the water; for the mill owner had located at a point at which he could validly use the water appropriated by the earlier comer but without consuming it, which conditions the junior appropriator was entitled to have continued. Likewise, a proposed change in the point of diversion has been denied where it would result in depriving junior appropriators of the benefits of maintenance of the stream conditions which existed at the time they made their appropriations.[75] Still another example is found in a fairly recent Washington case,[76] in which the right to make a temporary change in the point of diversion to a location upstream was denied because it would result in depriving the lands through which the stream flowed of the benefits of subirrigation and of domestic use from springs fed by the stream.

The Idaho Supreme Court has held that a change made in the point of diversion without the approval of the commissioner of reclamation does not forfeit the water right.[77] It has also been held, construing the statute, that as Boise River is an adjudicated stream, the department could entertain an application for a change in the point of diversion.[78]

It was urged in a Texas case[79] that an appropriator had forfeited an alleged prior right by changing his headgate without the authority of the board of water engineers. The court stated that the statute fixes a penalty, but does not declare a forfeiture of water rights in such cases.

A very recent Utah case[80] involved the question as to whether an application to the State engineer is necessary in case of changes in point of delivery from the canal of a mutual irrigation company to its stockholders. It was held that the statute does not apply in such

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[71] *Miller* v. *Douglas* (7 Ariz. 41, 60 Pac. 722 (1900)); *Van Tassel Real Estate & Livestock Co.* v. *Cheyenne* (49 Wyo. 333, 54 Pac. (2d) 906 (1936)). (See footnote 89 concerning Wyoming.)

[72] Vernon's Tex. Stats., 1936, Rev. Civ. Stats, art. 7495.

[73] Colo. Stats. Ann., 1935, ch. 90, sec. 104.

[74] *Columbia Mining Co.* v. *Holter* (1 Mont. 296 (1871)).

[75] *Vogel* v. *Minnesota Canal & Res. Co.* (47 Colo. 534, 107 Pac. 1108 (1910)).

[76] *Haberman* v. *Sander* (166 Wash. 453, 7 Pac. (2d) 563 (1932)).

[77] *Harris* v. *Chapman* (51 Idaho 283, 5 Pac. (2d) 733 (1931)); *Joyce* v. *Rubin* (23 Idaho 296, 130 Pac. 793 (1913)).

[78] *In re Rice* (50 Idaho 660, 299 Pac. 664 (1931)).

[79] *Ward County W. I. Dist. No. 3* v. *Ward County Irr. Dist. No. 1* (237 S. W. 584 (Tex. Civ. App., 1921)). On error to court of civil appeals, reformed and affirmed, without discussing the point to which this footnote refers, 117 Tex. 10, 295 S. W. 917 (1927).

[80] *Syrett* v. *Tropic & East Fork Irr. Co.* (97 Utah 56, 89 Pac. (2d) 474 (1939)). It was held in *Tanner* v. *Provo Res. Co.* (99 Utah 139, 98 Pac. (2d) 695 (1940)) that an appropriator who is not injured by a change in the point of diversion of another appropriator, has no ground for complaint.

case, where no other independent appropriators than the irrigation company have an interest in the canal or water. For the purpose of the statute, it was stated that the company stands as a single appropriator of water to which its stockholders are entitled, the delivery of water thereto being a matter of internal management of the company. The statute would apply if the company or a stockholder attempted to change the point at which the water is being diverted from the river.

### Place of Use

Statutes in the majority of the Western States, as shown in the appendix, authorize changes in the place of use, the Wyoming statute applying only to stored water, as noted below. The Colorado court has sanctioned this right of change in place of use in many cases.[81] Water rights in this State are ordinarily separable from the land for which acquired, although they may be made appurtenant by contract between an irrigation company and its stockholders or consumers.[82] The Colorado Supreme Court recently stated, in *Hassler* v. *Fountain Mutual Irrigation Co.:*[83]

> * * * a water right may be alienated apart from the land, or its use transferred from one place to another, or even the character of use changed, provided only that in each instance no injury results to vested rights of other appropriators.

Arizona goes to the other extreme. The law, both statutory and judicial, is very specific to the effect that appropriated water is appurtenant to particular tracts of land, and may be transferred therefrom only when through natural causes, and no fault of the owner, it becomes impracticable to use the water economically and beneficially upon the tract in connection with which the right was acquired.[84] The transfer under such circumstances requires the approval of the State water commissioner, subject to existing rights.[85]

The statutes of nearly all of those States which sanction changes in the place of use require the prior approval of the State administrative officials.

The present Wyoming statutes provide that water rights for the direct use of the natural unstored flow of streams cannot be detached from the lands for which acquired, without loss of priority;[86] but that reservoir rights, while attachable to particular lands by conveyance executed by the reservoir owner, do not otherwise attach to any particular lands but may be transferred from one tract to another at the will of the owner of the right, the only limitation being that the use be beneficial.[87] The Wyoming rule has been changed several times. A statute passed in 1905[88] authorized transfers of rights from one tract to another, if not injurious to other

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[81] *Strickler* v. *Colorado Springs* (16 Colo. 61, 26 Pac. 313 (1891)) ; *Cache la Poudre Irr. Co.* v. *Larimer & Weld Res. Co.* (25 Colo. 144, 53 Pac. 318 (1898)) ; *King* v. *Ackroyd* (28 Colo. 488, 66 Pac. 906 (1901)) ; *Hassler* v. *Fountain Mutual Irr. Co.* (93 Colo. 246, 26 Pac. (2d) 102 (1933)).

[82] *Wright* v *Platte Valley Irr. Co.* (27 Colo. 322, 61 Pac. 603 (1900)) ; *Comstock* v. *Olney Springs Drainage Dist.* (97 Colo. 416, 50 Pac. (2d) 531 (1935)).

[83] 93 Colo. 246, 26 Pac. (2d) 102 (1933).

[84] *Tattersfield* v. *Putnam* (45 Ariz. 156, 41 Pac. (2d) 228 (1935)).

[85] Ariz. Rev. Code, 1928, sec. 3314.

[86] Wyo. Rev. Stats., 1931, sec. 122–401.

[87] Wyo. Rev. Stats., 1931, sec. 122–1602.

[88] Wyo. Laws, 1905, ch. 97.

appropriators. This was repealed in 1909 in an act [89] providing that transfers could not be made without loss of priority, the provision being limited in 1921 [90] to the direct use of natural unstored flow of stream water.

The limitations upon taking water out of watersheds in Nebraska, New Mexico, and Texas, noted heretofore in discussing the use of natural channels for the conveyance of water (p. 360), necessarily apply to changes in place of use as well as to location of the original place of use.

An Idaho decision [91] denied the right of an appropriator to use his irrigation water upon a different tract of land from that on which originally used, if the seepage and waste water from the new land could not return to the stream above a lower junior appropriator's headgate in case the deprivation of such water greatly injured the latter. In another decision [92] it was held that it is not necessary to own the land on which water has been used in order to be entitled to change the place of use, if others are not adversely affected. This property right to change the place of use existed prior to the enactment of the statute; if the statute is applicable, it should be followed, but if not applicable, the water user who does not own the land may proceed in a court of equity.

The Oregon court has stated [93] that in order that waters appropriated for the irrigation of certain lands may be used to irrigate other lands, there must have been a continuing intention to irrigate a well-defined acreage. The water right, then, is lost—abandoned—if the intent to irrigate the first acreage is abandoned before the intention to irrigate the second area becomes fixed.

If the appropriative water right were inseparably appurtenant to the place of use, it would of course be impossible to change the place of use. However, as noted below in connection with the discussion of appurtenance of water rights (p. 385), there is apparently no such thing as absolutely inseparable attachment of the water right to the land, for the right may be lost to the user under certain circumstances. Generally speaking, the water right is appurtenant to the place of use or is capable of being made appurtenant, but if appurtenant it is severable under conditions prescribed by statute or stated in the court decisions.

### Character of Use

States authorizing, by statute, changes in the character of use for which water has been appropriated are fewer than those so providing for changes in point of diversion and place of use, but comprise a majority of the total number. In nearly all cases, procedure involves approval of the State water officials. (See appendix.)

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[89] Wyo. Laws, 1909, ch. 68. The State supreme court, in referring to this act, said that whether the right to change one's point of diversion subsequently existed would depend upon the construction of that statute, the effect of the statute upon change in place of use not being in issue (*Groo* v. *Sights*, 22 Wyo. 19, 134 Pac. 269 (1913)). Under the facts it was held that a change in point of diversion would result in substantial injury to a junior appropriator—hence denied. A very recent case holds that the Wyoming statutes do not forbid a change of point of diversion, but that such change may be made if no injury results to others (*Van Tassel Real Estate and Livestock Co.* v. *Cheyenne*, 49 Wyo. 333, 54 Pac. (2d) 906 (1936)).

[90] Wyo. Laws, 1921, ch. 161; Rev. Stats., 1931, sec. 122-401.

[91] *Hall* v. *Blackman* (22 Idaho 556, 126 Pac. 1047 (1912)).

[92] *First Security Bank of Blackfoot* v. *State* (49 Idaho 740, 291 Pac. 1064 (1930)).

[93] *In re Umatilla River* (88 Oreg. 376, 168 Pac. 922 (1917), 172 Pac. 97 (1918)).

In certain States without specific statutory provisions, decisions of the courts have upheld the right to make such change or have denied it because under the facts presented, injury would have resulted to other appropriators.[94]

The injury that may result to the rights of other appropriators by a change in the character of use of water usually appears in cases in which it is proposed to change a nonconsumptive use to a consumptive use. Thus the use of water for the development of hydroelectric power is a nonconsumptive use, and the water which is diverted under such an appropriative right is returned to the stream after its use and is thereafter available for the use of downstream appropriators. Obviously, to change such use to a use for irrigation of land, in which a large part of the water is consumed and consequently cannot return to the stream, would be to deprive the downstream appropriators of the benefits of the released water—in other words, it would be an alteration in the conditions under which the junior appropriators initiated their rights. Such an aleration will not be upheld in cases in which the rights of other appropriators, whether senior or junior, are injuriously affected. (See p. 336.)

In a Kansas case the right of upper riparian owners, who by lapse of time had lost their right to object to a dam used to operate a flour mill, to enjoin its continuation as a means of providing power for an electric-light plant, was denied, where it was not shown that the change resulted in an increased obstruction to the flow of the stream.[95] This was a case of change of use under a prescriptive right, not a right claimed under the appropriation statute.

The Nebraska Supreme Court, in a fairly early decision,[96] permitted a company which had appropriated water for uses including irrigation and power to change the power use to irrigation of additional lands not described in the original appropriation, even though an intervening appropriator had relied upon the return flow below the power use, inasmuch as irrigation was one of the original purposes. The appropriations of both parties had been made before the irrigation act of 1895 went into effect; and the court held that under the law existing in 1894 an appropriator could extend his ditch and change the character of use of the water from irrigation and power to irrigation only, if desired. The court stated, further:

> It has been the uniform rule to allow appropriators of water after it has been actually taken and applied to some beneficial purpose to change the place or character of its use.

The limitation that no injury be inflicted upon others was not dwelt upon, other than to say that the junior appropriator could not complain so long as the diversion was within the appropriated quantity and was all applied to a beneficial use. It was held, however, that on applying for an adjudication under the 1895 law the prior appropriator must specify the lands irrigated, and that he could change the place of use only with the permission of the State administrative agency. It may be noted that the present statute [97] authorizes changes in point of

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[94] In addition to the other cases cited herein, see *Washington State Sugar Co.* v. *Goodrich* (27 Idaho 26, 147 Pac. 1073 (1915)).
[95] *Whitehair* v. *Brown* (80 Kans. 297, 102 Pac. 783 (1909)).
[96] *Farmers' & Merchants' Irr. Co.* v. *Gothenburg Water Power & Irr. Co.* (73 Nebr. 223, 102 N. W. 487 (1905)).
[97] Nebr. Comp. Stats. 1929, sec. 46-606.

diversion or line of canal, with the approval of the State department, but contains no specific provisions for changes in place of use or character of use. Conceding that the authority to make such changes under State administrative approval may be implied, nevertheless under the present procedure for acquisition and forfeiture of rights, and specific designation of lands for which water not exceeding the statutory limitation may be appropriated, it is believed that the change from a nonconsumptive power use to a consumptive irrigation use on lands not described in the original application for a permit to appropriate water would not be allowed if subsequent appropriators were thereby deprived of the return water upon which the maintenance of their rights depended.

The right to change a nonconsumptive power use to a consumptive irrigation use, to the prejudice of a lower appropriator, was denied in the recent Oregon case of *Broughton* v. *Stricklin*.[98]

The Montana Supreme Court has stated that as a change from a power to an agricultural use results in consumption of the quantity of water diverted, it amounts to a new appropriation, the date of which is the date of change from the original power purpose.[99] It was held in another case that if agricultural uses will be injured, a use for placer mining may not be changed to another use;[1] and in a very recent case, that if others are not injured, the validity of an appropriation will not be affected by a change from mining to agricultural purposes.[2]

The Arizona statute[3] requires the approval of the State water commissioner for a change of use from domestic, municipal, or irrigation, and the approval of the legislature if the change contemplates the generation of hydroelectric energy of more than 25,000 horsepower.

A Colorado statute[4] provides that water appropriated for domestic purposes shall not be used for irrigation but that a municipality may use domestic water for sprinkling streets, extinguishing fires, and household purposes. Apparently this has not been passed upon by the supreme court. That court, however, in several cases has recognized the general right to change the character of use if others are not injured.[5]

The Wyoming statute[6] provides that water rights for the direct use of the natural unstored flow of a stream cannot be detached from the lands, place, or *purpose* of use for which acquired, without loss of priority. However, as noted heretofore in connection with preferential uses of water, existing rights may be condemned to supply water for a preferred use, and a change to a preferred use may be made under procedure administered by the board of control. (See pp. 345 and 353.)

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[98] 146 Oreg. 259, 28 Pac. (2d) 219 (1933), 30 Pac. (2d) 332 (1934).

In an earlier case an attempt to change a use for power to a use for irrigation during the summer months was denied as against junior appropriators (*In re North Powder River*, 75 Oreg. 83, 144 Pac. 485 (1914), 146 Pac. 475 (1915)).

[99] *Featherman* v. *Hennessy* (43 Mont. 310, 115 Pac. 983 (1911)).

[1] *Head* v. *Hale* (38 Mont. 302, 100 Pac. 222 (1909)). See also the recent decision in *Mannix & Wilson* v. *Thrasher* (95 Mont. 267, 26 Pac. (2d) 373 (1933)).

[2] *Peck* v. *Simon* (101 Mont. 12, 52 Pac. (2d) 164 (1935)).

In the early California decision in *Davis* v. *Gale* (32 Calif. 26, 91 Am. Dec. 554 (1867)), it was held that a change in use of water from mining to agriculture does not impair the validity of a vested appropriative right.

[3] Ariz. Rev. Stats., 1928, sec. 3285.

[4] Colo. Stats. Ann., 1935, ch. 90, sec. 24.

[5] *Strickler* v. *Colorado Springs* (16 Colo. 61, 26 Pac. 313 (1891)); *Ironstone Ditch Co.* v. *Ashenfelter* (57 Colo. 31, 140 Pac. 177 (1914)); *Hassler* v. *Fountain Mutual Irr. Co.* (93 Colo. 246, 26 Pac. (2d) 102 (1933)).

[6] Wyo. Rev. Stats., 1931, sec. 122–401.

## Transfer of Water Rights

### The Appropriative Right Is Usually Appurtenant, but Not Inseparably Appurtenant, to the Place of Use

The general rule as to the appurtenance of an appropriative right to the land in connection with which it is exercised is thus summed up by Wiel:[7]

> It is well settled that a water-right *may* pass with land as an appurtenance thereto, or as a parcel thereof, but not *necessarily* so; and whether a water-right passes as an appurtenance involves two questions, viz: (*a*) Whether the water-right is an appurtenance, and (*b*) whether, being such, it was intended to pass. Both of these are questions of fact in each case.

The author goes on to state that whether the water right is an appurtenance or parcel is a question of fact resting chiefly upon whether it was used specially for the benefit of the land in question, and that when used for irrigation there will seldom be doubt of such necessity. The various ramifications of this subject are further considered by Mr. Wiel at length.[8] The main point which it is desired to emphasize here is that while the appropriative right is usually (though not always, by any means) considered to be appurtenant or attached to the place of use, either by virtue of statutory declaration or by rule of the courts, yet it is not such an inseparable appurtenance that it cannot be alienated from the place of use either voluntarily by the holder of the right or under certain circumstances against his will.[9]

The statutes of many of the Western States make the appropriative water right appurtenant to the lands in connection with which the right is perfected, as shown in the appendix. This applies to water appropriated for irrigation purposes in some States, and to water appropriated for all purposes in some others. The Wyoming statute does not make the water right an appurtenance, but provides that the right to use direct flow shall attach to the land or other purpose or object and may not be detached therefrom without loss of priority, and that rights to water out of reservoirs shall not attach to particular lands except by an instrument executed by the owner of the reservoir; and in New Mexico the right to irrigation water is appurtenant to land unless otherwise provided by contract between the landowner and the owner of works for storage or conveyance of the water. The statutes of States which have accepted the terms of the Carey Act[10] provide that such water right shall be appurtenant to the land.

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[7] Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 550, p. 587. The subject is also treated in vol. I, secs. 552 to 554, pp. 588 to 595, and in vol. II in connection with water rights under public service and mutual corporations.

[8] See also Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II. secs. 1005 to 1018, pp. 1786 to 1822.

[9] Apparently there is no such thing as an absolutely inseparable appurtenance of either a riparian or an appropriative right to the place of use. That is, the riparian right is usually held to be a part of the soil, though some courts have called it an appurtenance; but it may be destroyed by adverse use on the part of others which clearly invades the right, thus separating the right of use from the riparian land. (In California, as noted in ch. 2, p. 44, appropriative rights on private land were often made possible because of the acquirement of prescriptive rights against riparians.) Furthermore, appropriative rights may likewise be lost to use on the land to which they are appurtenant—by prescription on the part of others and by abandonment or forfeiture of the right on the part of the holder, as noted below (p. 389). In fact, an appropriative right requires constant attention to keep it in good standing; it requires substantially continuous beneficial use of the water on the land in connection with which the right has been acquired or on other land to which the right is transferred.

[10] 28 Stat. L., 372–427, ch. 301 (Aug. 18, 1894).

The right to change the place of use of water under an appropriative right is granted by statute in a number of Western States as heretofore noted (p. 381). Qualifications are provided for the exercise of the right, but if the appropriator qualifies, he may change the place of use. Hence, even in the States which have statutes providing that the appropriative right shall be appurtenant to particular land, such right is not an inseparable appurtenance when conditions exist under which the statute authorizes a change in the place of use.[11] Generally, if the rights of others are not prejudiced thereby, one may detach his appropriative right from one tract of land and transfer it to other land by following a stated procedure, in which event the right becomes appurtenant to the tract to which transferred.

Whether or not the water right is an appurtenance to land, therefore, is usually a question of fact, in the absence of a statute making it appurtenant. If appurtenant, it passes with title to the land by conveyance or descent, unless specifically reserved, particularly if the deed contains a general appurtenances clause.

### A Water Right, Being Real Property, Is Subject to Transfer With the Same Formalities Required for the Conveyance of Real Estate

The water right is an interest in real estate, as shown above in chapter 2. Hence, the conveyance of an appropriative right generally requires a written deed; [12] exceptions being noted below.

It is recognized in various decisions that a water right may be mortgaged, to the same extent as other real estate.[13] The practice of including the water rights in mortgages of irrigated lands and irrigation company systems is common; for such lands would be reduced in value and in many cases would have none, if deprived of the right to water, and an irrigation system without water rights would have little or no value for any purpose.

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[11] In Colorado, which has no statute making all water rights appurtenant to land, the court stated in *Hastings & Heyden Realty Co.* v. *Gest* (70 Colo. 278, 201 Pac. 37 (1921)): "It is recognized in this state that water may or may not be appurtenant to land."

The Colorado Supreme Court has recently said that "a water right may be alienated apart from the land" (*Hassler* v. *Fountain Mutual Irr. Co.,* 93 Colo. 246, 26 Pac. (2d) 102 (1933)). More recently, the same court has stated that the general rule, well settled in Colorado, is that water rights may or may not be an appurtenance, and pass or not pass with a conveyance of land, depending upon the intention of the grantor: *Denver Joint Stock Land Bank* v. *Markham* (106 Colo. 509, 107 Pac. (2d) 313 (1940)).

Several other courts of last resort have recently stated the principle that a water right, though appurtenant to land, may be disposed of separately from the land, thus: "It is well established in this jurisdiction that a water right may be transferred separately from the lands on which it has been used, provided that to do so does not prejudice the rights of another water user; and that the right to segregate a water right from the lands to which it may be appurtenant inheres in the right of property and ownership in this state" (*Hillcrest Irr. Dist.* v. *Nampa & Meridian Irr. Dist.,* 57 Idaho 403, 66 Pac. (2d) 115 (1937)).

"Likewise it is settled by the decisions of this court that such a right is property which may be disposed of apart from the land on which it has been used" (*Brennan* v. *Jones,* 101 Mont. 550, 55 Pac. (2d) 697 (1936)).

"In other words, the water right is appurtenant to, but not inseparable from the land" (*In re Deschutes River and Tributaries,* 134 Oreg. 623, 286 Pac. 563, 294 Pac. 1049 (1930)).

Some of the practical operation as well as legal questions involved in the matter of appurtenance of water to land served by cooperative irrigation companies are discussed by the present author in Mutual Irrigation Companies in California and Utah, Farm Credit Admin. Coop. Div. Bull. 8 (1936).

[12] 67 C. J. 1038, sec. 479.

[13] Among such decisions, see *Bank of Visalia* v. *Smith* (146 Calif. 398, 81 Pac. 542 (1905)): *Yellowstone Valley Co.* v. *Associated Mortgage Investors* (88 Mont. 73, 290 Pac. 255 (1930)).

The course which the creditor of a mutual irrigation company may pursue in realizing on the value of water rights on foreclosure of a mortgage of the company's physical assets and water rights, and the uncertainty as to whether in at least some jurisdictions the water supply may be diverted away from the service area in view of the beneficial interest which the former stockholders have in the water rights, is discussed by the present author in Mutual Irrigation Companies in California and Utah, Farm Credit Administration, Coop. Div. Bull. 8 (1936), pp. 87–91 and 136–138. See also *Hobbs* v. *Twin Falls Canal Co.* (24 Idaho 380, 133 Pac. 899 (1913)).

A number of State statutes authorize the assignment of unperfected rights initiated under applications to appropriate water; such assignments not to be binding, except as between the parties, unless recorded with the official to whom the application was made. Such an assignment is not a transfer of real property, but of a right to acquire real property.[14]

### Under Exceptional Circumstances Title to Water Rights May Pass by Parol

While the general rule is that such interests pass only by instruments in writing, parol contracts and sales have been upheld as between the parties, as transfers in equity, where possession has passed and irrigation works have been constructed or improved on the strength of the oral agreement.[15] Furthermore, cases from several States have upheld oral transfers of possessory rights, including appurtenant water rights, on the public domain, where accompanied by a transfer of possession, on the ground that the rights did not rest upon grant. As stated in Corpus Juris,[16] it is well settled that such a transfer, accompanied by delivery of possession of all the appropriator's rights, carries with it the appurtenant water rights. In a Kansas case[17] it was held that the right to use power created by an accumulation of water above a dam might be granted by parol.

A curious result of the general rule that a written deed of conveyance is necessary to transfer an appropriative right, is the principle announced in various decisions that a transfer lacking all formalities operates as an abandonment of the water right, thus forfeiting the original priority and relegating the priority of the transferee to the date upon which he begins his own actual use of the water. Kinney[18] approves the principle on the ground that as a water right is real property, for which there is necessity of a record of at least the claims of those owning the rights, a sale and transfer should be consummated with all the formalities necessary for the transfer of other real property. On the other hand, Wiel[19] has pointed out that the reasoning on which the rule is based would lead to the harsh result that a parol sale or a faulty deed endangers the rights of the grantor, by working an abandonment of his priority

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[14] *Speer* v. *Stephenson* (16 Idaho 707, 102 Pac. 365 (1909)).

[15] Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 556, p. 600. Where one for years has received the full benefit that could accrue from such a contract, he cannot be heard to assert that the contract was void because not in writing (*Stowell* v. *Tucker* (7 Idaho 312, 62 Pac. 1033 (1900)). See also *Francis* v. *Green* (7 Idaho 668, 65 Pac. 362 (1901)); *Watts* v. *Spencer* (51 Oreg. 262, 94 Pac. 39 (1908)).

[16] 67 C. J. 1038, sec. 479. See also discussion by Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 555, p. 595. The rule has recently been reaffirmed in *Wills* v. *Morris* (100 Mont. 514, 50 Pac. (2d) 862 (1935)), where it was said that persons occupying public lands before a survey were "squatters" who might acquire a water right and transfer their possessory rights both to the land and to the water right orally. Even more recently, in *Cook* v. *Hudson* (110 Mont. 263, 103 Pac. (2d) 137 (1910), this court stated that the claim and water rights of a "squatter" may be conveyed by parol.

[17] *Johnston* v. *Bowerstock* (62 Kans. 148, 61 Pac. 740 (1900)). It was held that as the water in the river was not a part of the riparian estate the possessory right to a part of the same, accumulated by the dam which the proprietor had built, was in a sense a reducing of personal property to possession, much like the collection of a crop of ice, the transfer of the water or ice so accumulated being not required by deed. The oral contract in this case was made contingent upon the continuance of a written contract with another party running for 99 years, but containing a clause providing for termination under certain circumstances on 3 months' notice. In view of this latter contingency, enforcement of the oral contract was not prohibited by the statute of frauds.

[18] Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, sec. 1109, p. 1999.

[19] Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I. sec. 555, p. 595.

in case the object of the parol sale is not carried out; that it might properly be held that a parol sale is evidence of an abandonment but not conclusive evidence.

There is an apparent conflict in the decisions, as noted by the authors referred to above. As between the parties to a transfer which lacks all the formalities, the courts have enforced parol contracts of sales as transfers in equity where justified by the circumstances, as noted above. In such cases the question of abandonment is not material. And as against other appropriators from the same source of supply, application of the principle of abandonment seems to disregard the fundamental element of intent; for the intention on the part of an appropriator to abandon his water right is not shown more persuasively where he makes a transfer which lacks all the formalities, than where he scrupulously follows the legal procedure.[20] Granted that there is a necessity for the proper recording of all claims to water rights—a necessity particularly vital in safeguarding the interests of new appropriators, as well as in protecting existing rights—the original claim of the transferor is notice to the world of the extent of his right, and his parol transfer does not indicate an intent or attempt to enlarge that right; hence a requirement that his priority is forfeited by an informal transfer, where there is no cessation of beneficial use of the water, inures to the benefit of strangers to the transaction whose own rights are not interfered with by the acts of these parties and, in the view of the present author, operates with unnecessary severity upon the latter.

However, where there has been *in fact* an abandonment and cessation of use by the original appropriator, it is agreed that another with whom there is no privity of estate, and who resumes the use of the water even through the same ditches and on the same land, cannot thereby relate his priority back to the date of the original appropriation. His priority is effective only as of the beginning of his own use. The Oregon Supreme Court stated in *Hough* v. *Porter:*[21]

> * * * The right of a person claiming an appropriation of water cannot be tacked to that of a mere squatter, who, while he may have irrigated the land, has abandoned it. *Low* v. *Schaffer*, 24 Or. 239 (33 Pac. 678).
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> But a squatter upon public lands may, even by parol, transfer his claim and interest, whatever it may be in this respect, to another, and the rights of the subsequent purchaser and of his successors in interest, if asserted under the doctrine of prior appropriation, relate back to the date of the first appropriation by the person with whom there may be a privity of estate. It is well settled that the entryman need not necessarily have a complete title to the land in order to acquire a water right therefor.
>
> A mere claim of right to the land, supplemented by a diversion and appropriation of the water, is sufficient to entitle him to convey to another such interests as he may have, whether such appropriator be a mere squatter or lessee, or other person in possession: * * *

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[20] There can be no abandonment of a water right under a contract of transfer where the acts of the parties indicate precisely the contrary intention (*Middle Creek Ditch Co* v. *Henry*, 15 Mont. 558, 39 Pac. 1054 (1895)). The early Montana ruling that the attempt to convey a water right by an imperfect deed operates as an abandonment of the appropriative title, as stated in *Barkley* v. *Tieleke* (2 Mont. 59 (1874)), has been reversed. See *McDonald* v. *Lannen* (19 Mont. 78, 47 Pac. 648 (1897)); *Geary* v. *Harper* (92 Mont. 242, 12 Pac. (2d) 276 (1932)); *Wills* v. *Morris* (100 Mont. 514, 50 Pac. (2d) 862 (1935)).

Precisely the contrary intention from abandonment is indicated where one sold his title for a consideration, surrendered possessions, and agreed to make a proper conveyance (*Watts* v. *Spencer*, 51 Oreg. 262, 94 Pac. 39 (1908)).

[21] 51 Oreg. 318, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909). See also *In re Silvies River* (115 Oreg. 27, 237 Pac. 322 (1925)); *Head* v. *Hale* (38 Mont. 302, 100 Pac. 222 (1909)); *Chiatovich* v. *Davis* (17 Nev. 133, 28 Pac. 239 (1882)).

## Loss of Appropriative Water Rights

The right to water acquired by appropriation is a permanent interest in real estate, but can be lost as in case of other such interests; furthermore, inasmuch as the right is peculiarly a right of use, it can be lost under conditions not generally applicable to the loss of real property. The four ways in which appropriative water rights are commonly subject to loss are through voluntary abandonment, statutory forfeiture, adverse user by another, and estoppel.

### Abandonment Is a Voluntary, Intentional Act

Abandonment of an appropriative right may take place irrespective of statute. It is a voluntary loss of the water right—a mixed question of law and fact.[22] It consists of voluntary relinquishment and nonuse of the right, coupled with an intention to forsake or desert the right and not to repossess the use of the water; [23] hence it is a matter of intent coupled with corresponding conduct.[24]

The intent to abandon a water right, or a portion [25] of the right, is an essential element, and must be established as a question of fact in each case by clear and unequivocal evidence; mere lapse of time (in the absence of statutory forfeiture), without the intention, does not constitute an abandonment.[26] However, a presumption of intent to abandon, coupled with other acts, however slight, indicating such intention, may be created by nonuse for an unreasonable time.[27] This presumption may be overcome by other proof.[28]

In a word, nonuser is not *per se* an abandonment. It is, so far as concerns abandonment, only a sign that you "did not want the water any more" and meant to give it up, but may be rebutted by other evidence that you still meant to keep it, unless the nonuse lasted so unreasonably long as to be convincing of what your intention had been when you stopped use.[29]

The intent to abandon may be evidenced by the declaration of the party, or fairly inferred from his acts.[30] For example, one who sold his land with water right, and subsequently repurchased the land, but without the water stock, and irrigated it with rented water, was held to have abandoned his original right of appropriation and to have initiated a new right.[31] On the other hand, a proposal to change the place of use of water under an appropriation for power purposes to another point for irrigation purposes is not an abandonment of

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[22] *Farmers Irr. Dist.* v. *Frank* (72 Nebr. 136, 100 N. W. 286 (1904)).

[23] *Commonwealth Irr. Co.* v. *Rio Grande Canal Water Users Assn.* (96 Colo. 478, 45 Pac. (2d) 622 (1935)); *Joyce* v. *Murphy Land & Irr. Co., Ltd.* (35 Idaho 549, 208 Pac. 241 (1922)).

[24] *Syster* v. *Hazzard* (39 Idaho 580, 229 Pac. 1110 (1924)); *St. Onge* v. *Blakely* (76 Mont. 1, 245 Pac. 532 (1926)).

[25] *Smith* v. *Hawkins* (120 Calif. 86, 52 Pac. 139 (1898)); *Affolter* v. *Rough & Ready Irr. Ditch Co.* (60 Colo. 519, 154 Pac. 738 (1916)).

[26] *Beaver Brook Res. & Canal Co.* v. *St. Vrain Res. & Fish Co.* (6 Colo. App. 130, 40 Pac. 1066 (1895)); *Commonwealth Irr. Co.* v. *Rio Grande Canal Water Users Assn.* (96 Colo. 478, 45 Pac. (2d) 622 (1935)); *St. Onge* v. *Blakely* (76 Mont. 1, 245 Pac. 532 (1926)); *State* v. *Oliver Bros.* (119 Nebr. 302, 228 N. W. 864 (1930)); *Edgemont Imp. Co.* v. *N. S. Tubbs Sheep Co.* (22 S. Dak. 142, 115 N. W. 1130 (1908)); *Hammond* v. *Johnson* (94 Utah 20, 66 Pac. (2d) 894 (1937)).

[27] *Green Valley Ditch Co.* v. *Frantz* (54 Colo. 226, 129 Pac. 1006 (1913)); *St. Onge* v. *Blakely* (76 Mont. 1, 245 Pac. 532 (1926)).

[28] *Sieber* v. *Frink* (7 Colo. 148, 2 Pac. 901 (1884)); *Commonwealth Irr. Co.* v. *Rio Grande Canal Water Users Assn.* (96 Colo. 478, 45 Pac. (2d) 622 (1935)).

[29] Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 569, p. 611.

[30] *Gould* v. *Maricopa Canal Co.* (8 Ariz. 429, 76 Pac. 598 (1904)).

[31] *Brockman* v. *Grand Canal Co.* (8 Ariz. 451, 76 Pac. 602 (1904)).

Owners of a mining claim, some of whom took water for irrigation, by leasing their interests for a period of 99 years, thereby abandoned their irrigation rights (*Davis* v. *Chamberlain*, 51 Oreg. 304, 98 Pac. 154 (1908)).

the water right;[32] the intention is to devote the water to another use at another point, not to abandon the right. Nor does nonuser of a portion of the water appropriated for power purposes resulting from improvements in machinery operate as an abandonment of the right, unless it continues for an unreasonable time;[33] nor is there abandonment where use is made of stored water in exchange for direct-flow rights, where there is an abundance of flow in the stream consisting of mingled natural flow and water released from storage.[34] Actual relinquishment of the right must concur with the intent to abandon,[35] for abandonments and forfeitures are not favored,[36] and the "courts will not lightly decree an abandonment of a property so valuable as that of water in an irrigated region."[37] Hence the burden of proving an abandonment is upon the party who asserts it.[38] This is a well-settled rule.

It is logical that as the intention is a necessary element of abandonment, an abandonment should not result from circumstances over which the appropriator has no control.[39] (This principle has been applied in several cases arising under the forfeiture statutes, noted below, p. 396.) It is equally logical that transfer of a point of diversion or place of use, or a change from one use of water to another, should not operate as an abandonment of the water right or as a loss of priority, as heretofore discussed (p. 378), for the intention is clearly to continue the use under the new circumstances and not to abandon any right.

The time element is now largely simplified, by reason of the existence of statutes in most Western States prescribing periods of nonuse which constitute forfeiture of the right of use. This is discussed below (p. 392). For practical purposes, therefore, the principles applying to abandonment are important in such States for periods of nonuse shorter than the statutory period, coupled with an unequivocal intention to abandon.

There is a clear distinction between abandonment of a water right, and of specific quantities of water diverted from a stream. (See p.

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[32] *Broughton* v. *Stricklin* (146 Oreg. 259, 28 Pac. (2d) 219 (1933), 30 Pac. (2d) 332 (1934)).

[33] *Joseph Mill. Co.* v. *Joseph* (74 Oreg. 296, 144 Pac. 465 (1914)).

[34] *Masterson* v. *Kennard* (140 Oreg. 288, 12 Pac. (2d) 560 (1932)).

[35] *Utt* v. *Frey* (106 Calif. 392, 39 Pac. 807 (1895)); *Irion* v. *Hyde* (107 Mont. 84, 81 Pac. (2d) 353 (1938)); *Farmers Irr. Dist.* v. *Frank* (72 Nebr. 136, 100 N. W. 286 (1904)); *Broughton* v. *Stricklin* (146 Oreg. 259, 28 Pac. (2d) 219 (1933), 30 Pac. (2d) 332 (1934)); *Hammond* v. *Johnson* (94 Utah 20, 66 Pac. (2d) 894 (1937)).

[36] Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, sec. 1118, p. 2021; Long, J. R., A Treatise on the Law of Irrigation, 2d ed., sec. 185, p. 335; *Zezi* v. *Lightfoot* (57 Idaho 707, 68 Pac. (2d) 50 (1937)); *Hidalgo County W. C. & I. Dist. No. 1* v. *Goodwin* (25 S. W. (2d) 813 (Tex. Civ. App., 1930)); *Ramsay* v. *Gottsche* (51 Wyo. 516, 69 Pac. (2d) 535 (1937)); *Campbell* v. *Wyoming Dev. Co.* (55 Wyo. 347, 100 Pac. (2d) 124 (1940)).

"The courts abhor a forfeiture, and where no public interest is favored thereby equity leans against declaring a forefeiture" (*Hurst* v. *Idaho Iowa Lateral & Res. Co.*, 42 Idaho 436, 246 Pac. 23 (1926)).

[37] *Miller* v. *Wheeler* (54 Wash. 429, 103 Pac. 641 (1909)). See also *Thomas* v. *Ball* (66 Mont. 161, 213 Pac. 597 (1923)).

[38] "A party who bases his right on prescription or adverse possession, or on the abandonment or forfeiture of prior rights, has the burden of proof as to such matters; but where he makes a prima facie showing, the adverse party has the burden of rebutting or overcoming it" (67 C. J. 1061, sec. 526).

See also Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 570, p. 611; Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, sec. 1116, p. 2012; *Lema* v. *Ferrari* (27 Calif. App. (2d) 65, 80 Pac. (2d) 157 (1938)); *Thomas* v. *Ball* (66 Mont. 161, 213 Pac. 597 (1923)); *Rumsay* v. *Gottsche* (51 Wyo. 516, 69 Pac. (2d) 535 (1937)).

[39] *Huffner* v. *Sawday* (153 Calif. 86, 94 Pac. 424 (1908)); *Welch* v. *Garrett* (5 Idaho 639, 51 Pac. 405 (1897)); *Hough* v. *Porter* (51 Oreg. 318, 95 Pac. 732 (1908), 98 Pac. 1083 (1909), 102 Pac. 728 (1909)); *In re Manse Spring and Its Tributaries* (60 Nev. 280, 108 Pac. (2d) 311 (1940)).

364). Inevitably, in the functioning of an irrigation system, some of the water diverted from the source of supply returns to a stream channel through natural percolation or artificial drainage ditches or wasteways, for it is impossible in actual practice to make complete consumptive use of all water diverted. The portions of the water reduced to private possession and thereafter released into the stream, without intent to recapture, are thereby abandoned; but that obviously is not an abandonment of the appropriative right. In an Oregon case,[40] surplus water had been released from a reservoir with no intention of recapturing it. The supreme court, in holding that the appropriator had no further interest in such water after its release, and could confer no right upon anyone to its use, referred to such water as released or waste water and carefully refrained from calling it abandoned, in order to avoid confusion with abandonment of a water right.

There is an equally clear distinction between abandonment of an irrigation ditch and abandonment of a water right. Regardless of whether a water right in a particular case may be appurtenant to a ditch, or the ditch right appurtenant to the water right, these are two different species of property, just as are the water right and the land on which the water is used, and are therefore separate, or at least severable rights.[41] Ownership of the ditch and of the water right may, and often do, exist in different parties.[42] Hence, a particular ditch may be abandoned and the use of water continued through another ditch without constituting abandonment of the water right.[43] The question is whether there is an unreasonable voluntary cessation in the use of the water;[44] and if there exists an intention to utilize another ditch, and this is done without unreasonable delay, there is no abandonment. Otherwise one might have his ditch destroyed by floods and be held to have abandoned his water right even though he promptly built a new ditch in a slightly different location, to replace the old one.

Upon the abandonment of a water right, the water to which it was formerly entitled reverts to and remains in the stream as part of the public waters of the State, subject to the appropriations of others. This has been the rule of a number of cases. Some of the decisions have stated definitely that the water then becomes available to existing appropriators in the order of their priorities.[45] This is the logical conclusion; for such water is not new water in the stream, of which an independent appropriation may be made, but is a part of the flow of which only a right of use was originally acquired, such right having now been lost. It has been stated that there is no such thing as abandonment to particular persons, or for a consideration, and that the

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[40] *Vaughn* v. *Kolb* (130 Oreg. 506, 280 Pac. 518 (1929)). See also, as to the distinction between abandonment of a water right and of specific portions of water, *Stevens* v. *Oakdale Irr. Dist.* (13 Calif. (2d) 343, 90 Pac. 58 (1939)), discussed on pp. 375–376 herein.

[41] *Morgan* v. *Udy* (58 Idaho 670, 79 Pac. (2d) 295 (1938)); *Connolly* v. *Harrel* (102 Mont. 295, 57 Pac. (2d) 781 (1936)).

[42] *Swank* v. *Sweetwater Irr. & Power Co.* (15 Idaho 353, 98 Pac. 297 (1908)).

[43] *Nichols* v. *McIntosh* (19 Colo. 22, 34 Pac. 278 (1893)); *In re Johnson* (50 Idaho 573, 300 Pac. 492 (1931)); *Kleinschmidt* v. *Greiser* (14 Mont. 484, 37 Pac. 5 (1894)); *McDonnell* v. *Huffine* (44 Mont. 411, 120 Pac. 792 (1912)); *Stoner* v. *Mau* (11 Wyo. 366, 72 Pac. 193 (1903)); *Van Tassel Real Estate & Livestock Co.* v. *Cheyenne* (49 Wyo. 333, 54 Pac. (2d) 906 (1936)).

[44] *Nichols* v. *McIntosh* (19 Colo. 22, 34 Pac. 278 (1893)); *Stoner* v. *Mau* (11 Wyo. 366, 72 Pac. 193 (1903)).

[45] *North Boulder Farmers' Ditch Co.* v. *Leggett Ditch & Res. Co.* (63 Colo. 522, 168 Pac. 742 (1917)); *Wimer* v. *Simons* (27 Oreg. 1, 39 Pac. 6 (1895)); see also Oreg. Code Ann., 1930, sec. 47–901.

right once abandoned cannot be revived by a sale;[46] and it was held in a recent Oregon case[47] that an arrangement by which a milling company, for a consideration, would cease use of water for a period each year in order that upper irrigators could use it is not an abandonment, however designated, but is a transfer of water upstream for the benefit of certain appropriators and will not be upheld where a downstream appropriator is thereby injured. Furthermore, it would appear that if an independent appropriation were allowed to be made of water covered by an abandoned water right, then the one who had abandoned the right could himself regain his original priority by making a new appropriation at some later date, provided no intervening rights had accrued during the period of nonuse, and thus defeat the principle. Of course, one who has forfeited or abandoned the use of water may again appropriate the water as against *subsequent* appropriators, that is, as against persons who do not initiate their appropriations until after the original appropriator has resumed use of the water according to law.[48]

Abandonment applies only to appropriative rights, not riparian rights.[49] An essential part of the riparian doctrine is that use does not create nor nonuse destroy the right. Hence, so long as one retains title to riparian land, failure to exercise the right does not constitute an abandonment. This principle has been somewhat modified by the restrictions upon operation of the right in certain States, discussed in chapter 2, although those restrictions do not necessarily imply intentional abandonment.

### The Right May Be Forfeited by Failure to Use the Water Throughout a Period Prescribed by Statute

The statutes of a number of States provide that if an appropriator fails to use water during a stated number of successive years, the right of use shall cease and the water revert to the public. These periods are as follows:

*Arizona.*—Five years.[50]

*California.*—Three years.[51]

*Idaho.*—Five years. However, an extension of not to exceed 5 years may be granted by the commissioner of reclamation on showing of good reason for nonapplication to beneficial use during the 5-year period.[52]

*Kansas.*—No period of time is stated; any failure continuously to apply water beneficially, without sufficient cause shown, is to be deemed an abandonment and surrender.[53] It is further provided that any person who transfers or sells a water right shall be deemed to have abandoned it.[54]

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[46] Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 567, p. 607; *Middle Creek Ditch Co.* v. *Henry* (15 Mont. 558, 39 Pac. 1054 (1895)); *Watts* v. *Spencer* (51 Oreg. 262, 94 Pac. 39 (1908)).

The statement that there is no such thing as abandonment to particular persons or for a consideration was made in *Stephens* v. *Mansfield* (11 Calif. 363 (1858)) and approved in *Richardson* v. *McNulty* (24 Calif. 339 (1864)) and *McLeran* v. *Benton* (43 Calif. 467 (1872)), all these cases dealing with lands.

After abandoning a water right, one cannot revive the priority of right by making a sale thereof, even when acting in good faith (*Davis* v. *Gale*, 32 Calif. 26, 91 Am. Dec. 554 (1867)).

[47] *Hutchinson* v. *Stricklin* (146 Oreg. 285, 28 Pac. (2d) 225 (1933)).

[48] *Zezi* v. *Lightfoot* (57 Idaho 707, 68 Pac. (2d) 50 (1937)).

[49] Wiel, S. C., Water Rights in the Western States 3d ed., vol. I, sec, 861, p. 912.

[50] Ariz. Rev. Code, 1928, sec. 3280.

[51] Deering's Gen. Laws of Calif., 1937, act 9091, sec. 20a.

[52] Idaho Code Ann., 1932, sec. 41–216.

[53] Kans. Gen. Stats. Ann., 1935, sec. 42–308.

[54] Kans. Gen. Stats. Ann., 1935, sec. 42–314.

*Montana.*—No period is stated; if an appropriator abandons and ceases to use the water for a beneficial purpose, the right ceases. Questions of abandonment are to be questions of fact.[55]

*Nebraska.*—Three years. The declaration of forfeiture is made by the department of roads and irrigation under special procedure embracing notice, hearing, and appeal.[56]

*Nevada.*—Five years.[57]

*New Mexico.*—Four years. Water for storage reservoirs is excepted.[58]

*North Dakota.*—Three years.[59]

*Oklahoma.*—Two years.[60]

*Oregon.*—Five years. Failure to use for such period "shall be conclusively presumed to be an abandonment of such water right, and thereafter the water which was the subject of use under such water right shall revert to the public and become again the subject of appropriation in the manner provided by law, subject to existing priorities." The act is not to apply to or affect the water rights of cities or towns acquired for all reasonable and usual municipal purposes.[61] This act was passed in 1913. There are other and earlier enactments on loss of water rights, which are important so far as rights acquired under the statutes to which they apply are concerned.[62]

*South Dakota.*—Three years.[63]

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[55] Mont. Rev. Codes, 1935, sec. 7094. See *Thomas* v. *Ball* (66 Mont. 161, 213 Pac. 597 (1923)).

[56] Nebr. Comp. Laws, 1929, sec. 81–6309.

*State* v. *Oliver Bros.* (119 Nebr. 302, 228 N. W. 864 (1930)), was an appeal from the action of the department in dismissing a complaint filed for the purpose of having certain water rights canceled on the ground that water had not been used for more than 3 years immediately preceding. The decision was affirmed, as the evidence showed no intention to abandon the irrigation system, but, on the contrary, showed that much money had been spent on repairs over a series of years and that the parties had done all that could reasonably have been expected of them. "It must be conceded that the department of public works is an administrative body, having quasijudicial functions, and that as such it is invested with reasonable discretion in the exercise of its supervisory powers."

[57] Nev. Comp. Laws, 1929, sec. 7897.

[58] N. Mex. Ann. Stats., Comp. 1929, sec. 151–154; as to ground water, 1938 Supp. to Stats. Ann., sec. 151–208.

[59] N. Dak. Comp. Laws, 1913, sec. 8286.

[60] Okla. Stats., 1931, sec. 13083; Stats. Ann. (1936), tit. 82, sec. 32.

[61] Oreg. Code Ann., 1930, sec. 47–901 (Laws, 1913, ch. 279, p. 531).

[62] A section of the 1891 law relating to the appropriation of water for general rental, sale, or distribution for irrigation, domestic use, and watering livestock provided that a corporation constructing a ditch, canal, or flume under the act which fails to use the same for one year shall be deemed to have abandoned its appropriation (Oreg. Code Ann., 1930, sec. 47–1009). A section of the 1899 law relating to the appropriation of water for mining and electrical development provided that anyone constructing a ditch, canal, flume, or pipe line under the act who fails to use the same for 2 years shall be deemed to have abandoned his appropriation (Oreg. Code Ann., 1930, sec. 47–1103). Concerning this latter section, it was stated in *Pringle Falls Elec. Power & Water Co.* v. *Patterson* (65 Oreg. 474, 128 Pac. 820 (1912), 132 Pac. 527 (1913)): "Such right may be extinguished by any act showing an intent to surrender or abandon the right, after which, if the person having the right ceases its use for the statutory period for abandonment, his interest is lost." It was held in *In re Umatilla River* (88 Oreg. 376, 168 Pac. 922 (1917), 172 Pac. 97 (1918)), that the two acts treat of different subjects, each providing its own limit of nonuser as a ground of forfeiture, and are not contradictory; the acts in litigation had taken place long prior to 1913. Still another section of the act of 1898 relating to mining claims provides that ditches and mining flumes affixed to the soil are real estate, and that anyone owning such ditch, flume, and the appurtenant water right who fails to exercise ownership for 5 years, or who moves from the State with the purpose of changing residence and remains absent for 1 year without exercising ownership, shall be deemed to have lost all title, claim, and interest therein (Oreg. Code Ann., 1930, sec. 53–209). It has been held that this section does not apply to reservoirs (*Moore* v. *United Elkhorn Mines*, 64 Oreg. 342, 127 Pac. 964 (1912), 130 Pac. 640 (1913)). Also that the section was impliedly amended as to period of limitation by section 47–1103 of the present code (*Camp Carson Min. & Power Co.* v. *Stephenson* (84 Oreg. 690, 165 Pac. 351 (1917)). It may be further noted that both sections 47–1009 and 47–1103 provide that the question of abandonment shall be one of fact, to be tried and determined as other questions of fact. It has been held in connection with section 47–1009 that abandonment does not take place as a matter of law without a trial of the facts (*in re Willow Creek*, 74 Oreg. 592, 144 Pac. 505 (1914), 146 Pac. 475 (1915)).

[63] S. Dak. Code, 1939, sec. 61.0139.

*Texas.*—Three years. The statute applies to water "wilfully abandoned." [64]

*Utah.*—Five years. Forfeiture takes place, whether the unused or abandoned water is permitted to run to waste or is used by others without right. However, before the expiration of the 5-year period, a water-right holder may apply to the State engineer for an extension of not to exceed 5 years, which must be granted upon showing of reasonable or unavoidable cause for nonuse; financial crisis, industrial depression, legal proceedings, or the holding without use by municipalities, metropolitan water districts, and other public agencies to meet future requirements, being reasonable cause for nonuse. Any interested party may protest. Further extensions may be granted. These provisions do not apply to ground waters.[65]

*Wyoming.*—Five years. A water user who might be affected by a declaration of abandonment of existing rights may initiate proceedings before the board of control leading to such declaration. Any such declaration must be certified to the district court, to which the owner of the affected right is summoned.[66]

A Colorado statute [67] provides for the forfeiture of priorities in case of failure to submit claims in a general adjudication suit, but this does not apply to forfeiture for nonuse of water.

Various statues provide for the cancelation of unperfected rights under applications and permits to appropriate, in case of failure of the applicant or permit-holder to comply with the controlling conditions.

#### There Are Fundamental Distinctions Between Abandonment and Statutory Forfeiture

Several of the statutes which provide for forfeiture of the water right because of nonuse, use the term abandonment. This is unfortunate, for an attempt to apply the strict meaning of abandonment in interpreting such statutes inevitably leads to confusion, as the underlying principles are not identical. Kinney pointed out in 1912 that there is a decided distinction in legal significance between abandonment and forfeiture which, in view of the forfeiture clauses of statutes then recently enacted, should be observed.[68]

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[64] Vernon's Tex. Stats., 1936, Rev. Civ. Stats., art. 7544.

[65] Utah Rev. Stats., 1933, sec. 100–1–4, as amended by Laws, 1939, ch. 111.

[66] Wyo. Rev. Stats., 1931, secs. 122–401 to 122–427.

In *Wyoming Hereford Ranch* v. *Hammond Packing Co.* (33 Wyo. 14, 236 Pac. 764 (1925)) it was held that the trial court was justified in finding not only that there was a nonuser for more than the statutory period, but that it was accompanied by an intention to abandon the rights; and that it was unnecessary to say whether under the statute a forfeiture may be decreed upon evidence showing nonuser for the statutory period where the circumstances would not justify a finding of an intention to abandon the right. It was further held that the statutory proceedings were not exclusive, but that a question of abandonment not previously litigated may be determined in a court of competent jurisdiction if it becomes an issue. The forfeiture statute is to be strictly construed (*Van Tassel Real Estate & Livestock Co.* v. *Cheyenne,* 49 Wyo. 333, 54 Pac. (2d) 906 (1936)). In the very recent decision in *Horse Creek Conservation Dist.* v. *Lincoln Land Co.* (54 Wyo. 320, 92 Pac. (2d) 572 (1939)), it was held that if one's water supply would not be increased by reason of the forfeiture of another's water right, he is not entitled to maintain an action for a declaration of forfeiture. Further, that section 122–401 is not self-operative; before a forfeiture can be effective there should be formal declaration thereof by someone with proper authority to invoke it; until then the owner of the water right retains title and is justified in continuing the use. Further, "abandonment" under the statute must be effected by voluntary action and cannot be accomplished through enforced discontinuance. There must be a trial as to whether or not the water right has in fact been abandoned.

[67] Colo. Stats. Ann., 1935. ch. 90, sec. 198.

[68] Kinney, C. S., A Treatise on the Law of Irrigation and Water Rights, 2d ed., vol. II, sec. 1118, p. 2020.

In making the distinction, the Supreme Court of Arizona observed:[69]

There is a plain, fundamental distinction between an abandonment and a forfeiture. While to create an abandonment there must necessarily be an intention to abandon, yet such an intention is not an essential element of forfeiture in that there can be a forfeiture against and contrary to the intention of the party alleged to have forfeited.

And the Supreme Court of Utah recently stated:[70]

Abandonment is not based upon a time element and mere nonuser will not establish abandonment for any less time, at least, than the statutory period. The controlling element in abandonment is a matter of intent. * * * There can be no abandonment of a water right unless there is a concurrence of the acts of the party with his intent to desert, forsake, or abandon the right. A forfeiture for nonuser during the statutory time may occur despite a specific intent not to surrender the right. It is based, not upon an act done, or an intent had but upon a failure to use the right for the statutory time.

Forfeiture, therefore, can be involuntary; abandonment is necessarily voluntary and intentional.

Furthermore, forfeiture is predicated upon nonuse throughout a stated number of years, and does not operate if use of water is resumed before the expiration of the period; whereas abandonment takes place instantly. In determining questions of true abandonment, the period of nonuse is important only as evidence of the intent to abandon, for if the relinquishment and the intent be clearly proved, there is no need of showing subsequent nonuse over an extended period. It would follow that in a State in which the statutes provide a period for forfeiture, mere failure to use the water for any time less than the statutory period is not truly an abandonment unless the intent to abandon is present; and if nonuse extends throughout the statutory period, the intent is immaterial. However, certain of the statutes above noted appear to contemplate true abandonment as an element of the operation of the statute, in which case the question of intention to abandon the water right becomes material.

The relation of abandonment to a statutory period is indicated in the language of the Oregon statute,[71] to the effect that failure to use water throughout the period "shall be conclusively presumed to be an abandonment of such water right." The Oregon Supreme Court, in the case heretofore referred to[72] in which a milling company proposed to cease the use of water so that upper appropriators could use it for irrigation, held that such an arrangement for the benefit of certain appropriators for a consideration was not an abandonment, and that:

The right to the use of the water cannot be deemed forfeited by nonuser short of the period of time prescribed by the statute, and nonuser will not effect an abandonment in the absence of proof of intent to abandon: * * *

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[69] *Gila Water Co.* v. *Green* (29 Ariz. 304, 241 Pac. 307 (1925)).

[70] *Hammond* v. *Johnson* (94 Utah 20, 66 Pac. (2d) 894 (1937)). In this case the court brought out with great clarity the basic distinctions between abandonment and forfeiture, including the fact that abandonment is not based upon a time element. More recently, however, in *Tanner* v. *Provo Res. Co.* (99 Utah 139, 98 Pac. (2d) 695 (1940), this same court stated: "Abandonment of a water right requires concurrence of intention to abandon and actual failure in its use for the statutory period", citing *Broughton* v. *Stricklin* (146 Ore. 259, 28 Pac. (2d) 219 (1933), 30 Pac. (2d) 332 (1934)). As noted below, the Oregon statute makes failure to use water for the statutory period conclusive presumption of abandonment, whereas the Utah statute, as pointed out in *Hammond* v. *Johnson,* contemplates either abandonment or forfeiture.

[71] Oreg. Code Ann., 1935, sec. 47–901. See also the discussion of the Wyoming statute and court decisions construing it in footnote 66 above.

[72] *Hutchinson* v. *Stricklin* (146 Oreg. 285, 28 Pac. (2d) 225 (1933)).

As stated above in connection with abandonment (p. 390), the courts in several cases have refused to apply the forfeiture statutes to situations in which the failure to use water was not the fault of the appropriator. The cessation of use contemplated by the Wyoming statute was construed by the Federal court in *Morris* v. *Bean* [73] as a voluntary, not an enforced discontinuance, and as not working an "abandonment" (that is, a forfeiture) if caused by unlawful diversions upstream. It was held that the statute could not have been intended to apply to anything more than failure to use water from an available supply. In three recent cases the Wyoming Supreme Court has held to the same general effect. In one case [74] the rule stated in *Morris* v. *Bean* was approved as applicable to circumstances under which the holder of the water right was prevented by disastrous floods during several years from using his dams and ditches originally constructed. Later, in 1939, in an action to declare a forfeiture,[75] it was held that "abandonment" under the statute could not be accomplished through enforced discontinuance of use; and an even more recent decision [76] states that a water right cannot be held to be abandoned if nonuse is caused by facts not under the appropriator's control. The Supreme Court of New Mexico has recently held [77] that the forfeiture statute does not operate in a case in which water fails to reach the point of diversion without the fault of the appropriator and he is at all times ready and willing to put the water to the usual beneficial use. The Utah Supreme Court held in 1932 [78] that adjudicated rights were forfeited under the statute in a case in which the upper users for the statutory period took the water openly, notoriously, adversely, under claim of right, and with the knowledge and consent of the downstream appropriator, for it was reasonable to infer that the lower users knew that the upper ones were taking the water. More recently, as noted below in discussing forfeiture in relation to adverse use (p. 400), the Utah court held [79] that the statute is inapplicable to a case in which one is deprived of his use of water by reason of the wrongful use of another; but the Utah statute has since been amended to apply to just such situations. (See pp. 400–401.) In a very recent Nevada case [79a] the question arose as to whether the forfeiture statute applied to rights which were in existence when the statute was enacted in 1913; and it was held that while the legislature had the right to provide for forfeiture of rights thereafter acquired, the only way in which pre-existing rights could be lost was by intentional abandonment, for forfeiture would impair such rights contrary to another part of the act. In determining the fact of abandonment the courts would take into consideration nonuse of water and other circumstances affecting the case, "and will not cause to be forfeited or taken away valuable rights when the non-use of water was occasioned by justifiable causes. Especially is this true of rights which became vested prior to 1913." Reference was made to the

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[73] 146 Fed. 423 (C. C. D. Mont., 1906).

[74] *Ramsay* v. *Gottsche* (51 Wyo. 516, 69 Pac. (2d) 535 (1937)).

[75] *Horse Creek Conservation Dist.* v. *Lincoln Land Co.* (54 Wyo. 320, 92 Pac. (2d) 572 (1939)).

[76] *Scherck* v. *Nichols* (55 Wyo. 4, 95 Pac. (2d) 74 (1939)).

[77] *New Mexico Products Co.* v. *New Mexico Power Co.* (42 N. Mex. 311, 77 Pac. (2d) 634 (1937)).

[78] *Utah Power & Light Co.* v. *Richmond Irr. Co.* (79 Utah 602, 12 Pac. (2d) 357 (1932)).

[79] *Hammond* v. *Johnson* (94 Utah 20, 66 Pac. (2d) 894 (1937), 94 Utah 35, 75 Pac. (2d) 164 (1938)).

[79a] *In re Manse Spring and Its Tributaries* (60 Nev. 280, 108 Pac. (2d) 311 (1940)).

Wyoming statute and decisions,[66] refusing to take away rights because of nonuse where circumstances were such as to prevent the beneficial use of the water; and it was stated, by way of dictum, that it would seem that circumstances preventing a loss because of nonuse should be much stronger where the forfeiture section applies than in cases in which it does not apply.

The reasoning which supports the rule that abandonment shall not operate in a case in which the nonuse of water is forced upon the appropriator by circumstances over which he has no control, is sound, for abandonment is a voluntary, intentional act. Less logic is evident in applying this rule to statutory forfeitures, which contemplate failure to use water regardless of the intention of the appropriator; but it is nevertheless a just rule to apply if the failure to use the water is the result of physical causes such as damage from floods, and assuredly so if it results from droughts, the appropriator being ready and willing to divert the water when it is naturally available. However, the policy of extending the rule to cases in which the water is intercepted by others upstream, without right, is questionable; for in such cases the injured claimant has a right of action to enjoin the interruption to his use of the water, and if he fails to take the necessary steps to protect his interests it can scarcely be said that he is without fault in failing to invoke the adequate remedy which the law makes available.

### The Principles of Adverse User or Prescription Apply to the Loss of Water Rights

The water right of an appropriator may be lost, in general, by adverse use on the part of another for the prescriptive period defined in the statute of limitation of actions to recover real property. The principles applicable to the establishment of prescriptive rights to other forms of property have been adapted by the courts in many cases to the conditions peculiar to the exercise of water rights, and the statutory requirements so far as they are applicable necessarily govern the determination of such questions.

Generally, to ripen into a prescriptive title, there must be an open, notorious, adverse use of the water throughout the statutory period, under a claim of right. The use must be exclusive in character, amounting to such an invasion of the other's right as would furnish a cause of action in favor of the latter.[80] The Supreme Court of Montana stated in a very recent case:[81]

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[80] *Anaheim Water Co.* v. *Semi-Tropic Water Co.* (64 Calif. 185, 30 Pac. 623 (1883)); *San Diego* v. *Cuyamaca Water Co.* (209 Calif. 105, 287 Pac. 475 (1930)); *Irion* v. *Hyde* (107 Mont. 84, 81 Pac. (2d) 353 (1938)); *Cantrall* v. *Sterling Min. Co.* (61 Oreg. 516, 122 Pac. 42 (1912)).

[81] *Irion* v. *Hyde* (107 Mont. 84, 81 Pac. (2d) 353 (1938)). In *Cook* v. *Hudson* (110 Mont. 263, 103 Pac. (2d) 137 (1940)) this court stated: "Use may be open and notorious and still not be adverse."

See also *Smith* v. *North Canyon Water Co.* (16 Utah 194, 52 Pac. 283 (1898)).

Among recent cases see *Crum* v. *Mt. Shasta Power Corpn.* (117 Calif. App. 586, 4 Pac. (2d) 564 (1931), hearing denied by the supreme court); *Bowen* v. *Shearer* (100 Colo. 134, 66 Pac. (2d) 534 (1937)); *Fairview* v. *Franklin Maple Creek Pioneer Irr. Co.* (59 Idaho 7, 79 Pac. (2d) 531 (1938)); *Masterson* v. *Kennard* (140 Oreg. 288, 12 Pac. (2d) 560 (1932)). Continuous use neither requires nor contemplates constant use of the full amount claimed: *McGlochlin* v. *Coffin* (61 Idaho 440, 103 Pac. (2d) 703 (1940)). In this case the supreme court upheld prescriptive rights to the full flow of certain drains on the part of users of the flow, where the decrease in flow in certain years was due to drought and there was no voluntary abandonment on the part of the users. The court approved but distinguished *Boynton* v. *Longley* (19 Nev. 69, 6 Pac. 437 (1885)), in which it had been held that one who enlarged his use of water within the prescriptive period could not, at the end of the period, claim the use as so enlarged.

> It is equally well settled that in order to acquire a water right by adverse user or prescription, it is essential that the proof must show that the use has been (a) continuous for the statutory period which in this state is ten years (sec. 9024, Rev. Codes); (b) exclusive (uninterrupted, peaceable); (c) open (notorious); (d) under claim of right (color of title); (e) hostile and an invasion of another's rights which he has a chance to prevent. * * * The trial court * * * observed also, and we agree, that if the use were a permissive one, no matter how long continued, it could never ripen into an adverse or prescriptive right.

As the right of the lawful appropriator must be clearly invaded, it follows that there is no adverse use when the supply of water is sufficient for all claimants, and that a prescriptive right against other appropriators is not established by merely showing continuous use of the water for the statutory period.

> It is only when the water becomes so scarce that all parties cannot be supplied and when one appropriator takes water which by priority belongs to another, that there is an adverse use.[82]

The right of a licensee cannot ripen into an adverse title, so long as the license is in effect.[83] However, even though the use may be made by permission in the first instance, if it is thereafter exercised under a claim of right for the prescriptive period, the original character of the use does not prevent the acquisition of a prescriptive right.[84] The essential thing in this connection is that continuously for the period of the statute of limitations, the use shall have been without permission and hence that it shall have been hostile and an actual invasion of the appropriator's right. The California Supreme Court has stated [85] that for an appropriator to acquire a prescriptive right to divert and use water from a stream on land that he does not own, the quantity claimed must not only have been actually used, but must have been reasonably necessary and actually applied to a beneficial purpose; otherwise no prescriptive right can be acquired, regardless of the period of user.

As the adverse use must be continuous throughout the statutory period, an interruption of the adverse use by the rightful owner stops the running of the statute of limitations.[86] However, such an inter-

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[82] *Masterson* v. *Kennard* (140 Oreg. 288, 12 Pac. (2d) 560 (1932)). See also *Egan* v. *Estrada* (6 Ariz. 248, 56 Pac. 721 (1899)); *Ison* v. *Sturgill* (57 Oreg. 109, 109 Pac. 579, 110 Pac. 535 (1910)); *Redwater Land & Canal Co.* v. *Jones* (27 S. Dak. 194, 130 N. W. 85 (1911)); *Henderson* v. *Goforth* (34 S. Dak. 441, 148 N. W. 1045 (1914)).

[83] *Bowen* v. *Shearer* (100 Colo. 134, 66 Pac. (2d) 534 (1937)).

Prescription is not based upon permissive use: *Hunceker* v. *Lutz* (65 Calif. App. 649, 224 Pac. 1001 (1924)); *Smith* v. *Hallwood Irr. Co.* (67 Calif. App. 777, 228 Pac. 373 (1924; hearing denied by supreme court)).

Before the statute of limitations begins to run, after a revocable license, it is necessary that the party claiming the easement shall repudiate the license and make the fact known to the landowner: *Bachman* v. *Reynolds Irr. Dist.* (56 Idaho 507, 55 Pac. (2d) 1314 (1936)); *Morgan* v. *Udy* (58 Idaho 670, 79 Pac. (2d) 295 (1938)).

[84] *Irion* v. *Hyde* (107 Mont. 84, 81 Pac. (2d) 353 (1938)).

[85] *Joerger* v. *Pacific Gas & Elec. Co.* (207 Calif. 8, 276 Pac. 1017 (1929)).

See also *Mt. Shasta Power Corpn.* v. *McArthur* (109 Calif. App. 171, 292 Pac. 549 (1930; hearing denied by supreme court)); *Bazet* v. *Nugget Bar Placers* (211 Calif. 607, 296 Pac. 616 (1931)).

[86] 2 C. J. S. 701, sec. 141.

The California Supreme Court emphasized, in *Alta Land & Water Co.* v. *Hancock* (85 Calif. 219, 24 Pac. 645 (1890)), that the use must be uninterrupted, and drew a distinction between "continuous" and "uninterrupted" use so far as vesting of a prescriptive right is concerned. In this case, although the use was "continuous," it was not "uninterrupted," because just before the expiration of the statutory period an action in ejectment was brought which stopped the running of the statute, even though the continuity of use was not broken until final judgment and writ of possession several years later.

It was also held in this case that the simple act of appropriating water under the California statute would not of itself defeat or extinguish any prior right. "Actual and uninterrupted user, however, with or without the statutory appropriation, if adverse, for a useful purpose, and under claim of right, continued for the period prescribed by the statute of limitations, gives a prescriptive right which will extinguish the rights of the

ruption by the rightful owner must be actual, such as by physical acts manifesting an intention to resume use, or by filing suit, and not merely by making verbal protests.[87] The circumstances surrounding the interruption must be of the same definite character as those which started the statute running. Protests and accusations of water stealing were stated by the Utah court in the case cited in the last footnote to have merely emphasized the adverse nature of the user's holding.

Prescriptive rights, generally speaking, do not "run upstream." That is, in the usual case adverse use is made by virtue of a diversion which interferes with the use of water by a *downstream* appropriator or riparian owner by actually depriving him of an opportunity to divert the water to the use of which he claims a right. Use of water by one whose point of diversion is located below the headgate of another, however, will seldom be adverse to the upstream claimant, for the reason that the latter is not thereby prevented from diverting water—hence there is no invasion of his right. The rule has been announced in various decisions, therefore, that a riparian owner or an appropriator cannot acquire a prescriptive right to receive water as against upstream riparian owners; and exceptions are noted in cases in which a downstream claimant has actually invaded some right of the upstream claimant, such as by locating his diversion works upon the land of the latter.[88]

The claimant who asserts a prescriptive title has the burden of proving all the elements of prescription.[89]

The California Water Commission Act contains a provision to the effect that nonapplication of water to riparian lands for a continuous period of 10 consecutive years shall be deemed to be conclusive presumption that the waters are not needed, and if not otherwise appropriated, such waters become public waters.[90] This declaration was held unconstitutional by the supreme court [91] as being contrary to the letter and spirit of the constitutional amendment of 1928,[92] which expressly protects the riparian not only as to present needs but also as to future reasonable beneficial uses. A section of the Texas water code provides that one who shall have perfected a statutory appro-

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riparian proprietor." Statutory appropriation was held to be not necessary to prescription, but it gives to one who seeks to acquire a right by prescription this advantage—that it gives notice to prior claimants that his user is adverse and under claim of right, and sets the statute in motion against such prior claimant.

[87] *Hammond* v. *Johnson* (94 Utah 20, 66 Pac. (2d) 894 (1937)). See also *Cox* v. *Clough* (70 Calif. 345, 11 Pac. 732 (1886)).

The interruption of possession must rise in dignity and character to that required to initiate an adverse possession: *Armstrong* v. *Payne* (188 Calif. 585, 206 Pac. 638 (1922)); *Big Rock Mutual Water Co.* v. *Valyermo Ranch Co.* (78 Calif. App. 266, 248 Pac. 264 (1926; hearing denied by supreme court)).

Prescriptive rights formerly acquired can be lost only by abandonment, forfeiture, or operation of law: *Lema* v. *Ferrari* (27 Calif. App. (2d) 65, 80 Pac. (2d) 157 (1938)).

[88] See discussion of the general situation by Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 863, p. 916. This matter has also been referred to above, in chapter 2, p. 41, in connection with the loss of riparian rights. See also the discussion of prescriptive rights to waters of springs in Idaho and Washington, chapter 5, pp. 283 and 296.

[89] 67 C. J. 1061, sec. 526. Adverse party has burden of rebutting or overcoming a prima facie showing. See also *Haight* v. *Costanich* (184 Calif. 426, 194 Pac. 26 (1920)); *Pyramid Land & Stock Co.* v. *Scott* (51 Calif. App. 634, 197 Pac. 398 (1921; hearing denied by supreme court)); *Morgan* v. *Walker* (217 Calif. 607, 20 Pac. (2d) 660 (1933)); *Fairview* v. *Franklin Maple Creek Pioneer Irr. Co.* (59 Idaho 7, 79 Pac. (2d) 531 (1938)); *Irion* v. *Hyde* (107 Mont. 84, 81 Pac. (2d) 353 (1938)); *Spring Creek Irr. Co.* v. *Zollinger* (58 Utah 90, 197 Pac. 737 (1921)).

[90] Deering's Gen. Laws of Calif., 1937, vol. II, act 9091, sec. 11.

[91] *Tulare Irr. Dist.* v. *Lindsay-Strathmore Irr. Dist.* (3 Calif. (2d) 489, 45 Pac. (2d) 972 (1935)).

[92] Calif. Const., art XIV, sec. 3.

priation and made use of the water for 3 years shall be deemed to have title by limitation as against all other claimants and owners of land riparian to that source of supply.[93] The court of civil appeals [94] held that this provision does not give a right as against the riparian rights of landowners; that riparian waters are not unappropriated waters but are the property of the riparian owners, to which an appropriator cannot acquire title by 3 years' use under the appropriation statute. The evidence in this case did not raise an issue of right or title under the statute of limitations of 10 years.

### Can an Appropriative Water Right Be Acquired Solely by Adverse Use by Another Who Fails To Make a Statutory Appropriation?

The question as to whether title to a water right may be acquired solely by adverse use, or after abandonment by a prior appropriator without making a new statutory appropriation, has been the subject of recent controversy in Utah. The fact that the question is debatable was stated in one opinion.[95] A decision in 1937 held that adverse possession is not founded or dependent upon the doctrines of abandonment or forfeiture of water rights, and that as long as the use granted by the State is exercised by someone, the interest of the State is served.[96] The State engineer of Utah was not a party to the action, but filed a brief in support of a petition for rehearing, contending that under the present statute a right is forfeited after 5 years of continuous nonuse, whereupon the water reverts to the State and can be reappropriated only upon application to the State. On this point, the court, in denying a rehearing, stated that the action was one to quiet title and affected no one but the parties and those claiming through or under them; that the adverse claimant acquired all the rights which the other party could assert at the conclusion of his statutory term of adverse user; and that the opinion did not affect any rights which the State or any other third party had or could assert to the water in question.[97]

The question of prescription again appeared in a subsequent case,[98] and again the State engineer filed a supporting brief on petition for rehearing, which was denied.[99] The court, in interpreting its former opinion, held that as the party against whom the use might have been adverse had no rights to the waters so used, the question of adverse use was not determinative of the cause. Denials of the petitions for rehearing in both of these cases were by three-to-two decisions, and those justices who dissented, felt that the whole question of adverse user in relation to water rights should have been reopened and not left in its existing state of some uncertainty. Subsequently, at the 1939 session, the legislature adopted amendments designed to prevent the acquisition of a right to water already appropriated by another, solely by adverse use. The following sentence was included in the section which provides that upon abandonment or cessation of the use of water for a period of 5 years

[93] Vernon's Tex. Stats., 1936, Rev. Civ. Stats., art. 7592.
[94] *Freeland* v. *Peltier* (44 S. W. (2d) 404 (Tex. Civ. App., 1931)).
[95] *Clark* v. *North Cottonwood Irr. & Water Co.* (79 Utah 425, 11 Pac. (2d) 300 (1932)).
[96] *Hammond* v. *Johnson* (94 Utah 20, 66 Pac. (2d) 894 (1937)).
[97] *Hammond* v. *Johnson* (94 Utah 35, 75 Pac. (2d) 164 (1938)).
[98] *Adams* v. *Portage Irr., Res. & Power Co.* (95 Utah 1, 72 Pac. (2d) 648 (1937)).
[99] *Adams* v. *Portage Irr., Res. & Power Co.* (95 Utah 20, 81 Pac. (2d) 368 (1938)).

the right shall cease and the water revert to the public and again be subject to appropriation only under the water code, unless an extension of time has been granted:

The provisions of this section are applicable whether such unused or abandoned water is permitted to run to waste or is used by others without right.[1]

Likewise, in the section which provides that rights to the use of unappropriated public waters may be acquired only as provided in the water code, the following sentence was inserted:

No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession.[2]

In a very recent case in New Mexico [3] the supreme court, in discussing testimony, stated that the testimony did not prove an abandonment of the water right,

* * * nor a prescriptive right (if such a right can be acquired under our law) * * *

And even more recently the Wyoming Supreme Court, after holding that under the facts a prescriptive right had not been shown to have been established, indicated a similar doubt, thus: [4]

We do not mean to intimate, or seem to concur in the view, that a prescriptive title to water may be acquired in this state, particularly since 1890, when the legislature enacted a law requiring the initiation of all water rights to be pursuant to a permit from the State Engineer. We do not need to enter into that question in this case. See the case of Wyoming Hereford Ranch v. Hammond Packing Co., 33 Wyo. 14, 236 Pac. 764.

The answer in any given State in which the legislature has not prohibited the acquisition of a water right by prescription would appear to depend upon several factors: (1) Whether the procedure to appropriate water through the State engineer is the exclusive method of acquiring a water right; (2) whether forfeiture results from illegal use of water on the part of others, that is, adverse use; (3) whether the statutory period of forfeiture is less than the prescriptive period in the statute of limitations; (4) whether the water right can be detached from the land to which it is appurtenant and whether the statutory procedure is the only way of changing the place of use.

The one who substantiates a claim of adverse use takes over the rights which the other party can assert at the end of the prescriptive period, as the Utah court states; but only those rights. If, then, the prescriptive period is 7 years and the statutory period of forfeiture for nonuse is 5 years, as is now the case in Utah, the water reverts to the public at the end of 5 years and the former appropriator thereafter has nothing for the adverse user to take—unless the court should hold, as several courts have held (see p. 396), that loss of the right does not result from unlawful diversion by another. The Utah Legislature, as above stated, has now provided that water once appropriated and used by others without right does revert to the public at the end of 5 years' nonuse by the lawful appropriator. Should it be held by the courts, in jurisdictions which do not have such legislative provision but in which the prescriptive period exceeds the period for

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[1] Utah Laws, 1939, ch. 111, amending Rev. Stats., 1933, sec. 100–1–4.
[2] Utah Laws, 1939, ch. 111, amending Rev. Stats., 1933, sec. 100–3–1.
[3] *Pioneer Irr. Ditch Co.* v. *Blashek* (41 N. Mex. 99, 64 Pac. (2d) 388 (1937)).
[4] *Campbell* v. *Wyoming Dev. Co.* (55 Wyo. 347, 100 Pac. (2d) 124 (1940)).

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statutory forfeiture, that forfeiture of the water right follows nonuse, regardless of the reasons therefor, then the right of the adverse user could not be based upon adverse use, for the water has become public water before the expiration of the prescriptive period; and his right to appropriate water would not begin until the forfeiture by the other appropriator had occurred. If the statutory procedure is exclusive, a filing would then have to be made with the State engineer to initiate the new appropriative right. Suppose, then, that there are other appropriators on the stream. If further appropriations of that quantity are subject to existing priorities, as the Oregon statute specifically states,[5] and as several decisions have stated is the case with abandoned water, the adverse user's new appropriation is junior to theirs. This is a question on which there are apparently few, if any, clear-cut decisions; but it would appear that the new appropriation would be junior to existing rights, and if the holders of such rights did not take preventive action, there would then be the beginning of a new adverse user as against them.

Again, if the water right cannot be detached from the land to which it is appurtenant without losing its priority, as the statute declares in case of direct-flow rights in Wyoming, and if the statutory procedure is the exclusive method of acquiring a right to unappropriated water, it would appear that a valid right to water attached to a given tract cannot be acquired by another for use on some other tract, unless the water right is abandoned or forfeited or the priority lost by the detachment, and the water then reappropriated through the State. Likewise, in Arizona, although water rights may be transferred to other tracts, neither the holder of a water right nor apparently anyone else can make such transfer except by following the statutory procedure and by showing that through no fault of the owner it is no longer practicable to use the water on the original tract.

### Water Rights May Be Lost by Estoppel

Rights may likewise be lost by appropriators who by their inequitable conduct, by acts and declarations, have led others to make use of their water rights on the assumption that such use would be entirely legal. Appropriators whose conduct has been such are subsequently estopped from asserting their own rights.

An estoppel involves turpitude, fraud—such as misleading statements or acts, or concealment of facts by silence—with the result that one party is induced or led by the words, conduct, or silence of another party to do things that he otherwise would not have done.[6] The intent to deceive must have existed, or at least there must have been an imputation that the party against whom an estoppel is claimed expected the other party to act. Unless there is some degree of turpitude, a court of equity will not estop one from asserting his title where the effect is to forfeit his property and transfer its enjoyment to another.[7]

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[5] Oreg. Code Ann., 1930, sec. 47–901.

[6] *Verdugo Canyon Water Co.* v. *Verdugo* (152 Calif. 655, 93 Pac. 1021 (1908)); *Sherlock* v. *Greaves* (106 Mont. 206, 76 Pac. (2d) 87 (1938)).

[7] *Lower Latham Ditch Co.* v. *Louden Irr. Canal Co.* (27 Colo. 267, 60 Pac. 629, 83 Am. St. Rep. 80 (1900)).

It follows that silent acquiescence does not of itself constitute an estoppel, where there is no concealment of essential facts. In the language of the California Supreme Court:[8]

A mere passive acquiescence where one is under no duty to speak does not raise an estoppel.

Hence the mere fact that persons had installed wells and pumps on their own land, with the knowledge of their neighbors and without objection by them, did not create an estoppel. There was no fraud in such silence; it was not a case of inequity of asserting a right after having by silence misled others through concealment of facts unknown to them. But if conscience requires one to speak, silence may establish an equitable estoppel.[9]

Where both parties were making improvements and relying upon the same water to maintain them, and each knew what the other was doing, neither could establish an estoppel, for the elements upon which an estoppel can be founded were not present. If one party was estopped under such circumstances, the other was equally so.[10] The Federal court, in rendering this decision, stated:

It is safe to say that few cases of this character have been tried where the defense of estoppel has not been interposed with result uniformly unsuccessful.

Wiel has pointed out [11] that the question of estoppel is often confused with consideration of laches and acquiescence as barring an injunction; but that they are entirely different matters, as estoppel bars a right, and there must be some degree of turpitude to raise it, whereas laches simply bars an injunction because of lack of diligence in seeking the remedy while leaving an action at law for damages.

## Questions of Appropriation Arising Between States

### (A) Conveyance of Appropriated Water Across State Lines

THE RIGHT TO APPROPRIATE WATER WITHIN ONE STATE FOR USE IN ANOTHER STATE HAS BEEN HELD BY SEVERAL STATE COURTS TO BE AT THE SUFFERANCE OF THE STATE IN WHICH THE APPROPRIATION IS INITIATED

Each State has the right to make its own water law, as shown above in chapter 2, and may therefore authorize and regulate the making of appropriations. As an incident to that right, various States have statutes which grant, restrict, or forbid the initiation of an appropriation of water within their borders for use in another jurisdiction.

Owing to the fact that some streams cross State boundary lines, and that portions of some irrigable valleys lie in more than one State, the question of the legality of making an appropriation and diversion of water within one State for the irrigation of lands outside that jurisdiction, arose at a fairly early date.

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[8] *Verdugo Canyon Water Co.* v. *Verdugo* (152 Calif. 655, 93 Pac. 1021 (1908)).

[9] It was held in the very recent decision in *Tanner* v. *Provo Res. Co.* (99 Utah 139, 98 Pac. (2d) 695 (1940)), that one employed to assist and advise a company in the preparation of a suit to adjudicate all the rights on a stream, but without adequately making known his own adverse claim, was thereafter estopped to assert it against the company. The court stated that the overwhelming preponderance of evidence showed that the company was misled to its detriment by his active and passive conduct.

[10] *Morris* v. *Bean* (146 Fed. 423 (C. C. D. Mont., 1906)).

[11] Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 593, p. 642, and sec. 644, p. 711.

The Wyoming Supreme Court concluded that the right to appropriate water and have it flow down to the headgate of the ditch does not stop at the State line; that if not prohibited by statute, an owner of lands within one State may make a valid appropriation of water in a neighboring State and may convey the water across the boundary line for the irrigation of such lands.[12] This was a case in which a stream arose in Montana and flowed into Wyoming, the diversion being made in Wyoming for the irrigation of lands in both States; and the appropriation was made prior to the admission of Wyoming to statehood and even prior to the 1886 irrigation statute. The court expressly refrained from expressing an opinion as to whether such an appropriation could be made under the State constitution and statutes, or as to whether such a right could be acquired from a stream located wholly within Wyoming.

The Colorado Supreme Court had held previously that the early territorial acts had expressly confined irrigation legislation to lands within the Territory of Colorado, and that the State statutory proceedings for the adjudication of water rights could have no application to cases in which the point of diversion was in Colorado and the lands to be irrigated were in New Mexico; hence water could not be decreed for the use of such lands.[13] The effect of the decision was, therefore, not that it was unlawful to appropriate water in Colorado and transport it into New Mexico for use there, but that such an appropriator could not have his right adjudicated under the Colorado procedure and the priority thus established as against other Colorado appropriators. The courts had no jurisdiction to award such priorities.

The Idaho Supreme Court in 1912[14] held that title to the public waters of the State was vested in the State for the use of the citizens thereof; that the State had not authorized the appropriation of such water for use outside its boundaries, nor expressly forbidden it; but that a failure to speak on the subject, or to confer the right, in specific terms, to use a natural resource of Idaho beyond its jurisdictional borders, should be construed in favor of the State and against those claiming the right. Hence there was no authority for the making of such appropriation. The court made it clear that this stream was located wholly within Idaho, hence in this case there was no question of the appropriation of water from an interstate stream.

Statutes subsequently enacted in these three States are noted under the next heading.

#### SEVERAL STATES BY STATUTE HAVE PLACED RESTRICTIONS UPON THE RIGHT TO MAKE SUCH APPROPRIATIONS, AND SOME HAVE ENACTED RECIPROCAL LEGISLATION ON THE MATTER

Colorado since 1917 has definitely forbidden the diversion or transportation, by artificial or natural means, of the waters of any spring, reservoir, lake, pond, creek, river, stream, or watercourse into any other State for use therein; and has made it the duty of the State water officials and of the attorney general to enforce this prohibition.[15]

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[12] *Willey* v. *Decker* (11 Wyo. 496. 73 Pac. 210 (1903)).
[13] *Lamson* v. *Vailes* (27 Colo. 201. 61 Pac. 231 (1900)).
[14] *Walbridge* v. *Robinson* (22 Idaho 236. 125 Pac. 812 (1912)).
[15] Colo. Stats. Ann., 1935, ch. 90, sec. 1.

A Montana statute, adopted in 1921, requires the approval of the legislature for the appropriation of water in that State for use outside its own boundaries;[16] but in 1937 the Montana Legislature authorized such appropriations by the State of Wyoming, valid only when the State water conservation board should issue certificates of appropriation therefor, and effective only in the event Wyoming should enact legislation granting similar rights to Montana for diversions within Wyoming.[17] It was also provided that the board might cooperate with Wyoming officials in the control of water rights on interstate streams.

Wyoming for some years has authorized diversions for use in Utah, and cooperative agreements covering interstate streams, contingent upon reciprocal legislation by Utah.[18] This act was amended in 1939 to include the authorization of appropriations from the Little Missouri River in Wyoming for use in Montana, contingent upon certification of beneficial use by the State of Montana.[19] This act was to take effect April 1, 1939, and was approved February 20. However, an act approved 5 days later provided that no water of Wyoming should ever be appropriated for use outside the State without the specific authorization of the legislature; forbade the granting of permits therefor; made it the duty of the attorney general, State engineer, board of control, State planning and water conservation board, and other water officials to enforce the act; and prescribed penalties for violations.[20] This act was made effective from and after its passage. Still another act, approved the same day, set up procedure under which Wyoming water users could change their points of diversion from within adjoining States to points in Wyoming.[21]

California,[22] Idaho,[23] and Nevada,[24] have statutes making the granting of applications to appropriate water within such States for use in other States subject to the existence of reciprocal laws in those other States. California excepts interstate lakes and streams connected with them. Idaho excepts certain streams and lakes; and in addition to the general provision governing reciprocity, has special sections relating to diversions within Idaho for use in Oregon and in Wyoming.

Oregon provides that the State engineer, in his discretion, may decline to issue a permit where the point of diversion is in Oregon and the place of beneficial use is in another State unless under the laws of such other State water may be diverted therein for use in Oregon; and also contains a proviso that no lake may be used to store water for irrigation or power in another State without the consent of the county court and the State reclamation commission.[25] Washington has a similar provision granting discretion to the State supervisor of hydraulics where the place of use is in another State or nation, unless under the laws of such State or nation water may be diverted therein for use in Washington.[26] Arizona likewise has a statute allowing the

[16] Mont. Rev. Codes, 1935, sec. 7135.
[17] Mont. Laws, 1937, ch. 64.
[18] Wyo. Rev. Stats., 1931, sec. 122–432.
[19] Wyo. Laws, 1939, ch. 96.
[20] Wyo. Laws, 1939, ch. 125.
[21] Wyo. Laws, 1939, ch. 123.
[22] Deering's Gen. Laws of Calif., 1937, act 9091, sec. 15a.
[23] Idaho Code Ann., 1932, secs. 41–401 to 41–409.
[24] Nev. Comp. Laws, 1929, sec. 7986.
[25] Oreg. Code Ann., 1930, sec. 47–510.
[26] Wash. Rem. Rev. Stats., 1931, sec. 11578.

State water commissioner discretion in declining to issue a permit where the point of diversion is in Arizona and the place of use is in another State, but does not make the discretion contingent upon the existence of reciprocal laws.[27]

Utah authorizes appropriations from interstate streams within Utah for use in other States, and does not limit this to States which grant reciprocity.[28] The State engineer may cooperate with officers of adjoining States, and with the consent of the Governor, may enter into agreements with them.

The inability of a State to enforce its statutes beyond its borders, and the solution offered by reciprocal legislation, were discussed in the Idaho case [29] above referred to. The court stated:

> It was suggested on the oral argument that some of the irrigation states have reciprocity statutes on this subject, and in such a case we can conceive how laws of one state might be executed in another. In other words, if the right to appropriate and divert waters of this state to be used in another state were recognized and conferred upon the condition that the authority of this state may be exercised in the regulation and control of the right in the state in which the use is to be had and that the state of Montana had accepted the conditions of the statute by reciprocal legislation, then this state could execute and enforce the above-mentioned provisions of the statute.

It was after this decision that Idaho passed the statute authorizing appropriations of this character subject to reciprocal legislation in the State in which the water was to be used. These reciprocity statutes do not attempt to give the State officials jurisdiction to enforce priorities in the other States; administration, in the last analysis, is dependent upon cooperation between the officials of the States concerned.

### THE UNITED STATES SUPREME COURT HAS UPHELD AN APPROPRIATIVE RIGHT OF THIS CHARACTER THAT HAD VESTED BY REASON OF LONG-CONTINUED BENEFICIAL USE

A controversy over the appropriation of water in Colorado for use in Nebraska reached the Supreme Court of the United States.[30] A Nebraska irrigation company had made an appropriation in 1890, diverting water in Colorado from an interstate stream for the irrigation of lands in both Colorado and Nebraska, and brought suit to enjoin the Colorado water officials from distributing the water without full recognition of such priority. The company claimed the constitutional right to transport water from an interstate stream from one State to another, and the Colorado officials claimed that the water had been dedicated to the use of the people of that State and could not be appropriated for use outside the State. The lower Federal courts denied this contention of the Colorado officials; and the Supreme Court held:

> It is thus plain that the decree appealed from necessarily rested, not upon Colorado laws or decisions which attempted to deny the asserted right to the use of the water in Nebraska, nor upon Nebraska laws or decisions which could not be effective in Colorado, but upon rights secured to the appellee by the Constitution of the United States. This substantial and very fundamental question being in the case, and essential to the disposition which was made of it, the motion to dismiss must be overruled.

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[27] Ariz. Rev. Code, 1928, sec. 3291.
[28] Utah Rev. Stats., 1933, sec. 100–2–8.
[29] *Walbridge* v. *Robinson* (22 Idaho 236, 125 Pac. 812 (1912)).
[30] *Weiland* v. *Pioneer Irr. Co.* (259 U. S. 498 (1922)).

On the merits of the case, the lower courts had held that the presence of the State line did not affect the superiority of right, and had enjoined the Colorado officials from treating the company otherwise than would be the case if the lands were located wholly within Colorado. Having that day delivered the opinion in the important interstate case of *Wyoming* v. *Colorado*,[31] wherein the doctrine of priority of appropriation was applied to private diversions regardless of State lines, the Supreme Court affirmed the decree on the authority of *Wyoming* v. *Colorado*.

It may be noted that the Supreme Court did not state that Colorado lacked the power to prevent the acquirement of an appropriative right in that State for use of water in another State. The decision concerned the exercise of an established right. The Federal district court's finding, that by reason of long-continued beneficial use the Nebraska company had a vested property right to continue the use, was affirmed by the circuit court of appeals, and the decree of that court was affirmed by the Supreme Court. The effect of this case, then, was to protect the exercise of a validly established appropriative right, notwithstanding the fact that the irrigation project overlapped a State boundary line.

### (B) Use of Water of Interstate Streams

IN A CONTROVERSY OVER THE USE OF WATER OF AN INTERSTATE STREAM, EACH STATE IS ENTITLED TO AN EQUITABLE APPORTIONMENT OF BENEFITS FROM THE USE OF THE STREAM

This principle has governed the decisions of the United States Supreme Court, as noted in greater detail below (p. 408). Wiel,[32] writing in 1911, discussed the Federal and State decisions which had been rendered to that time and advanced tentative conclusions concerning the equitable division of benefits between States which, in the light of Supreme Court decisions subsequently rendered, seem now to be well established. He also discussed the difficult procedural questions which arise as the results of diversions from a stream on both sides of a State line and stated: [33]

> Perhaps it may be a fair deduction that any court will grant relief *in personam*, by injunction or personal command, against all parties personally served with process within its jurisdiction, and may, as incidental to the determination of the propriety of granting personal relief, inquire into matters of title to water-rights whose situs is in another jurisdiction; but that no court will grant relief *in rem*, nor relief actually determining title to water-rights whose situs is outside the jurisdiction, such as a decree quieting title.

A Federal court stated [34] in 1917 that the question of rights, as between States, to share in the water of an interstate stream, is a matter for adjustment between the States, and individual users cannot raise a question about the use of such water in another State out of the territorial jurisdiction of the court. Further, a suit to determine conflicting priorities is essentially one to quiet title to real property, and is local and not transitory; but where the necessary parties are before a court of equity, the court may, acting in personam, coerce action

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[31] 259 U. S. 419 (1922).
[32] Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 345, p. 372.
[33] Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 344, p. 368.
[34] *Vineyard Land & Stock Co.* v. *Twin Falls Salmon River Land & Water Co.* (245 Fed. 9 (C. C. A., 9th, 1917)).

respecting the rem, even though the rem is not affected by the direct operation of the decree because it is beyond the territorial jurisdiction of the court. Federal court jurisdiction has been involved in a number of such cases, to two of which, of very recent date, attention is directed.[35] The *Albion-Idaho* decision upheld a decree of the Federal District Court for Utah, which had divided the waters of an interstate stream between the users in Utah (the upstream State) and those in Idaho; the division within each group being left to preexisting decrees to which the users were respectively parties. The *Brooks* decision upheld an order of contempt, issued by the Federal District Court for Arizona against certain New Mexico users (upstream), for violation of a consent decree in that court concerning an interstate stream, to which such users had been parties; the court, in settling effectively water rights in the Arizona section of the stream, necessarily having had to consider the rights of claimants in New Mexico to interfere with the flow.

The Supreme Court of Nebraska recently had for decision [36] a contention that an irrigation district within Nebraska, because its appropriation was made in Wyoming not far from the State line, across which the waters were conveyed to the district lands in Nebraska, and because its appropriation was made under the laws of Wyoming and its diversion works were located therein, was not subject to the jurisdiction of the State of Nebraska. It was held that this contention was unsound, the district being a corporation recognized under the laws of Nebraska and operating therein. Further:

> The fact that it takes water from the North Platte river just outside of the state of Nebraska and conducts it into the state does not justify the assumption that it is not subject to the control of the state as soon as the water is brought within its borders. It is the duty of the state, under the Constitution and laws, to see that the waters of the streams used for irrigation purposes are not wasted; that the prior appropriators shall be protected as against subsequent appropriators, and in this instance it appears that there are a number of prior appropriators whose rights are superior to those of the defendant in the use of the waters of the North Platte river. These appropriators are all in Nebraska. Clearly, the state of Wyoming would have no authority to administer the waters, after they come into this state, and control their use. If the contention of defendant is sound, it would leave the defendant in absolute control of the waters which it takes from the river, without regard to the rights of prior appropriators, and no state and no court would have any authority to interfere to compel it to use the waters for a beneficial purpose. * * * We think, likewise, that defendant, as soon as it brings the water across the line into this state, is subject to regulation by the state, and it should be compelled to comply with any reasonable regulation imposed by authority of the state.

### THE UNITED STATES SUPREME COURT, IN CONTROVERSIES BETWEEN STATES OVER RIGHTS TO THE USE OF WATER OF INTERSTATE STREAMS, HAS CONSISTENTLY APPLIED THE PRINCIPLE OF AN EQUITABLE APPORTIONMENT OF BENEFITS

Several important suits between States over rights to divert and use the water of interstate streams, both eastern and western, have been before the Supreme Court. The principle there established is that the States stand upon an equality of right, hence are entitled to an equitable apportionment of benefits to be derived from the streams common to their territorial areas. This does not necessarily imply

[35] *Albion-Idaho Land Co.* v. *Naf Irr. Co.* (97 Fed. (2d) 439 (C. C. A., 10th, 1938); *Brooks* v. *United States* (119 Fed. (2d) 636 (C. C. A., 9th, 1941)).
[36] *State ex rel. Sorenson* v. *Mitchell Irr. Dist.* (129 Nebr. 586, 262 N. W. 543 (1935); petition for writ of certiorari denied, 297 U. S. 723 (1936)).

an equal division of the water. Equality of right refers to the equal level or plane on which all the States stand, in point of power or right, under our constitutional system.

Applying this principle to concrete cases, it was held in *Kansas* v. *Colorado* [37] that the upstream State does not have such exclusive ownership or control of the stream as to entitle the water users therein to divert and use the water regardless of injury to the rights of the downstream State. This was a case between a State in which the riparian doctrine was recognized and one in which the appropriation doctrine was followed exclusively; and Kansas, the downstream riparian State, had complained that diversions in Colorado were injuring the rights of riparian owners and appropriators in Kansas. Considering the interest of both States, the Supreme Court decided that Kansas had not shown that Colorado had been taking more water than the users there would be entitled to under an equitable apportionment, and hence was not entitled to a decree; but would be free to bring suit at a future time if further depletions of the stream within Colorado should exceed those justified by an equitable division of benefits.

The same principle was applied in *Wyoming* v. *Colorado*,[38] where the circumstances differed in important respects from those in *Kansas* v. *Colorado*. In the earlier case, Kansas was not seeking to prevent a proposed diversion, but to enjoin the exercise of established appropriative rights; in the later case, Wyoming sought to prevent a proposed diversion in Colorado for the irrigation of unreclaimed lands. Furthermore, in this later case, both States recognized the exclusive doctrine of appropriation.

> Here the complaining State is not seeking to impose a policy of her choosing on the other State, but to have the common policy which each enforces within her limits applied in determining their relative rights in the interstate stream.

Under such circumstances, where both States recognized the same essential principles of water law, both contained arid lands, and had the same need for irrigation, it was concluded that the mutually accepted doctrine of appropriation afforded the only equitable basis for determining the controversy. Therefore, appropriations should be respected, as between the two States, according to their several priorities, just as would be done if the stream lay wholly within one State. This meant that the priorities in both States must be integrated, a particular priority in Colorado being senior to some priorities in Wyoming and junior to others. (Whether this must be the *sole* basis in such controversies is now in dispute. See p. 423, below.)

Two recent decisions on eastern interstate streams, where all parties recognized the riparian doctrine, applied the same principle of equitable apportionment as between States. In *Connecticut* v. *Massachusetts* [39] the Court declined to adopt the suggestion that the common-law doctrine should govern the determination, stating that each State is free to change its laws governing riparian ownership and to permit the appropriation of water, hence the riparian law that happened to be effective for the time being in both States did not necessarily constitute a dependable basis of adjustment of this interstate controversy. In *New Jersey* v. *New York* [40] the Court again refused to apply the strict

[37] 206 U. S. 46 (1907).
[38] 259 U. S. 419 (1922).
[39] 282 U. S. 660 (1931).
[40] 283 U. S. 336 (1931).

common-law rules of private riparian rights. The upper State does not have an exclusive interest in the stream, nor can the lower State require it to flow down undiminished. The conflicting substantial interests of each must be reconciled as well as possible, in an effort always to secure an equitable apportionment, "without quibbling over formulas." Both cases involved proposed diversions in the upstream States, and both decisions held that the diversions were within the rights of such States but placed limitations upon the exercise of the rights in order to safeguard the interests of the lower State.

A still more recent decision again applied the principle, in this instance as between Washington and Oregon to the use of Walla Walla River water primarily for irrigation purposes.[41] Both Washington and Oregon had stipulated that for the purposes of this case the water rights were governed by the doctrine of prior appropriation; hence the equitable apportionment was placed on that basis. In a case between States, an injury of serious magnitude must be proved by clear and convincing evidence to set in motion the restraining power of the Court.

> The case comes down to this: the court is asked upon uncertain evidence of prior right and still more uncertain evidence of damage to destroy possessory interests enjoyed without challenge for over half a century. In such circumstances an injunction would not issue if the contest were between private parties, at odds about a boundary. Still less will it issue here in a contest between states, a contest to be dealt with in the large and ample way that alone becomes the dignity of the litigants concerned.

The principle was restated recently in a case concerning an interstate compact,[42] noted below, and appears to be well established in interstate controversies of this character.

### (C) Interstate Compacts

#### SOME OF THE STATES HAVE RESORTED TO COMPACTS FOR THE ADJUSTMENT OF CONFLICTING INTERESTS ON INTERSTATE STREAMS

Of the many compacts effected between States, comparatively few provide for the apportionment of the waters of interstate streams. The most far-reaching compact relating to the apportionment among States of the flow of a western interstate stream is the Colorado River Compact. This concerns Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming; and it has been ratified by all of these States except Arizona. Arizona by an act passed in 1939 has made ratification conditional upon the acceptance of a proposed compact between Arizona, California, and Nevada, governing the apportionment of the Colorado River waters apportioned under the Colorado River Compact to the Lower Basin States.[43] The act sets a time limit of 1 year, or 1 additional year if extended by the Governor of Arizona by proclamation, for approval by California and Nevada and by Congress, Arizona giving its approval in the act if the conditions are met. Two other compacts to which Colorado is a party have been in operation for some years—one with Nebraska concern-

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[41] *Washington* v. *Oregon* (297 U. S. 517 (1936)).
[42] *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.* (304 U. S. 92 (1938)).
[43] Ariz. Laws, 1939, ch. 33.

ing the South Platte River, and the other with New Mexico relating to La Plata River. A temporary compact entered into by Colorado, New Mexico, and Texas concerning the waters of the Rio Grande expired in 1937, but a permanent compact providing for an equitable apportionment was ratified in 1939 and is in effect.[44] The Red River of the North is the subject of a compact by Minnesota, North Dakota, and South Dakota, signed by the Governors in 1937 after the enactment of concurrent (but not identical) legislation by the three States, the signed compact having since received the assent of Congress;[45] the purpose of which is to provide for the conservation and most advantageous utilization of water resources, control of flood waters, and prevention of pollution, but which does not purport to apportion waters among the States. Minnesota and South Dakota provided by concurrent legislation in 1939[46] for a boundary waters commission for the primary purpose of controlling the levels of boundary waters. Several compacts involving the apportionment and use of interstate waters for irrigation are in process of negotiation and still others have been proposed.[46a]

The terms of these compacts customarily are formally negotiated by compact commissioners, the appointment of whom is authorized by the State legislatures, and the agreements become effective when ratified by the legislatures and by Congress. Some compacts, as noted above, have been effectuated through concurrent State legislation only, but the compacts actually apportioning the waters of western streams have been made subject to congressional approval, and in the negotiations involving western streams the President has designated a Federal representative. The interest of the United States lies not only in the constitutional prohibition against the making of interstate compacts without the consent of Congress,[47] but in the fact that these agreements concern the regulation of interstate streams. The Supreme Court has recently held that whether the water of an interstate stream must be apportioned between the States presents a Federal question, and stated:[48]

> But resort to the judicial remedy is never essential to the adjustment of interstate controversies, unless the States are unable to agree upon the terms of a compact, or Congress refuses its consent.

Cooperative agreements between State engineers concerning exchange of data, determination of water rights, and operations designed simply to facilitate administration are less formal and do not rise to the dignity of interstate compacts. The statutes of several States grant authority to the water administrative officials to engage in such cooperation.

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[44] Colo. Laws, 1939, ch. 146; N. Mex. Laws, 1939, ch. 33; Tex. Acts, 1939, 46th Leg., Spec. L., p. 531; Vernon's Tex. Stats., 1939 Cum. Supp., Rev. Civ. Stats., art. 7466e-1; Public, No. 96, ch. 155, 76th Congress, 1st Sess. (May 31, 1939).

[45] Minn. Laws, 1937, ch. 234, p. 314; N. Dak. Laws, 1937, ch. 258, p. 506; S. Dak. Laws, 1937, ch. 262, p. 367; 52 U. S. Stat. 150, ch. 59 (1938).

[46] Minn. Laws, 1939, ch. 60, p. 84; S. Dak. Laws, 1939, ch. 294, p. 371.

[46a] Concerning current negotiations for interstate river compacts, as well as discussions of important compacts and other problems relating to the use of water of interstate streams, see Interstate Water Problems, Final Report of the Committee of the Irrigation Division on Interstate Water Rights, Trans. Amer. Soc. Civ. Eng., vol. 104 (1939), pp. 1822–1866.

[47] U. S. Const., art. I, sec. 10, par. 3.

[48] *Hinderlider v. La Plata River & Cherry Creek Ditch Co.* (304 U. S. 92 (1938)).

### THE UNITED STATES SUPREME COURT HAS ANNOUNCED PRINCIPLES APPLICABLE TO THE APPORTIONMENT OF INTERSTATE WATER BY COMPACT OR DECREE

The La Plata compact has been the subject of litigation over the feature providing for rotation of water in time of shortage. The Colorado Supreme Court held that such compact, which interfered with a Colorado appropriator's use of his decreed water by requiring the water to be delivered to New Mexico appropriators during a portion of the time, could not be pleaded by the State water officials as excusing their failure to enforce such priority.[49] In a later decision in the same cause [50] it was stated that the compact attempted to provide for the equitable apportionment of waters in defiance of ownership, and that it did not finally settle anything; and the former opinion was adhered to.

The judgment of the Colorado Supreme Court was reversed on appeal to the United States Supreme Court,[51] which reviewed the question of interstate compacts and announced or reiterated several important principles:

(a) As each State is entitled only to an equitable share of the water of an interstate stream, an adjudication decree in either State cannot confer rights in excess of such share, and parties in the other State are free to challenge claims that under the decree all the water can be taken from the stream.

(b) Adjustment of controverted rights may be made by compact without a judicial or quasi-judicial determination of existing rights, as well as by a suit in the Supreme Court. The Court has recommended that such matters be adjusted by compact, in order to avoid the difficulties incident to litigation.

(c) Whether such apportionment be made by compact with the consent of Congress, or by decree of the Supreme Court, the apportionment is binding upon the citizens of each State and upon all water claimants, even where the State had previously granted water rights.

(d) The apportionment may provide either for a continuous equal division of water or for rotation in use of the stream.

(e) As no claimant has any right greater than the equitable share to which the State is entitled, no vested right is taken away by the apportionment if there was no vitiating infirmity in the proceedings leading up to the compact or in its application.

(f) The assent of Congress to a compact does not make it a "treaty or statute of the United States" within the meaning of the Judicial Code, so that a decision of a State court against its validity is not appealable to the Supreme Court, nor is a claim based on the equitable interstate apportionment of water the subject of appeal. However, the decision of the Colorado Supreme Court restraining the State engineer from taking action required by the compact, denied an important claim under the Constitution, which may be reviewed on certiorari. Whether the waters of an interstate stream must be apportioned be-

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[49] *La Plata River & Cherry Creek Ditch Co.* v. *Hinderlider* (93 Colo. 128, 25 Pac. (2d) 187 (1933)).

[50] *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.* (101 Colo. 73, 70 Pac. (2d) 849 (1937)).

[51] *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.* (304 U. S. 92 (1938)).

tween two States presents a Federal question, and the fact that the States are not parties to the suit does not deprive the Supreme Court of jurisdiction.

## Specific Operations for Controlling the Flow of Water, and Their Relation to the Exercise of Water Rights

### (A) Structures on Watercourses

Chapter 1 defines the term "watercourse" and discusses the distinction between a watercourse and diffused surface water. It is noted that a watercourse necessarily has a definite channel, as well as a flow of water, whereas diffused surface water consists of vagrant and temporary flows of water which under some circumstances may collect in natural channels which do not conform to the requirements of a watercourse.

#### CHARACTER OF STRUCTURES

The structures commonly built to control the flow in a watercourse are dams for the storage, retardation, or diversion of water, and diversion headgates which may be built into the dam itself or may be separate structures. From the standpoint of exercising water rights and affecting other water rights, it is desirable to indicate briefly the several functions of these stream-control structures.

Dams behind which water is stored in reservoirs may be located in the stream channel itself, thus converting the immediate portion of the upstream channel into an artificial lake, or may be located away from the watercourse, in which event the reservoirs are filled through feeder canals which divert from the stream. Retention dams for channel storage of water may or may not have control gates. If control gates, through which the impounded water may be released into the channel below the dam, are not provided, a reservoir is created from which water will overflow the dam in periods of high run-off, and otherwise will be lost only through evaporation, seepage, or diversions directly from the artificial lake. If control gates are provided, water may be drawn from the reservoir into the downstream channel. This latter type is the common type of structure by which flood water is impounded in channel reservoirs for later use, to be withdrawn from storage as needed.

Detention or retardation dams, with automatic outlets, are designed to allow a maximum flow through the outlet at all times, the purpose being to hold back flood flows temporarily but without interference with the calculated normal flow.

Diversion dams are designed to raise the level of water in the channel in order that a portion of the flow may be forced through a headgate on the stream bank at one end of the dam or a short distance upstream, and thence into a canal leading away from the stream. On very small stream channels, one box-like structure may serve to divert water into a canal through one gate and allow part of the flow to continue down the channel through another gate.

So-called gully plugs are obstructions placed in ravines and other small channels which contain flowing water at infrequent intervals. They are miniature dams.

The construction of dams, both on watercourses and elsewhere, is commonly subject to supervision by State officials. This usually applies to dams exceeding specified heights or designed to impound more than a stated quantity of water. This supervision is a matter of insuring the safety of the structure; and the procedure is entirely separate from that under which rights are acquired to impound or divert water.

### STRUCTURES EFFECTUATING A USE OF WATER MUST BE OPERATED WITH REGARD TO THE REQUIREMENTS OF DOWNSTREAM PRIOR CLAIMANTS

An appropriative right to water in a watercourse, as shown in chapter 2, is a right to the use of the water. This may be a nonconsumptive use, as for development of hydroelectric energy, or it may be a consumptive use, as in case of crop irrigation. Where the use is nonconsumptive, the water is returned to or released into the stream channel and is available there for further use; and downstream appropriators, whether senior or junior to the appropriator for nonconsumptive use, may insist that the water be returned and not converted into a consumptive use to their detriment. (See discussion of changes in purpose of use, above in this chapter, p. 383.)

Furthermore, the appropriator has a right to the continuance of the natural conditions existing at the time he made his appropriation. (See discussion of exclusive character of appropriative right, above in this chapter, p. 328 et seq., 337.)

On the other hand, the appropriator cannot insist upon the upstream release of water which would do him no good; he cannot insist upon the maintenance of a barren right, and thus require water to be left in the channel if it would be dissipated by natural causes before reaching his headgate. He can maintain an action for an injunction or damages only in the event that he is being substantially injured by a junior upstream diversion. Hence, if *all* the water in a stream would be lost in a dry season before reaching the senior appropriator, he has no cause of action over an upstream diversion of the flow by a junior appropriator at such time; and his right of action would be highly questionable where it is shown that although *some* water would reach him if left in the channel, the quantity would be too small to be of material benefit. (See p. 333 and 335.)

There have been many cases involving the maintenance of an appropriative right as against the operation of upstream structures subsequently installed, where these later structures were concerned with the use of water, that is, with the exercise of a water right. Dams for the storage (retention) of water, and diversion structures are in this group. To the extent that such a structure effects a withdrawal of water from the watercourse, either for direct use or for storage in a reservoir elsewhere, or an impounding of water in a channel reservoir, during the times such water is required to satisfy valid, prior downstream claims to its use, it constitutes an exercise of a subordinate water claim which is enjoinable in the event of material injury. The law is well settled to this effect. Water may generally be stored for future use only by virtue of an appropriation, or pursuant to other legislative authority, subject to existing rights on the watercourse; as noted in chapter 2 (page 41), the decisions in the

States which recognize the riparian doctrine are not in accord as to the right of a riparian owner to store water for future use without making an appropriation therefor.

STRUCTURES WHICH DETAIN WATER FOR BRIEF PERIODS MAY COMPLICATE THE EQUITABLE ADMINISTRATION OF DOWNSTREAM WATER RIGHTS

Detention or retardation dams raise a somewhat different problem. Their purpose is to regulate flood flows, not to store water for later use; and while they necessarily withhold water, the detention is for brief periods. This is a beneficial purpose in the interest of land conservation and flood protection, but it is not such a use of water as is ordinarily contemplated by the appropriation statutes. The purpose of the structure is to benefit the public, and not to acquire an exclusive right to the flow of a specific quantity of water for the sole use of an individual appropriator or group of appropriators. In this case, the water is not wanted at all.

The California Supreme Court, in a decision rendered in 1939,[52] stated that undoubtedly the purpose of the constitutional amendment of 1928 [53] had been to make possible the marshaling of the State's water resources to meet the growing needs of its people; that the State program in developing and conserving its water resources had progressed to a point at which the upstream storage of water as a means of protection against flood damage and of equalizing and stabilizing the flow is a beneficial use; and that it was necessary to declare, as inherent in the State plan, that storage for those purposes and for future use is within the beneficial uses intended by the amendment. Such right of storage, it was further stated, is necessarily subordinate to all beneficial uses made in the exercise of riparian and prior appropriative rights, and may be exercised only pursuant to appropriations lawfully made.

The foregoing decision, therefore, recognizes flood control as a beneficial use of water for which an appropriation may be made and must be made. In this controversy, while several issues were involved, the right of upstream storage of excess waters by a city was upheld as against a downstream claimant whose riparian and appropriative rights were specifically declared and protected in the decree. It was concluded by the court that when a water claimant's rights, riparian or appropriative, are protected by the court, he—

> may not lawfully complain of, and has no right to prevent or control, the storage of waters in the upper reaches of the stream for flood control, stabilization and equalization of the flow, and other beneficial uses; * * *.

The city's principal interest was in appropriating water for the present and prospective needs of its inhabitants; flood control, important as it was in the regulation of the stream, obviously was not the primary concern of the city in going to a far-distant point to appropriate this water. This, then, was not a controversy between an appropriator for flood control only, and a later appropriator for consumptive use of water who proposed to divert water upstream from the flood-control

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[52] *Meridian* v. *San Francisco* (13 Calif. (2d) 424. 90 Pac. (2d) 537 (1939)).

[53] Cal. Const., art. XIV, sec. 3, declaring that because of conditions prevailing in the State the general welfare requires that its water resources be put to beneficial use to the utmost possible extent, and subjecting the exercise of all water rights to reasonable beneficial use under reasonable methods of diversion.

works. The decision does not state that an appropriation *for flood control only* constitutes a water right having all the attributes with which such right has been vested in western water law; and a question may well be raised as to whether, after all existing rights for domestic, agricultural, power, and industrial uses have been properly safeguarded, an appropriation for stream regulation and flood control would be held to prevent a later upstream appropriator from taking, out of the stream, excess water which otherwise would be impounded solely to prevent flood damage lower down, at least where the return flow from such diverted waters would not interfere with the flood-control program.

Of course the purpose of those who install detention or retardation dams is not to make consumptive use of water. Where consumptive use is the object, retention and diversion dams are employed in the exercise of a water right. The detention or retardation dam is designed solely to equalize natural floods—a purpose entirely foreign to one which requires the upstream release of water by junior appropriators. It is the downstream rather than the upstream water users who are affected by such structures.

Whether or not in a given jurisdiction the operation of a detention or retardation dam for the temporary slowing down of the flow of a stream is held to be the exercise of a water right, or a beneficial use of water for which an appropriation must be made, the actual operation of such a structure may have a bearing upon the exercise of downstream water rights, and particularly upon the value of flood-water rights. It is safe to say that the usual flows of most streams used for irrigation in the West have been over-appropriated; that is, that the aggregate appropriations exceed the quantities usually available. Flood flows, therefore, are the only flows available for the use of the latest claimants. Likewise, on certain streams, the entire summer normal flow is covered by direct-flow appropriations, and the flood flows, both winter and summer, have been appropriated for storage in reservoirs. Some such reservoirs are of large capacity and constitute the principal source of water supply for large irrigation projects.

The earliest appropriator, in a jurisdiction in which riparian rights have been abrogated, is entitled to all the water flowing in the stream if necessary to satisfy the terms of his appropriation, and each succeeding appropriator is similarly entitled to all the surplus or whatever portion his right attaches to. Hence, a structure which reduces a flood flow and converts it into a smaller stream flowing for a longer period of time, has the effect of making more water available for the early appropriations at the expense of the later ones. For example, if A, B, C, and D each has a right to divert 100 second-feet when available, D being the latest appropriator, and if a retardation dam reduces a flood of 400 second-feet to a maximum flow of 300 second-feet, which will necessarily flow a longer time, the three early appropriators will take the entire stream and will have the use of it longer than would be the case without the structure, and D will be deprived of any part of that flow solely by reason of the existence of the structure.

No cases have been found involving the remedy of a junior appropriator under just such circumstances. It seems clear, however, that

the regulation of western streams must proceed with full regard for established rights to the use of the water, as recently declared by the Supreme Court of California.[54] The public-welfare aspect of flood protection and channel improvement by properly constituted authority as an exercise of the police power is well recognized. Various decisions of the United States Supreme Court concerning the public works of the United States in controlling floods and improving the navigability of watercourses have held that where lands belonging to an individual are permanently flooded to such an extent as to destroy their value, there is a taking under the Federal Constitution for which compensation must be made, but that it is otherwise where the overflow is not permanent but there is merely some injurious effect upon property.[55] In the example given above, there would be a question of fact as to whether the value of the land to which the late floodwater appropriation was appurtenant was practically destroyed or merely impaired. In condemnation suits the Federal courts have distinguished between proximate damages resulting directly from the public works, for which compensation must be paid, and consequential damages resulting only after the interposition of some other force, for which recovery is denied. According to a recent decision [56]—

> It seems to us that when a given act is such as to put in force a normal law of nature, which in conjunction with the original act done, produces a harmful result, such result is necessarily a proximate cause of the act done.

Unless some equitable adjustment is possible, the effect of the public improvement in the example of the four appropriators is to take property from one man and give it to others. A possible alternative to an action for an injunction or for damages—in which proof would be difficult and the maintenance of which might be questionable under many circumstances—would be an action to compel the distribution of water in such manner as not to deprive the late appropriator of the quantity he would have received if the retardation dam had not been built. This would require measurement of the flow above the point at which it is affected by the dam and an equitable adjustment of diversions below the dam, under the supervision of the State water officials or of a commissioner appointed by the court. Such adjustment would effectuate the appropriator's right to substantial maintenance of the stream conditions existing at the time he made his appropriation; and any inconvenience to which the several appropriators would be put by reason of an adjustment equitable to all of them would be incidental to the public-welfare aspect of the improvement.

### (B) Structures and Operations for the Control of Diffused Surface Waters

#### CHARACTER OF WORKS

These works are principally gully-plugs, dikes or levees, and contour plow furrows.

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[54] *Meridian* v. *San Francisco* (13 Calif. (2d) 424, 90 Pac. (2d) 537 (1939)).

[55] *United States* v. *Lynah* (188 U. S. 445 (1903)); *Bedford* v. *United States* (192 U. S. 217 (1904)); *Jackson* v. *United States* (230 U. S. 1 (1913)); *United States* v. *Cress* (243 U. S. 316 (1917)); *Sanguinetti* v. *United States* (264 U. S. 146 (1924)); *Jacobs* v. *United States* (290 U. S. 13 (1933)).

[56] *United States* v. *Chicago, B. & Q. R. R.* (82 Fed. (2d) 131 (C. C. A. 8th, 1936); petition for writ of certiorari denied, 298 U. S. 689 (1936)).

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Gully-plugs are mentioned above. Dikes or levees several feet in height are calculated to obstruct and deflect, and in conjunction with wire-spreader fences, to capture and spread the larger flows of sheet water over the land. The primary purpose and effect of plow furrows is to capture rain water and melting snow in place, and to force the water into the ground. These are soil-conserving operations; and in addition to the mechanical control of the water, their effect is to induce new or additional growths of vegetation which play an important part in preserving the soil surface.

Gully-plugs in watercourses, and levees and fences which cross watercourses, necessarily have the effect of altering the flow of water therein. In most cases, probably, the gullies and other natural channels in which they are placed do not have the essential elements of a watercourse, so that the flows thus controlled are still to be classed as diffused surface waters. It is to this aspect that the present discussion is directed.

#### WIDESPREAD CONTROL OF DIFFUSED SURFACE WATERS THROUGHOUT A DRAINAGE BASIN WILL NECESSARILY AFFECT THE FLOW OF WATER IN THE SURFACE DRAINAGE CHANNELS

The control operations which promote new or additional growths of vegetation, thereby effect a consumptive use of a portion of the waters controlled. While much of the water sinks into the ground, some is necessarily consumed in transpiration through the plants. This is essentially one form of irrigation.

Likewise, when the flow of diffused surface water is checked and forced into the ground, it adds to the ground-water supply at that point, instead of collecting into surface channels and flowing thereby into surface streams. The ground water in the basin eventually finds its way to the main drainage channels, just as does the surface water; but water forced into the ground by spreading works reaches the surface stream later than would be the case otherwise, and often at different places. The sources of supply, therefore, to this extent are altered. If the operations are carried on over a large area, it is reasonable to expect not only a modification of the extremes of flow in the drainage channels, but also some change in the points at which the stream system receives its diffused tributary waters.

The necessary result of material changes in the regimen of streams will be to affect in some measure the existing appropriations of water from those streams. In some situations the changes may be detrimental to some individuals. Relative priorities may be affected; and there may be more ground water available for withdrawal in some areas, and consequently less water in the stream at higher points, than existed under previous conditions. On the other hand, the effect of upstream regulation may be to reduce fluctuations in the downstream flow, with results beneficial to the stream system as a whole. The benefits and injuries will necessarily depend upon the facts in a given case.

#### INTERRELATIONSHIP OF RIGHTS TO DIFFUSED SURFACE WATERS AND TO WATER IN WATERCOURSES

It has been shown in chapter 3 that the relationship of rights in the flow of watercourses to rights in the diffused waters tributary thereto

is most important, but that the principles governing this relationship have not yet been clearly established in any Western State. A correlation of these rights on a basis of reasonable use of land and water is suggested. This, it is further shown, may be difficult to effectuate in some of the States, particularly those States in which previous court decisions have emphasized the paramount nature of one kind of right or the other; but in others it appears to be in harmony with the existing doctrines of water law. Furthermore, precedent for so coordinating these conflicting rights or claims of right on such basis exists in some extant State doctrines relating to the use of ground waters.

### (C) Structures for Making Water Available for Stock

#### THE RIGHT TO USE WATER FOR STOCK IS GOVERNED BY THE LAW OF WATER RIGHTS IN EACH JURISDICTION

It is necessary in the arid regions to provide artificial appliances for the impounding of water for range livestock, owing to the great distances which often intervene between natural watering places and to the fact that such natural facilities may be inadequate or entirely lacking during dry periods. Small reservoirs for this purpose are often known as "stock tanks." They may be constructed in watercourses or away from them, and may be filled and replenished by natural stream accumulations, diversion from streams, capture of diffused surface waters, accumulations from springs, or withdrawal of ground waters from flowing wells or from wells operated by windmills or other pumping devices.

Stock water is differentiated as to purpose of use from domestic water. As noted in the discussion of domestic use in the first part of this chapter, the right of a riparian owner to use all the water of a stream for domestic purposes "and for watering cattle," though possibly not for large herds of cattle, has been recognized by the Supreme Court of California; whereas the Oregon court limited the riparian right to domestic use and the watering of stock essential to the sustenance of riparian owners. Generally, so far as the appropriation of water is concerned, domestic use in relation to livestock includes only domestic animals kept for the use of the household and farm, and does not apply to the rancher's herds of cattle and sheep, at least while on the range. (See pp. 320–323.)

Watering stock, therefore, is one of the specific and separate purposes for which water may be appropriated. As noted in the appendix, Nevada has a separate statute under which rights to water range livestock are acquired; New Mexico exempts the acquisition and exercise of such rights from the provisions of the water code, and grants travelers the right to take water for themselves and for a few animals from certain natural sources; Oregon exempts developments of ground water for stock from the appropriation statute; and Texas exempts wells for stock water (also domestic use) from the artesian-control statute, if properly equipped. Generally, unless exercised by a riparian owner in States which recognize the riparian doctrine, or unless specifically exempted in the water codes, such rights are subject to the provisions of the appropriation statutes to the same extent as other uses of water.

It follows that the relation of a stock tank to a water right depends upon the character of rights which attach to or may be acquired in connection with the use of water of the particular source of supply for the stock tank. If the water is impounded in or diverted from a watercourse, the law of watercourses applies (ch. 2); if the stock tank collects diffused surface waters, the law governing that classification applies (ch. 3); and similarly as to the interception or collection of ground waters and spring waters (chs. 4 and 5). Even though there be an inherent right in the public to drink from, and to water animals in, flowing streams, as stated by the Utah court,[57] nevertheless, the exercise of that right is subject to the limitation that existing rights of others shall not be impaired.

The distinction, from a legal standpoint, between artificial openings in the ground, such as wells and tunnels, and natural openings through which water flows, such as springs, is given in chapter 1. Upon this distinction rests the question as to whether the supply for the stock tank, when drawn from the ground-water supply, is governed by the law of ground waters or by that of spring waters.

Windmills are used in certain instances to raise ground waters to the surface from which point the waters flow into stock tanks. A windmill is simply one form of pumping plant. The law of ground waters in the particular jurisdiction will govern the right to abstract waters in this manner, just as it does in case of wells operated by other types of pumping plants.

## The Ownership of Unappropriated Waters

The long-agitated question as to the ownership of unappropriated waters on the public domain has been squarely presented to the United States Supreme Court for consideration in the pending original suit of *Nebraska* v. *Wyoming*. Various States by constitutional or statutory provision have dedicated all waters within their boundaries to the public or to the State, subject to existing rights of use;[58] and the view taken generally by public officials of these Western jurisdictions has been that the ownership of waters even on the public domain has vested in each State since its creation. On the other hand, with the growth during the present century of Federal interest in the development and use of water for purposes other than navigation, the view has been taken by officials concerned with the development of Federal water-supply projects that the United States has never surrendered its ownership of unappropriated waters on the public domain, but has voluntarily complied with State laws concerning the appropriation of waters as a matter of comity. Inasmuch as the question is now before the Supreme Court, and as the opposing viewpoints have been rather fully presented to the Court for its consideration, it is deemed best to confine the discussion of this subject to a statement of the facts in *Nebraska* v. *Wyoming* which bear upon this question and to a summary of the arguments as to this particular point thus far advanced, on the one hand by the United States, and on the other by Nebraska, Wyoming, and Colorado.

[57] *Adams* v. *Portage Irr., Res. & Power Co.* (95 Utah 1, 72 Pac. (2d) 648 (1937), 95 Utah 20, 81 Pac. (2d) 368 (1938)).
[58] See ch. 2, p. 78, herein.

## The Pending Interstate Case of Nebraska v. Wyoming in the United States Supreme Court[59]

### PARTIES

This suit was instituted by the State of Nebraska against the State of Wyoming, by a bill of complaint in equity filed in the Supreme Court at the October Term 1934, asking for an equitable apportionment between the two States of the waters of the North Platte River.

Wyoming filed a motion to dismiss the bill of complaint, alleging, among other things, a lack of necessary parties to the suit. Wyoming contended that Colorado, in which the North Platte River has its source, and the Secretary of the Interior were necessary parties. The Court overruled both of these contentions; but Colorado was later impleaded at the instance of Wyoming.

The United States later filed its motion for leave to intervene in the case. The Court granted the motion.

### FACTS BEARING UPON THE QUESTION OF OWNERSHIP OF UNAPPROPRIATED WATERS

It is conceded by all of the parties that the North Platte River is a nonnavigable stream. It has its source in Colorado, crosses Wyoming, in which State its flow is augmented from other sources, and enters Nebraska, in which State it joins with the South Platte River (which also rises in Colorado and flows thence into Nebraska) to form the Platte River. The Platte flows through Nebraska and becomes a tributary of the Missouri River at the eastern boundary of the State.

The laws of all three States apply the doctrine of appropriation with respect to the disposition of the waters of the North Platte River.[60] The bill of complaint alleges that Wyoming by various permits granted by it has threatened and is threatening to divert more water from the river than it is equitably entitled to divert, to the detriment of Nebraska and Nebraska appropriators.

*Federal projects involved.*—Directly involved are two Federal reclamation projects on the North Platte River, constructed or being constructed by the Secretary of the Interior under the Reclamation Act [61]—the North Platte and the Kendrick (formerly known as the Casper-Alcova) projects.

The North Platte project, which has been in operation for many years, includes approximately 251,000 acres, of which more than two-thirds is in Nebraska and the balance in Wyoming, the distribution system overlapping the State line. Storage reservoirs are located in both States, the largest reservoirs and about 94 percent of the aggregate project storage capacity being in Wyoming; and of the project lands located in Nebraska, about 91 percent is irrigated with water diverted in Wyoming and conveyed across the State line. Of the total 251,000 acres, some 151,000 acres were public lands when the project was initiated and have since been disposed of to settlers who have acquired water rights from the project. The United States has also

[59] Based upon a statement prepared by Albert C. Howard, of the Office of the Solicitor, United States Department of Agriculture, after an examination of the pleadings and briefs filed in this case down to December 31, 1940.

[60] In Nebraska the riparian doctrine is recognized concurrently with the doctrine of appropriation. See ch. 2, herein.

[61] 32 Stat. L. 388, ch. 1093 (June 17, 1902).

contracted with the owners of private lands for the delivery of water, as well as with municipal and industrial concerns, and under the authority of the Warren Act [62] has entered into contract for the furnishing of water to various holders (principally irrigation districts) of rights in the direct flow of the river. Deliveries under the Warren Act contracts are accomplished partly with water stored in Pathfinder Reservoir, partly with seepage and return flow from project lands, and partly with the use of direct-flow appropriations originally acquired by the contracting parties. This project also includes hydroelectrical developments.

The works of the Kendrick project, still under construction, are located wholly within Wyoming. The purposes of this project are to provide water from the North Platte for the irrigation of about 66,000 acres in Wyoming; to augment and stabilize the flow of the river with the use of storage reservoirs, and thereby make additional water available for use downstream; and to develop hydroelectric power from the sale of which it is hoped to recoup 75 percent of the Federal investment in the project, the remainder to be recovered from the sale of water rights.

*Acquisition of appropriative rights for the Federal projects.*—The Reclamation Act provides in section 8 that the Secretary of the Interior, in carrying out the provisions of the act, shall proceed in conformity with State or Territorial laws relating to the control, appropriation, use, or distribution of water used in irrigation. The motion of the United States for leave to intervene, which was filed at the October Term 1937, alleges that, in initiating and perfecting the appropriations for the North Platte project, the United States complied substantially with the laws of the State where the diversion was made; and that in case of the diversion of water in Wyoming for use in Nebraska, the United States complied with the law of Wyoming and, as far as possible, with the law of Nebraska also. In initiating its appropriation for the Kendrick project, likewise, the United States has complied with the laws of Wyoming.

*Controversy over the priority of the Kendrick project and its effect upon an equitable apportionment of the water of the river.*—According to the complaint, plans for the Kendrick project were commenced some time in March 1933. Subsequently, an application for a permit to appropriate water was filed with the State engineer of Wyoming. In issuing the permit, the State engineer assigned to it a priority date as of December 6, 1904, which is the same as that assigned to the permit issued for the North Platte project. According to Wyoming's answer, which was filed at the October Term 1934, this was done because the original permit issued in 1904 provided for the appropriation of all of the then unappropriated waters of the river in Wyoming, and also because the construction of the Kendrick project was a belated fulfillment of a promise made by the Secretary of the Interior to the State many years before.

Nebraska contends that the priority date of the permit for the Kendrick project was wrongfully assigned, and that the proper date for such permit should have been not earlier than March 1933. Since December 6, 1904, and prior to March 1933, appropriative permits have been granted by Nebraska for the use of water in that State

[62] 36 Stat. L. 925, ch. 141 (February 21, 1911).

which, it is alleged, are senior to the permit issued to the Secretary of the Interior for the Kendrick project in Wyoming. This appropriation, together with the earlier appropriation, if allowed to stand, it is alleged, will result in an inequitable apportionment of the waters of the river between the two States to the detriment of Nebraska and Nebraska appropriators. Nebraska, therefore, asks the Court to assign a proper priority date to the Government's second permit, and that the water of the river be apportioned on the basis of the priority of the permits issued by the two States. Such, it is alleged, is the proper basis for apportionment where the States involved apply the doctrine of appropriation.[63]

(While the foregoing statement of this particular controversy reflects the pleadings, note should be made of the subsequent status of the permit, to-wit: The State engineer of Wyoming, in response to an inquiry as to what priority date for the Kendrick project direct-flow appropriation was finally allowed by his office, advises that the priority date of the Casper Canal is July 27, 1934.)

Except as already indicated, the answer of Wyoming generally denied the allegations contained in the bill of complaint. Wyoming took issue with Nebraska on the proposition that, in a suit between two or more States, each of which applies the doctrine of appropriation, for the apportionment of the waters of an interstate stream, the priority of the appropriations made in the various States should be the sole basis for the apportionment of the waters among such States. Wyoming contends that priority of appropriations in such case is merely one of the factors to be considered in making an equitable apportionment. Colorado agrees with this position.

### INTERVENTION OF THE UNITED STATES

In overruling the contention of Wyoming that the Secretary of the Interior was a necessary party, the Supreme Court stated: [64]

> The motion asserts that the Secretary of the Interior is an indispensable party. The bill alleges, and we know as matter of law, that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law. His rights can rise no higher than those of Wyoming, and an adjudication of the defendant's rights will necessarily bind him. Wyoming will stand in judgment for him as for any other appropriator in that state. He is not a necessary party.

At the October Term 1937 the United States filed a motion for leave to intervene in the case, attaching to the motion a petition of intervention on behalf of the United States and an appendix to the motion. A number of grounds for intervention were alleged, principally (1) that neither Wyoming nor Nebraska is willing to defend the appropriations made by the United States in Wyoming for use in Nebraska; (2) that the United States is the owner of all unappropriated water in the North Platte River, irrespective of any appropriation made or to be made by it under the law of any State; (3) that the title of the United States to such water is involved and, therefore, Wyoming cannot stand in judgment for it; and (4) that the United States is entitled to have apportioned to it, free from the sovereign control of

[63] Citing *Wyoming* v. *Colorado* (259 U. S. 419 (1922)) in support of this contention.
[64] *Nebraska* v. *Wyoming* (295 U. S. 40 (1935)).

any State, the water already appropriated by it and all of the remaining unappropriated water of the river, if any.

All three of the States objected to the motion for leave to intervene. Each denied the title of the United States to the unappropriated water of the stream, and each contended that the United States should not be allowed to intervene, because the Court had already decided that Wyoming would stand in judgment for the rights of the Secretary of the Interior, which meant also the United States. Nebraska and Wyoming both denied that they were unwilling to defend the appropriations made by the United States in Wyoming for use in Nebraska. In reply, the United States contended that the opinion of the Court, quoted above, held only that the Secretary of the Interior was not a necessary party and should not be construed that the United States at least is not a proper party. The Court granted the motion of the United States to intervene but without prejudice on the final determination of the case to any of the substantive questions of law or fact raised by the motion.

Subsequently, at the October Term 1938, the United States filed another petition of intervention, and the States filed answers to the petitions at the October Term 1939. The intervention of the United States in this interstate suit therefore directly presented the question of the ownership of water of nonnavigable streams (the North Platte River in particular) in States created out of the public domain. The opposing positions taken by the United States and by the States on this question, in the pleadings on intervention, are summarized in the following pages.

## OWNERSHIP OF WATERS OF NONNAVIGABLE STREAMS IN STATES CREATED OUT OF THE PUBLIC DOMAIN: CASE OF THE UNITED STATES

It is contended by the United States:

*That the title of the United States antedates the creation of the States, and was not divested thereby.*—The United States obtained its title to and rights in the waters of the North Platte River through territorial cessions from France in 1803, Spain in 1819, Mexico in 1848, and Texas in 1850, comprising most of the western half of the United States; by virtue of which cessions it became the sole owner and acquired full political authority over all property rights of any kind in the territory ceded, subject only to previously existing rights of private ownership.[65] The property thus acquired included, of course, the waters of all streams and lakes, whether navigable or nonnavigable.

The settled law is that title to the beds of navigable streams and lakes passes to the States upon admission to the Union, and that title to the beds of nonnavigable streams and lakes on the public domain remains in the United States.[66] There is no difference in principle between title to the beds of streams and lakes and title to their

[65] Citing *Shively* v. *Bowlby* (152 U. S. 1, 48, 58 (1894)), *United States* v. *Winans* (198 U. S. 371, 383 (1905)), and *Winters* v. *United States* (207 U. S. 564, 577 (1908)).

[66] Citing *Hardin* v. *Shedd* (190 U. S. 508 (1903)), *Oklahoma* v. *Texas* (258 U. S. 574, 594, 595 (1922)), *United States* v. *Utah* (283 U. S. 64, 75 (1931)), *United States* v. *Oregon* (295 U. S. 1, 14 (1935)). Dictum to the contrary in *Kansas* v. *Colorado* (206 U. S. 46, 93, 94 (1907)) considered to have been unsupported when enunciated and must be taken as overruled by later decisions. The distinction made under the common law between navigability and nonnavigability (*Martin* v. *Waddell*, 41 U. S. 367, 410–415 (1842); *Shively* v. *Bowlby*, 152 U. S. 1, 11–14 (1894)) has been held controlling in determining whether title to the beds of streams and lakes passed to the States upon admission to the Union (*Martin* v. *Waddell*, *supra*; *Pollard's Lessee* v. *Hagan*, 44 U. S. 212 (1845)).

waters.[67] Each new State, upon admission to the Union, became vested with political powers equal to those of every other State, and as incident to such powers, it became the owner of the beds and waters of navigable streams and lakes, subject to the power of the United States to control navigation and commerce; but the property rights of the United States, which include the ownership of the beds and waters of nonnavigable streams and lakes, did not pass to the State.

Nor can the title of the United States to such waters be said to be divested by the admission of a State to the Union under a State constitution which declares waters to be the property of the State or of the public, whether the constitution is adopted before the passage of the enabling act—as in case of Wyoming—or whether the enabling act becomes effective upon the adoption of a constitution, as in case of Colorado. In neither case is the action of Congress in admitting the State a conveyance or relinquishment of the title of the United States to the unappropriated waters, for all Congress does in admitting a new State is to create the State and nothing more.[68]

*That Congress, in enacting the desert land legislation, did not convey title to waters on the public domain to the States, but simply permitted the appropriation of such waters by private persons upon compliance with State laws.*—The doctrine of appropriation originated on the public domain as the result of local custom and had been given the sanction of local law before Congress took cognizance of the custom.[69] In the Act of 1866 [70] Congress simply acknowledged and recognized as against the United States the validity of such existing rights to appropriate or use the waters of the public domain as were recognized by local law, this being in effect the affirmance of a tacit grant by the United States; and in the amendatory act of 1870 [71] Congress made it clear that the future acquisition of water rights by appropriation was permitted where recognized by local law. Whether or not a grant of riparian land by the Federal Government carried with it riparian rights, was still not clear. However, the Desert Land Act of 1877,[72] which provided for the entry and reclamation of desert land in certain States and Territories, made the right to the use of water for irrigation on desert land dependent upon prior appropriation, the surplus nonnavigable waters on the public lands to remain free for appropriation and use by the public; and the Supreme Court has held that after the passage of this act, if not before, a grant of riparian land by the United States carried of its own force no riparian rights, each State being free to determine for itself to what extent the appropriation or the riparian doctrine should obtain.[73]

All rights to appropriate water on the public domain are derived from the United States, either by tacit grants before 1866, or under these three Congressional enactments through the instrumentality of

[67] Citing *Howell* v. *Johnson* (89 Fed. 556, 557–560 (C. C. D. Mont. 1898)) for a statement that title to the waters of navigable streams passed to the State upon admission to the Union, but that title to the waters of nonnavigable streams remained in the United States.

[68] Citing *Coyle* v. *Oklahoma* (221 U. S. 559, 568 (1911)), in which the Supreme Court said: "A constitution thus supervised by Congress would, after all, be a constitution of a State, and as such subject to alteration and amendment by the State after admission. Its force would be that of a state constitution, and not that of an act of Congress."

[69] See ch. 2, herein, p. 70 and following, for a discussion of the origin and growth of the doctrine on the public domain, and of the several Acts of Congress cited in this paragraph.

[70] U. S. Rev. Stats., sec. 2339; 14 Stat. L. 251, 253, sec. 9 (July 26, 1866).

[71] U. S. Rev. Stats., sec. 2340; 16 Stat. L. 217, 218, sec. 17 (July 9, 1870).

[72] 19 Stat. L. 377, ch. 107 (March 3, 1877). See amendments in 26 Stat. L. 1096, 1097 (March 3, 1891).

[73] Citing *California-Oregon Power Co.* v. *Beaver Portland Cement Co.* (295 U. S. 142 (1935)).

State laws. Appropriations by individuals are subject to the police power of the State and are valid as against the United States; but while the result of private appropriations is to diminish the usufructuary rights remaining in the Federal Government, the latter's right to use all waters remaining unappropriated is not affected.[74] The dedication in various State constitutions and statutes of all waters to the State or the public,[75] and the adoption of the appropriation doctrine by the Western States, did not defeat the Federal title to unappropriated waters of nonnavigable streams; water rights, whether appropriative or riparian, are real property, and the States have no power to transfer property of the United States to themselves by the adoption of one rule of law and the rejection of another.[76]

Expressions of the Supreme Court concerning the effect of the Desert Land Act—that following that act, if not before, the nonnavigable waters on the public domain became *publici juris*, subject to the plenary control of the designated States;[77] that the act "reserved" the waters for the use of the public under State laws;[78] and that the act "dedicated" the waters to the use of the public [79]—should not be construed as holding that Congress conveyed title to the States or in any way relinquished the right of the United States in such waters. The three acts merely make it possible for persons to acquire rights to such waters from the United States, upon compliance with State laws, and they are not irrevocable but are subject to amendment or repeal by Congress.[80]

*That Congress, in directing the Secretary of the Interior to proceed in conformity with State laws in carrying out the provisions of the Reclamation Act, did not subject the waters appropriated by the United States to the sovereign control of the States.*—Section 8 of the Reclamation Act [81] neither impairs the title of the United States to unappropriated nonnavigable waters nor subjects waters appropriated by the United States under the Act to the sovereign control of the States. The provision that nothing in the Act should affect the right of any State, or of the Federal Government, or of any landowner, appropriator, or water user in the waters of any interstate stream was inserted in order to avoid prejudicing the contention then being made in *Kansas* v. *Colorado* [82] that the United States possessed the implied power to regulate all waters of interstate streams.[83] The provision disclaiming any intention to interfere with State water laws, and directing the Secretary of the Interior to proceed in conformity with such laws in carrying out the provisions of the Act, is merely a conformity provision. It is directory, not mandatory. Its purpose is to harmonize Federal reclamation activities with State laws, so far as possible, as a matter

[74] In support of the proposition that the United States owns the unappropriated waters of the public domain, were cited *Atchison* v. *Peterson* (87 U. S. 507, 512 (1874)), *Sturr* v. *Beck* (133 U. S. 541, 552 (1890)), *Gutierres* v. *Albuquerque Land & Irr. Co.* (188 U. S. 545 (1903)), and *California-Oregon Power Co.* v. *Beaver Portland Cement Co.* (295 U. S. 142, 162 (1935)).

[75] See ch. 2 herein, p. 78.

[76] Citing *United States* v. *Oregon* (295 U. S. 1 (1935)) and *United States* v. *Utah* (283 U. S. 64 (1931)).

[77] *California-Oregon Power Co.* v. *Beaver Portland Cement Co.* (295 U. S. 142, 163-164 (1935)).

[78] *Ickes* v. *Fox* (300 U. S. 82, 95 (1937)).

[79] *Brush* v. *Commissioner* (300 U. S. 352, 367 (1937)).

[80] The holding in *Kansas* v. *Colorado* (206 U. S. 46 (1907)) that the United States possessed no implied power to regulate the waters of nonnavigable interstate streams is not considered by the United States as authority against its position in this case, for the general proprietary interest of the United States in nonnavigable waters was not in issue there. The Court conceded the power of the Federal Government to control the disposition of the public domain.

[81] 32 Stat. L. 388, ch. 1093 (June 17, 1902).

[82] 206 U. S. 46 (1907).

[83] Noting the statement of that purpose made in *Wyoming* v. *Colorado* (259 U. S. 419, 463 (1922)).

of comity and as a convenient means of giving public notice of the intention of the United States to use its own waters. The final proviso of the section that the right of use of water acquired under the Act shall be appurtenant to the land irrigated is a departure from the laws of many States. The provision in section 5 that title shall not permanently attach to purchased water rights until final payment reserves title in the United States; yet under the laws of many States the United States would have no title because appropriative rights vest only upon application to beneficial use.

Certain amendments to the Reclamation Act indicate the disregard of Congress for State laws in disposing of water appropriated by the United States under the Act.[84]

In addition, the rights of the United States in the waters of the public domain are greater than those of a private appropriator, for the United States, in addition to its powers as an owner, has governmental power with respect to its property under clause 2, section 3, article IV of the Constitution.[85]

*That the title to the unappropriated nonnavigable waters on the public domain therefore remains in the United States, free from the sovereign control of any State. No State, over the protest of the United States, can stand in judgment for the United States with respect to such waters.*—For the most part, the question of the ownership of the unappropriated waters of nonnavigable streams is of no practical importance. Private persons may appropriate such waters upon compliance with State laws, and since the rights of such persons thus acquired are valid as against the United States, it is in fact immaterial whether those rights be regarded as having been acquired from the United States or from the States. Furthermore, the United States does not propose in this litigation either to interfere with or jeopardize in any way the private rights which have already been acquired, or to attempt to change the present system whereby private rights may be acquired upon compliance with State laws. The question is important, however, in determining whether the United States is subject to State control in respect to the use and distribution of the waters which it has appropriated.

### OWNERSHIP OF WATERS OF NONNAVIGABLE STREAMS IN STATES CREATED OUT OF THE PUBLIC DOMAIN: CASE OF THE STATES

All three States (Nebraska, Wyoming, and Colorado) filed objections to the intervention of the United States. Some of those objections have been anticipated in setting forth the position of the United States; hence the case of the States will be stated more briefly. All three States have taken substantially similar positions, and except as otherwise noted, the position stated below is that of all of these States.

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[84] Specifically noted: The Act of April 16, 1906 (34 Stat. L. 116, ch. 1631) authorizes the Secretary of the Interior to lease surplus power or power privileges, and the Act of February 25, 1920 (41 Stat. L. 451, ch. 86), authorizes the Secretary to sell water for purposes other than irrigation—in both cases disregarding State laws concerning priority of water uses. The Act of February 21, 1911 (36 Stat. L. 925, ch. 141), authorizes the Secretary to contract for the supplying of water not needed for project lands at charges fixed by the Secretary, yet the law of Wyoming vests the power to fix such charges in the State. Section 8 of the Reclamation Act makes the water appurtenant to the land irrigated, but section 41 of the Act of May 25, 1926 (44 Stat. L. 636, ch. 383), authorized other disposition of water rights appurtenant to lands found to be permanently unproductive, in spite of the Wyoming law providing that direct-flow rights cannot be detached from lands for which acquired without loss of priority.

[85] Citing *Utah Power & Light Co.* v. *United States* (243 U. S. 389 (1917) ).

The three States contend:

*That the court has already decided that the United States is not an indispensable party to this suit. The United States is not even a proper party.*—The Supreme Court has already decided in this case [86] that the United States is not an indispensable party to this suit and that Wyoming would stand in judgment for the United States as for any other appropriator. Although the ruling of the Court in terms is applicable to the Secretary of the Interior—it being stated that his rights can rise no higher than those of Wyoming, and that an adjudication of Wyoming's rights will necessarily bind him—it is equally applicable to the United States because the Secretary of the Interior could have no interest in the case except as he would represent the interest of the United States.

Furthermore, the United States is not even a proper party to this suit, because in law it is not the "appropriator" in respect to the appropriations made for the two reclamation projects involved. The water rights of those projects belong to the owners of the lands to which the waters are applied.[87]

*That Congress has permanently and irrevocably dedicated the non-navigable waters on the public domain to the use of the public under the appropriation laws of the States.*—Irrespective of the character of the title derived by the United States by virtue of the various cessions of Western territory, Congress, by the Acts of 1866, 1870, and 1877 has permanently "reserved" or "dedicated" such waters for the use of the public and made them subject to appropriation under the laws of the various States. The Supreme Court has said, in *California-Oregon Power Co.* v. *Beaver Portland Cement Co.*" [88] that "following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, * * *." The Congressional Acts, therefore, were *final* and *irrevocable*.[89] Section 8 of the Reclamation Act, discussed above in connection with the position of the United States, is a further recognition by Congress of the plenary power of the States in this field.

*That to uphold the ownership of unappropriated waters by the United States would be to discriminate against States in which the appropriation doctrine obtains.*—The several States stand upon a basis of equality of right with respect to each other. To uphold the Government's contention and deny the title of the States to the unappropriated waters on the public domain is to deny to the States created out of the public domain, which have adopted the doctrine of appropriation, the equality with other States to which they are entitled. Each State is free to adopt either the doctrine of appropriation or the riparian doctrine. A grant by the United States of riparian land in a State in which the riparian doctrine obtains carries with it riparian rights and makes such rights wholly subject to the sovereign power of the State.[90]

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[86] *Nebraska* v. *Wyoming* (295 U. S. 40 (1935) ).

[87] Citing *Ickes* v. *Fox* (300 U. S. 82 (1937)). In its reply brief the United States cited *Ide* v. *United States* (263 U. S. 497, 506 (1924)) *contra*, and urged that the United States at least is the owner of the water appropriated for the Kendrick Project, the rights of which have not yet become appurtenant to any land; and contended that *Ickes* v. *Fox* is not against its view.

[88] 295 U. S. 142, 163–164 (1935).

[89] Also citing in support *Ickes* v. *Fox* (300 U. S. 82 (1937)) and *Brush* v. *Commissioner* (300 U. S. 352 (1937)).

[90] See ch. 2 herein, pp. 34, 72, and following, concerning the right of each State to adopt its own system of water law, and the effect of the Desert Land Act upon the water rights of patentees of public land. See also, in ch. 2 the discussions of the riparian doctrine in California, Oregon, South Dakota, and Washington.

The result of the full implications of the position of the United States, on the other hand, would be discriminatory against a State in which the doctrine of appropriation obtains, because the unused water would not be subject to the police power of the State except, of course, by the revocable permission of Congress.

*That the admission of States under constitutions declaring that waters are the property of the public or of the State is an agreement with Congress as to such ownership.*—Colorado was admitted to the Union after the passage by Congress of an enabling act which provided that the admission of the State should be effective upon the adoption of a State constitution. The State constitution, which was adopted March 14, 1876, provided in section 5, article XVI:

> The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

The constitution of Wyoming was before Congress at the time of the passage of the enabling act, and by the Act of Admission was "accepted, ratified, and confirmed" by Congress. The constitution was in effect July 10, 1890. Section 1 of article VIII provided:

> The waters of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state are hereby declared to be the property of the state.

Both Colorado and Wyoming contend that their admission to the Union under constitutions which declared that waters were the property of the public or of the State, in effect constituted an agreement by Congress that such waters belonged to the States.

*That if the United States originally obtained any title to waters on the public domain, it was a title to be held in trust; and the authority of the United States is limited to the control of navigation and the reclamation of public lands.*—Colorado contends that the United States obtained no title to the water or even the rights to the water of the public domain by virtue of the cessions of Western territory; or if it obtained such title, that it was a title to be held in trust. Water in its natural state is not subject to ownership; and except as to water reduced to possession, only the right to use the water is subject to ownership. No true property right in water can be obtained until the water is actually applied to a beneficial use. The United States, therefore, could have no property right in waters of the territory ceded unless it actually applied the waters to a beneficial use. Furthermore, if the United States obtained any title to the waters or the rights to the waters of the public domain by virtue of the cessions, such title was obtained to be held in trust for the benefit of the States to be created out of the public domain and in trust ultimately for the benefit of private appropriators.

Nebraska further contends that the authority of the United States over the waters and streams within the States is limited to two features: (1) control of navigability, and (2) the preservation of water rights equitably incident to the public lands, and the reclamation of such lands through irrigation. Otherwise, the States have complete authority over such waters.[91]

[91] Citing in support *United States* v. *Rio Grande Dam & Irr. Co.* (174 U. S. 690, 703–706 (1899)); *Gutierres* v. *Albuquerque Land & Irr. Co.* (188 U. S. 545, 552–556 (1903)); *Wyoming* v. *Colorado* (259 U. S. 419, 460–65 (1922)); *California-Oregon Power Co.* v. *Beaver Portland Cement Co.* (295 U. S. 142 (1935)).

*That a determination of the question of ownership of unappropriated water is not necessary in this interstate suit.*—Nebraska contends that the determination of the questions raised by the United States in connection with its intervention is not necessary in this suit, which was brought simply to obtain an equitable apportionment among the States of the waters of an interstate stream. The question of the title to the unappropriated waters of nonnavigable streams and lakes is wholly academic and moot.

By the Acts of 1866, 1870, and 1877, Congress has recognized the authority of the States to control the disposition of nonnavigable waters on the public domain, and the right of private persons to appropriate such waters upon compliance with State laws. It is immaterial, from a practical point of view, whether water rights so acquired are deemed to be acquired by virtue of Federal legislation or by virtue of State law. In either case such an appropriation is good as against the United States. The power of Congress, if any, to modify by amendment or to repeal the acts mentioned, and the possibility that Congress might attempt to exercise such power, raise a moot question. The Court is bound to decide the issues of this case on the basis of existing legislation insofar as such legislation is applicable. If and when Congress attempts to modify by amendment or to repeal the acts mentioned, then will be a proper time to decide the questions raised by the motion of the United States to intervene and its petition of intervention.

Nebraska further contends that section 8 of the Reclamation Act is a further recognition by Congress of the authority of the States in this field. Whether that section be regarded as directory, as the United States contends, or as mandatory, is immaterial. In either case, it is binding upon the Secretary of the Interior. The possibility that Congress might change this provision of law also raises a moot question.

# APPENDIX

## Abstracts of State Statutory Provisions Relating to Important Principles Governing the Appropriation of Water, Determination of Rights, and Administration of Rights

The following summaries bring together, for each of the 17 Western States, important principles contained in the statutes governing the appropriation and use of water, and which have been referred to in various portions of the preceding text.

These summaries do not purport to be digests of the State water codes. Nor do they refer to matters of procedure other than to show the general methods by which water must be appropriated, rights of use determined, and the distribution of water effected under the State statutes. For example, in various places herein it is stated that a particular action may be taken only with the prior approval of the State engineer. In many such instances the State engineer's approval can be granted only after a hearing at which objections to the proposed action may be made, and in some such instances specific provision is made in the statute for review of the decision of the particular controversy. It has not been deemed necessary in this statement of general principles to include such further details, nor to include statements of the right of appeal from judgments of courts, rehearings, intervention of parties, steps necessary to be taken in perfecting an appropriative right under permit from the State, detailed duties of the water administrative organization, and other such matters which occupy large portions of the water codes.

The principles and procedure governing the appropriation of water and the exercise of water rights, usually stated in great detail in the statutes, are supplemented in many of the States by rules and regulations and explanatory material issued by the water administrative authorities.

### ARIZONA

(All references, unless otherwise indicated, are to sections of the Arizona Revised Code of 1928)

#### Appropriation of Water

1. The water of all sources flowing in streams, canyons, ravines, or other natural channels or in definite underground channels, whether perennial or intermittent, flood, waste, or surplus water, and of lakes, ponds, and springs on the surface belongs to the public and is subject to appropriation and beneficial use (3280).

1.1. During years when a scarcity of water exists, owners of lands shall have precedence of the water for irrigation according to the dates of their appropriation or their occupation of the lands by themselves or their grantors. The oldest titles shall have precedence (3320).

1.2. Any person may appropriate any unappropriated water for domestic, municipal, irrigation, stockwater, waterpower, or mining uses, for his personal use or for delivery to consumers. The first appropriation shall have the better right (3281).

1.3. Beneficial use shall be the basis, measure, and limit to the use of water (3280).

2. Any person, including a municipality, the State or the United States, intending to acquire the right to the beneficial use of water shall make an application to the State water commissioner for a permit to appropriate (3284).

2.1. An application for the appropriation of waters of a stream for generation of electric energy exceeding 25,000 horsepower, or for a permit to build therefor, shall not be approved or granted unless authorized by act of the legislature (3285).

2.2. In case of reservoirs, the party proposing to store the water applies for a primary permit and the party proposing to put the stored water to beneficial use applies for a secondary permit (3289).

2.3. The commissioner shall approve all applications in proper form for beneficial purposes, and may approve an application for less water than applied for if substantial reasons exist (3285).

2.3.1. Applications for municipal uses may be approved to the exclusion of all subsequent appropriations, if the commissioner decides that the estimated needs of the municipality so demand (3285).

2.3.2. As between pending conflicting applications where the supply is not sufficient for all, preference shall be given according to the relative values to the public, thus: 1. Domestic and municipal uses, domestic use including gardens not exceeding one-half acre to each family; 2. Irrigation and stock watering; 3. Waterpower and mining (3285).

2.3.3. Permits (approval of applications) shall be accepted on condition that no value in excess of the amount paid to the State shall be claimed in connection with public regulation of rates, or in the acquisition of the rights by the State, a city, county, municipal water or irrigation district, or any political subdivision (3287).

2.4. The commissioner must reject an application if the proposed use conflicts with vested rights, is a menace to the safety, or against the interests and welfare of the public (3285).

2.5. Upon perfecting the appropriation and completion of beneficial use, a certificate is issued to the applicant (3290).

2.5.1. Certificates for rights to use water for power shall limit the right to 40 years from date of application, subject to a preference right of renewal under the laws existing at the date of expiration (3290).

2.6. A permit may be assigned, but the assignment is not binding except upon the parties unless approved by and filed with the commissioner (3287).

3. An application for the appropriation of water shall not be denied because the point of diversion or any portion of the works or the place of intended use is in another State. Where either the point of diversion, or any of the works, or the place of intended use, or the lands or part thereof to be irrigated are within Arizona, the permit shall issue. The commissioner may, however, in his discretion decline to issue a permit where the point of diversion is in Arizona, but the place of beneficial use is in some other State (3291).

4. Whenever the owner of a right to use appropriated water fails so to use for 5 successive years, the right ceases and the water reverts to the public and is again subject to appropriation (3280).

5. An applicant or any person whose rights are affected by the commissioner's decision may appeal to the superior court (3292).

### Determination of Rights

1. The commissioner may, and upon a petition filed by one or more water users upon any stream or water supply shall, if the facts and conditions justify, determine the rights of the various claimants. If an action has been brought in a State court for such determination, the court may transfer the action to the commissioner for determination (3293).

2. The commissioner upon the completion of investigations and taking of testimony makes findings of fact and an order determining and establishing the several rights to the waters of such stream or supply (3300).

3. The record is thereupon filed in the superior court. Each claimant who has appeared in the proceeding is served with notice, the court proceedings thereafter to be as nearly as possible like those of a suit in equity. Exceptions may be filed to the findings of the commissioner; if no exceptions are filed the court shall enter a decree affirming the commissioner's determination. Hearings are held upon the exceptions, and the final decree affirms or modifies the order of the commissioner (3300 and 3301).

4. Each person represented in the determination is issued a certificate, containing the priority of date and extent and purpose of the right (3303).

### Administration and Distribution of Water

1. The State water commissioner has general control and supervision of the waters of the State and of their appropriation and distribution, except as to the distribution reserved to water commissioners appointed by the courts under existing decrees (3282).

1.1. The State water commissioner shall create water districts when the necessity therefor arises, and from time to time as claims to the use of water shall be determined (3307).

1.2. The commissioner shall appoint a water superintendent for each district, whose duties are to regulate the distribution of water according to the rights of the ditches therein. He has authority to regulate headgates and may make arrests. Injunction may be issued against the superintendent upon application of any interested party if it appears that he has failed to carry into effect the order of the commissioner or the court decree determining existing rights (3307 to 3309; 3315).

2. Owners of reservoirs may use stream channels for the conveyance of stored water to consumers, upon notification to the water superintendent (3312).

3. Natural stream channels may be used generally to carry water, without diminishing the quantity flowing which has been appropriated, the water superintendent to divide the water where the interested parties cannot agree among themselves (3323).

4. Water users owning land with attached water rights may rotate in the use of their common supply, and the superintendent must distribute the water in accordance with the terms of their written agreement of rotation (3313).

5. Water used for irrigation purposes shall remain a right appurtenant to the land upon which it is used. If at any time for any natural cause beyond the control of the owner, it becomes impracticable to use the water beneficially or economically on such land, the right may be severed from the land and simultaneously transferred and become appurtenant to other land without losing priority, with the approval of the commissioner, if this can be done without detriment to existing rights (3314).

6. The approval of the commissioner must be obtained before any proposed change of use of water appropriated for domestic, municipal, or irrigation purposes is effected (3285).

6.1. The consent of the legislature must be obtained if the change contemplates the generation of hydroelectric energy in excess of 25,000 horsepower (3285).

## CALIFORNIA

(All references herein, unless otherwise indicated, are to sections of the Water Commission Act, which appears as Act 9091, Deering's General Laws of California 1937, vol. II.)

### Appropriation of Water

1. All waters flowing in any river, stream, canyon, ravine, or other natural channel, not applied to useful and beneficial purposes upon riparian lands or

reasonably needed therefor or otherwise appropriated, are declared to be public waters of the State subject to appropriation in accordance with the provisions of the water commission act (11). Water which having been appropriated or used flows back into a stream, lake, or other body of water may be appropriated (17).

1.1. Appropriations of ground waters under the water commission act refer only to subterranean streams flowing through known and definite channels (42).

1.2. The right to water in any natural stream or watercourse is limited to reasonable beneficial use and does not extend to waste or unreasonable use or unreasonable method of use or diversion (1, as amended by Stats. 1939, p. 2420; Const. art. XIV, sec. 3).

1.2.1. The term "useful or beneficial purposes" shall not be construed to mean the use in any one year of more than 2½ acre-feet per acre in the irrigation of land not in cultivated crops (42).

2. The division of water resources of the department of public works, as statutory successor of the State water commission, shall allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated (15). The acts of the chief of the division in such matters shall be deemed the acts and orders of the division (1, as amended by Stats. 1939, p. 2421). Any person, firm, association, or corporation may apply to the division for a permit to make an appropriation (17). Any person, firm, association, or corporation interested in an application may bring action in the superior court for a review, after final action by the division (1b, as amended by Stats. 1939, p. 2421).

2.1. The procedure in the water commission act is the exclusive method by which water subject to the provisions of the act may be appropriated (1c).

2.2. The priority dates from the date of the application (17).

2.3. It is declared to be the established policy of the State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation, and in acting upon applications to appropriate water, the division is to be guided by this declaration (15).

2.3.1. Application for a permit by a municipality for domestic purposes shall be considered first in right, irrespective of whether it is first in time. If permission is granted a municipality to appropriate any quantity of water in excess of existing needs, pending the application of the entire amount permitted, the division may issue permits for temporary appropriation of the excess quantity used from time to time, or the division may authorize the municipality to become as to such surplus a public utility for the time being. When the municipality desires to use the additional water it must make compensation for the facilities of the temporary permittee so rendered valueless. This compensation may be determined through eminent-domain proceedings (20).

2.4. The division has authority to grant a permit or to refuse to grant it and to reject any application, after hearing (1a). An application must be rejected when, in the judgment of the division, the proposed appropriation would not best conserve the public interest (15).

2.5. Upon completion of the appropriation a license to appropriate water is issued. The holder of a permit to whom a license has been refused may bring an action in court for review (19).

2.5.1. Every permit or license shall include an enumeration of conditions under which it is issued, and the statement that the appropriator shall take the same subject to such conditions (20).

2.5.2. At any time after 20 years after the granting of a license, the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State may purchase the works and property used in effectuating such license; the price may be determined in eminent-domain proceedings (20).

2.5.3. Each permit or license must be accepted under the condition that no value in excess of amounts paid to the State therefor shall ever be claimed with

respect to any valuation in connection with public-utility regulation or when acquired by the State or any political entity mentioned in the preceding paragraph (20).

3. The entire flow of a natural stream which carries water from California into another State is subject to use in California under the laws thereof. Rights to the use of such water held under California laws shall be prior and superior to any rights thereto held under the laws of any other State (Civ. Code, sec. 1410a).

4. Water may be appropriated in California for beneficial use in another State only when, under the laws of the latter, water may be lawfully diverted therein for use in California. Upon any interstate stream a right of appropriation having the point of diversion and place of use in another State and recognized by the laws thereof, shall be as effective as if the point of diversion and place of use were in California, provided that the laws of such State have reciprocal effect. This does not apply to interstate lakes or streams flowing in or out of such lakes (15a).

5. Upon failure to use beneficially water for which a right has vested by appropriation, for a period of 3 years, such unused water reverts to the public and becomes unappropriated public water (20a).

6. Nothing in the water commission act shall be construed as to deprive any person, firm, association, or corporation of the right of appeal conferred under the laws of the State (43).

## Determination of Rights

1. In case suit is brought in any court of competent jurisdiction for determination of rights to water, the court may in its discretion refer the same to the division as referee; or the court may refer the suit to the division for investigation of one or more of the physical facts involved (24).

1.1. In the event of reference to the division for investigation, the division may base its report solely upon its own investigation or in addition it may hold hearings. The report of the division as referee shall be subject to review by the court upon exceptions thereto (24).

2. In case suit is brought in a Federal court for determination of water rights within or partially within the State, the division may accept a reference of such suit as master or referee for such court (24a).

3. Upon petition signed by one or more claimants to the use of water of a stream system, requesting the determination of rights of the various claimants thereto, it shall be the duty of the division if upon investigation it finds that the facts are such that the public interest will be served, to grant the petition. Rights may be so determined whether based upon appropriation, riparian rights, or other basis of right, but not including the right to take water from an underground supply other than from subterranean streams flowing through known and definite channels (25).

3.1. Hydrographic investigations are made by the division, known claimants notified, proof of claims received, hearing of contests held, and an order made determining and establishing the several appropriation rights of the stream (26 to 36).

3.2. The order and all data are filed with the superior court. Exceptions may be filed by any party interested; if no exceptions are filed the court enters a decree affirming the order of determination. Hearings are held upon exceptions, the proceedings to be as nearly as possible in accordance with the rules governing civil actions. If in the judgment of the court the State is a necessary party to the action, the court shall make an order to that effect, service to be made upon the attorney general. The final decree shall declare the water right by appropriation adjudged to each party and the conditions of its priority (36a to 36c).

3.3. A certificate of appropriation is issued to each claimant represented in the determination (36d).

### Administration and Distribution of Water

1. The division shall create watermaster districts from time to time as water rights are determined, or agreements between claimants are entered into, or permits and licenses subsequently issued (37).

2. Upon request of the owners or governing bodies of at least 15 percent of the means of direct diversion in any watermaster district, the division in its discretion may appoint a watermaster and deputy watermasters. The duty of the watermaster, under the general supervision and control of the division of water resources, shall be to divide the waters among those entitled to divert from the streams and to adjust the means of diversion accordingly (37a). He has the power to make arrests (37d).

2.1. Any person injured by any act of the watermaster may apply to the superior court of the county for an injunction (37a).

3. Natural channels may be used to convey waters in connection with municipal purposes, drainage, irrigation, or flood control, where the quantities of water at points of diversion of others shall not be lessened thereby, and as a means of conveying appropriated waters (Civ. Code, sec. 1410b). Water appropriated may be turned into the channel of another stream and mingled with its waters and later reclaimed, but in so doing the water already appropriated by others must not be diminished (Civ. Code, sec. 1413).

4. In the determination of appropriative rights by stream systems, as to water used for irrigation, the decree shall declare among other things the specific tracts of land to which the water shall be appurtenant (36c).

5. The point of diversion of appropriated water may be changed if others are not injured thereby (Civ. Code, sec. 1412). The point of diversion, place of use, or character of use of water appropriated under the water commission act may be changed upon petition to the division, finding by the division that the change will not operate to the injury of other users, and permission by the division to make the change (16 and 39).

## COLORADO

(All references are to sections of Colorado Statutes Annotated 1935, ch. 90, unless otherwise indicated)

### Appropriation of Water

1. The unappropriated water of every natural stream is the property of the public and is dedicated to the use of the people of the State, subject to appropriation (Const. art. XVI, sec. 5). The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied (Const. art. XVI, sec. 6).

1.1. Persons who have received the benefits of natural overflow from streams in irrigation of meadowland may, in case of diminution of stream flow, construct ditches having the same priorities as the original natural irrigation (19).

1.2. Ditches constructed for the purpose of utilizing waste, seepage, or spring waters shall be governed by the same laws relating to priority as those for utilization of water of running streams; the person upon whose lands the seepage or spring waters first arise to have the prior right if capable of use on his lands (20).

1.3. Waters of natural flowing springs may be appropriated for all beneficial uses the same as water of natural streams, irrespective of whether the spring waters are tributary to natural streams. Rights of appropriators from springs not tributary to natural streams shall be fixed among themselves; in absence of decree or contract, adverse use for more than 20 years establishes a right of use irrespective of record filing of claim (21). This section is not to be construed as amending or repealing section 20, or as impairing vested rights (22).

1.4. Water raised from mines or natural channels, in the business of mining or milling, and having flowed from the premises of the persons or corporations which raised the water to any natural channel or gulch, shall be considered beyond the control of such parties and may be taken and used by others as in case of natural watercourses (ch. 110, sec. 212).

1.5. Water appropriated for domestic purposes shall not be used for irrigation, except that water supplied to cities and towns may be used for sprinkling streets, extinguishing fires, and household purposes (24).

2. Every person, association, or corporation shall, within 60 days after commencing the construction or enlargement of any reservoir, ditch or canal, or change of location of any ditch, file a claim therefor with the State engineer. If the data are found sufficient for a clear presentation of facts concerning the claim, the papers are to be accepted for filing by the State engineer and reproductions made and sent to the claimant, who must file the same with the county clerk and recorder within 90 days from the time stated as the date of commencement (27 to 31).

2.1. The Colorado law does not provide for applications for permits to appropriate water.

2.2. Due diligence must be exercised in the construction of projects (32).

2.3. Transfers of claims are noted on the State engineer's records (193).

2.4. The appropriation of water for a reservoir, when decreed, shall be superior to an appropriation for direct application claiming a date of priority subsequent in time to that of the reservoir (79).

3. It is unlawful for any person, corporation, or association to transport the waters of any springs, reservoir, lake, pond, creek, river, stream, or watercourse of the State into any other State for use therein (1).

### Determination of Rights

1. For the purpose of hearing, adjudicating, and settling all questions concerning the priority of appropriation of water, the district court of the proper county is vested with exclusive jurisdiction (150 and 154).

2. Any person, association, or corporation interested as owner of any ditch, canal, or reservoir may petition the judge of the district court for an adjudication (158). All claimants in the water district are made parties (161 to 163).

2.1. When any general adjudication of priorities shall be commenced, the court shall command the State engineer to certify a complete list of all filings of appropriation not canceled or submitted for adjudication (193).

2.2. All available evidence shall be considered and decree shall be made determining and establishing the several priorities of right and giving each priority a number (158 and 165).

2.3. A certificate showing the date and amount of the appropriation and the priority number shall be given to the appropriator (158).

3. No judicial decree fixing priorities shall be effective until a certified copy thereof shall be filed in the office of the State engineer and the division engineer (159).

4. The court may appoint a referee in such cases as it deems necessary (166 to 181).

### Administration and Distribution of Water

1. The State engineer shall have general supervising control over the public waters of the State (203). He has general charge of the work of the irrigation division engineers and the district water commissioners (206 and 224).

2. An irrigation division engineer is appointed for each irrigation division created within the State, whose duty is to supervise the distribution of water in the water districts composing his division, according to decrees of adjudication, under the general supervision of the State engineer (224 and 241). The irrigation divisions are created by statute (224 to 226, 232).

2.1. Any party who may deem himself injured or discriminated against by any order or regulation of the division engineer shall have the right to appeal to the State engineer who shall, after due notice, hold a hearing and may suspend, amend, or confirm the order complained of (241).

2.2. A water commissioner is appointed for each water district, whose duty is to divide the water of the natural streams among the several ditches according to priorities. He is vested with police powers and may adjust the headgates within his district (331, 334 and 335). The water districts are created by statute (250 to 326).

2.3. In case of emergency, a water commissioner at large may be appointed within a division (342).

3. Reservoir water may be transported in natural stream channels provided the ordinary high-water mark is not exceeded, transmission losses as determined by the State engineer to be deducted from the quantities so transported (80 and 81). Water generally may be diverted from one public stream and discharged into another, the quantity diverted from the latter to be reduced by transmission losses determined by the State engineer (100).

4. Reservoir water may be delivered into a ditch or public stream to supply appropriations, in exchange for equal quantities diverted upstream less losses determined by the State engineer, provided others are not injuriously affected (103).

5. Holders of water rights from the same stream may make temporary exchanges of water for the purpose of saving crops or more economical use (110).

6. The point of diversion of water may be changed upon petition to the court from which the original decree issued, hearing, and decree authorizing the change and protecting the vested rights of others (104 to 109).

7. When the waters of a natural stream are not sufficient for all those desiring the same, those using the water for domestic purposes shall have the preference over claimants for any other purpose, and those using water for agricultural purposes shall have preference over those using it for manufacturing purposes (Const., art. XVI, sec. 6).

## IDAHO

(All references herein unless otherwise indicated are to sections of the Idaho Code Annotated, 1932)

### Appropriation of Water

1. All the waters of the State, when flowing in their natural channels, including the waters of all natural springs and lakes, are declared to be the property of the State (41–101). The right to the use of the waters of rivers, streams, lakes, springs, and subterranean waters may be acquired by appropriation (41–103). The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied, except that the State may regulate and limit the use thereof for power purposes (Const., art. XV, sec. 3).

1.1. As between appropriators the first in time is the first in right (41–106).

1.2. All ditches for the purpose of utilizing seepage, waste, or spring waters of the State shall be governed by the same laws relating to priority of rights as ditches utilizing water of running streams (41–107).

1.3. The appropriation must be for some useful or beneficial purpose (41–104).

1.3.1. No one shall be authorized to divert for irrigation purposes more than 1 cubic foot per second of the normal flow for each 50 acres irrigated, or more than 5 acre-feet of stored water per annum for each acre irrigated, unless it can be shown to the satisfaction of the department of reclamation that a greater amount is necessary. Where both normal flow and flood or winterflow water are concerned, the total amount claimed shall not exceed the equivalent of a continuous flow during the irrigation season of 1 cubic foot per second for 50 acres or 5 acre-feet of stored water per acre (41–202, amended by Laws 1935, ch. 145). No license or court decree shall be issued confirming the right to more than 1 cubic foot per second for each 50 acres unless it can be shown to the satisfaction of the department of reclamation and the court that a greater amount is necessary (41–214).

2. Any person, association, or corporation intending to acquire the right to appropriate water shall, before commencing any work, make application to the department of reclamation for a permit to appropriate (41–202, amended by Laws 1935, ch. 145).

2.1. All rights to divert and use the waters of the State for beneficial purposes shall be acquired and confirmed under the provisions of the appropriation statute (41–201).

2.1.1. However, the Idaho Supreme Court has held in a number of cases that the statutory method is not the exclusive method of appropriating water. (See ch. 2, p. 87.)

2.2. In case of an application involving the development of more than 500 theoretical horsepower or more than 25 cubic feet per second, a hearing is held at which any interested person, firm, association, or corporation may protest. If no protest is filed the commissioner of reclamation may approve the application (41–203, amended by Laws 1935, ch. 145).

2.3. If the proposed use will reduce the quantity of water under existing rights, or if the water supply is insufficient or other substantial reasons exist, the commissioner may reject the application or partially approve it and grant a permit for a less quantity of water than applied for. These provisions apply to any stream on an interstate boundary where the water sought to be appropriated has its source largely within Idaho, irrespective of the location of any proposed power generating plant. Appeal may be taken to the district court (41–203, amended by Laws 1935, ch. 145).

2.4. Approval of an application constitutes a permit. Appeal may be taken to the district court in case an applicant is aggrieved by the endorsement upon his application (41–204, amended by Laws 1935, ch. 145).

2.5. On proof of completion of works a certificate is issued, and on proof of application to beneficial use a license is issued. Appeals may be taken to the courts (41–208 to 41–217).

2.6. No permit shall be issued to appropriate the water of any lake not exceeding 5 acres in surface area at high-water mark, pond, pool, or spring located wholly upon the lands of a person or corporation except to or with the formal permission of such owner (41–206 and 41–207).

2.7. The Division of Grazing of the United States Department of the Interior may appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain, upon application to the department of reclamation. The permit, license, and certificate of water right shall be conditioned that the water appropriated shall never be utilized thereunder for any purpose other than the watering of livestock without charge on the public domain. The maximum flow shall be 5 miner's inches, and the maximum storage 15 acre-feet in any one storage reservoir. The permit, license, and certificate of water right may be revoked by the commissioner of reclamation in his discretion for the purpose of issuing permit for the construction of any reservoir to have a storage capacity of at least 500 acre-feet of water for irrigation purposes. The United States Bureau of Reclamation is not hereby prevented from appropriating water under the general laws of the State (Laws 1939, ch. 205).

3. Appropriations may be made within Idaho for use in Oregon under prescribed conditions (41–401 to 41–407). No permit to appropriate the public water of Idaho shall be granted by the department of reclamation unless the sister State to which it is desired to divert the water shall have enacted reciprocal legislation. Such appropriations from certain-named sources are prohibited (41–408). The department of reclamation shall allow the appropriation of water within Idaho for use in Wyoming only in the event of reciprocal legislation by Wyoming (41–409).

4. All rights to the use of water shall be lost and abandoned by failure for a term of 5 years to apply it to beneficial use. Such water shall revert to the State and be again subject to appropriation. Upon proper showing for good reason for nonapplication to beneficial use, the commissioner of reclamation may grant an extension of time for not to exceed 5 years (41–216, amended by Laws 1933, ch. 193).

### Determination of Rights

1. Whenever suit shall be filed for the purpose of adjudicating water rights from any stream, and before such adjudication is made, the judge shall request the department of reclamation to make a hydrographic survey of the stream which shall be accepted as evidence in the determination of such rights (41–1301).

2. When an adjudication has been made, any holder of a water right from such source whose right was not thereby determined, or who has acquired subsequently a water right therefrom, may bring an action to obtain a summary supplemental adjudication of his right, accepting the previous decree as binding. The right thus established shall not be deemed adjudicated, but prima facie merely, and may be attacked in a collateral action (41–1305).

### Administration and Distribution of Water

1. The department of reclamation has immediate direction and control of the disposition of water from all streams in accordance with rights of prior appropriation (41–502).

1.1. The department shall divide the State into water districts, including streams or water supplies the priorities of which have been adjudicated. Water masters are elected by the holders of water rights, in default of which the department makes the appointment. Their duties are to distribute the water among those entitled thereto and to adjust headgates (41–504 to 41–507).

2. Appropriated water may be turned into a different stream channel and reclaimed thereafter and reservoir water may be exchanged for direct flow, due allowance to be made for transmission losses and the rights of prior appropriators to be safeguarded (41–105). The owner of a reservoir may use the bed of a stream or natural watercourse for the conveyance of stored water under the supervision of the department of reclamation (41–701).

3. A right to the use of water shall become the complement of or one of the appurtenances of the land or other thing to which the water is applied (41–101). Water rights confirmed under the statute or by court decree shall become appurtenant to and shall pass with a conveyance of the land for which the right of use was granted (41–214 and 41–1302).

4. The place of diversion may be changed when others are not injured thereby (41–108). The use of water may be transferred from land to which it is appurtenant under the statute or by decree of court, to other land upon application to the department of reclamation, notice and hearing, and certificate of the commissioner of reclamation. Appeal may be taken to the courts (41–216, amended by Laws 1933, ch. 193).

5. When the waters of a natural stream are not sufficient for the use of all those desiring it, those using the water for domestic purposes shall (subject to limitations prescribed by law) have the preference over those claiming for any other purpose, and those using for agricultural purposes shall have preference over those using for manufacturing purposes. In an organized mining district those using the water for mining or milling purposes connected with mining shall have preference over those using for manufacturing or agricultural purposes. These provisions are subject to the laws regulating the taking of private property for public and private use (Const., art. XV, sec. 3).

## KANSAS

(All references herein are to sections of the General Statutes of Kansas, 1935)

### Appropriation of Water

1. The right to the use of running water in a river or stream for purposes of irrigation may be acquired by appropriation. As between appropriators, the one first in time is first in right (42–101).

1.1. In the portion of the State west of the 99th meridian all natural waters, whether standing or running, and whether surface or subterranean, shall be devoted first to purposes of irrigation in aid of agriculture, subject to ordinary domestic uses; and second, to other industrial purposes; and may be diverted

from natural beds, basins, or channels for such purposes and uses. Such diversion shall not interfere with any prior vested right of appropriation for the same or a higher purpose without condemnation. Natural lakes and ponds of surface water having no outlet shall be deemed parcel of the lands on which situated, and only the proprietors shall be entitled to appropriate the same (42–301).

1.2. All water flowing in subterranean channels and courses, or flowing or standing in subterranean sheets or lakes, south of Township 18 and west of the 99th meridian, shall belong and be appurtenant to the lands under which they flow or stand and shall be devoted, first, to the irrigation of such lands in aid of agriculture, subject to ordinary domestic use; second, subject to such use, may be devoted to other industrial purposes. Appropriations heretofore made are not to be affected (42–305).

1.2.1. No person shall appropriate the water of any subterranean supply which naturally discharges into any superficial stream to the prejudice of any prior appropriator therefrom (42–306).

1.3. Every person complying with the act and applying water obtained by means of any artesian well to beneficial uses shall be deemed to have appropriated such water (42–307).

1.4. The appropriation is limited to water applied to beneficial uses (41–302).

1.5. Any person may take water from any stream for filling barrels or other vessels for his domestic use (42–311).

2. Any person desiring to appropriate water must post a notice at a conspicuous place at the point of diversion and file a copy with the county register of deeds (42–103).

3. An appropriation of water may also be made under the authority granted to the water commission, all the authority, powers and duties of which have been transferred to the division of water resources of the State board of agriculture (24–903 and 74–506b).

3.1. Surface or ground water may be appropriated by the Federal Government, corporations, and individuals upon application to the division (24–903).

3.2. Where appropriations of water for different purposes conflict they shall take precedence in the following manner: Domestic and transportation water supply, irrigation, industrial uses, water power (24–903).

4. Any person entitled to the use of water for the irrigation of lands or other purposes may store the same for use "presently thereafter" (42–313).

5. Failure to use appropriated water continuously for beneficial purposes without sufficient cause shown, shall be deemed an abandonment and surrender of the right (42–308).

5.1. Any person transferring any water right, and any person receiving any money or other thing of value in consideration of the prorating or rotating of water, shall be deemed to have abandoned all right to the use of such water. Rights of encumbrancers or equitable owners of lands or works to which the water is appurtenant are not to be affected by such abandonment (42–314).

### Determination of Rights

1. Exclusive jurisdiction for the ascertainment and settlement of the several rights and priorities of persons interested in appropriated water, is conferred upon the several district courts having jurisdiction (42–3109).

### Administration and Distribution of Water

1. The judge of the district court may appoint a water bailiff to enforce priorities of appropriative rights, to adjust headgates, and to divide the waters of any source of supply according to the rights and priorities of the parties entitled to receive the same (42–3109).

2. For the purpose of aiding in the performance of court decrees the division of water resources is charged with the duty of distributing the waters in natural streams according to adjudicated rights, and may regulate headgates and controlling works accordingly (74–509b and 74–509c).

3. Any person may conduct water into and along any of the natural streams or channels of the State and may withdraw the water at any point desired, due allowance being made for loss (42–303).

4. The persons entitled to the use of water from the same source may agree among themselves to rotate the use of their water, with due regard to the rights of others (42–340 to 42–347).

5. Every water right of every kind relating to the use of water for irrigation purposes shall be appurtenant to the land upon which it is established, by the use of water thereon, and shall pass with any and every conveyance of such land whether mentioned in the deed of conveyance or not, unless the same is expressly excepted from the operation of the conveyance. Such water right, however, may be the subject of separate transfer by deed as in case of real estate (42–121).

5.1. In the appropriation of water upon application to the division of water resources, the decisions of the division are to be guided by the principle (among others) that waters appropriated for irrigation are to become appurtenant to the lands to which they are applied, and underground waters for all purposes to become appurtenant to the lands under which they flow (24–903).

6. The place of diversion of water may be changed if others are not injured thereby and the conduit may be extended beyond the first place of use (42–102).

## MONTANA

(All references herein, unless otherwise indicated, are to the Revised Codes of Montana, 1935)

### Appropriation of Water

1. The right to the use of the unappropriated water of any river, stream, ravine, coulee, spring, lake, or other natural source of supply may be acquired by appropriation, and an appropriator may impound flood, seepage, and waste water in a reservoir and thereby appropriate the same (7093).

1.1. The appropriation must be for a useful or beneficial purpose (7094).

2. Two methods of appropriation are followed in Montana:

2.1. In case of unadjudicated waters, to appropriate water, the appropriator must post a notice in a conspicuous place at the point of intended diversion and file a notice of appropriation with the county clerk (7100). Failure to comply with the statutory requirement deprives the appropriator of the right to the use of water as against a subsequent claimant who complies therewith; by compliance, the right of use relates back to the date of posting notice (7102).

2.2. In case of adjudicated waters, the appropriator must employ a competent engineer to make a survey of the diversion works, and the appropriator shall file a petition with the clerk of the county court, which shall contain the declaration that the water rights sought shall be subject to the terms of any existing adjudication decree. Parties who may be affected are made defendants. At the conclusion of the trial, the court may enter an interlocutory or permanent decree allowing the appropriation sought, subject to all prior adjudicated rights. Failure to comply with the statutory provisions deprives the appropriator of the right to use water as against a subsequent appropriator mentioned in or bound by a decree of the court (7119 to 7133).

3. The United States may appropriate the water of streams or lakes subject to the general conditions applicable to appropriations by private individuals, provided such appropriation shall be held valid for 3 years after filing notice of appropriation. If, at the termination of 3 years, construction work has not been commenced, the right shall become null and void (7099).

4. Appropriation of water for use outside of the State shall not be made except pursuant to an act of the State legislature (7135).

4.1. Appropriations may be made in Montana by the State of Wyoming to which it is desired to divert water, provided Wyoming enacts reciprocal legislation; such appropriations to be valid only when the State water conservation board shall have issued certificates of appropriation (Laws 1937, ch. 64).

5. Upon abandonment and cessation of use of appropriated water, the right ceases; but questions of abandonment shall be questions of fact and shall be determined as other questions of fact (7094).

### Determination of Rights

1. In any action commenced for the protection of water rights, all persons who have diverted water from the same stream or source may be made parties and the court may in one judgment settle the relative priorities and rights of all such parties (7105).

1.1. Any person not a party to a decree, who prior to the decree claimed a water right affected thereby or who subsequently has made a valid appropriation, may petition the court for an order making him a party to the decree and establishing his right in relation to the other rights affected. Procedure is the same as that governing the appropriation of water from adjudicated streams (7124.1).

2. At the direction of the State water conservation board, the State engineer may bring action to adjudicate the water of any stream or any stream and its tributaries (Laws 1939, ch. 185).

2.1. In such actions, the State engineer upon direction of the board, or any party in any pending action for the adjudication of a water right, may apply to the court for the appointment of a referee to whom the court may submit any and all issues of fact (Laws 1939, ch. 185).

2.2. Either before or after the bringing of such action, the State engineer upon direction of the board, or upon direction of the court, shall make hydrographic surveys of the streams in question for the use of the board and the courts. Such data may be introduced as evidence in the adjudication proceedings (Laws 1939, ch. 185).

### Administration and Distribution of Water

1. Whenever rights to the use of the water of a source of supply have been determined by decree of court, it shall be the duty of the judge, upon application of the owners of at least 15 percent of the water rights affected, in the exercise of his discretion, to appoint one or more commissioners to distribute the water in question (Laws 1939, ch. 187).

1.1. The State water conservation board, or any person under contract with it, or any other owner of stored waters, may petition the court to have such stored waters distributed by the water commissioners. Upon issuance of the court's order, the commissioners are to distribute such waters in the same manner as decreed water rights (Laws 1939, ch. 187).

1.2. The commissioners may adjust headgates and may make arrests (7143).

1.3. A dissatisfied water user may file a complaint with the court (7150).

2. Appropriated water may be turned into the channel of another stream or from a reservoir into a stream and later reclaimed; water already appropriated by another not to be diminished in quantity or deteriorated in quality (7096).

3. Possessors of land susceptible of irrigation from any stream, the waters of which are so diminished by prior appropriation that a sufficient quantity is not available, who shall construct reservoirs or acquire interests in water stored in reservoirs of the State water conservation board or other owners, which reservoirs are located below the lands to be irrigated, may divert direct flow in exchange for equal quantities of stored water to be delivered to direct flow appropriators, if this can be done without injury to prior appropriators (Laws 1937, ch. 39).

4. The person entitled to the use of water may change the place of diversion if others are not thereby injured, or extend the conduit to another place of use or change the purpose of use (7095).

## NEBRASKA

(All references herein unless otherwise indicated are to sections of the Compiled Statutes of Nebraska, 1929)

### Appropriation of Water

1. The use of water of every natural stream is dedicated to the people for beneficial purposes (Const., art. XV, sec. 5). The water of every natural stream not heretofore appropriated is declared to be the property of the public and is subject to appropriation (46–502). The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest (Const., art. XV, sec. 6). As between appropriators the one first in time is the first in right (46–503).

1.1. The right to the use of running water flowing in any river or stream or down any canyon or ravine may be acquired by appropriation by any person (46–613).

1.2. Unappropriated water of a natural lake or reservoir may be appropriated for irrigating land for which water has already been appropriated, but for which in time of scarcity no water can be obtained under the original appropriation (81–6328).

1.3. The use of water for power purposes shall never be alienated, but may be leased or otherwise developed as prescribed by law (Const., art. XV, sec. 7).

1.4. The appropriation must be for some useful or beneficial purpose (81–6309).

1.4.1. No allotment from the natural flow of streams for irrigation shall exceed 1 cubic foot per second for each 70 acres of land, nor 3 acre-feet in the aggregate during 1 year for each acre of land, nor shall it exceed the least amount of water that experience may indicate is necessary in the exercise of good husbandry for the production of crops. These limitations do not apply to storage waters (81–6311); but another section provides that no appropriation of stored water for irrigation shall exceed 3 acre-feet per year for each acre of land (46–617).

2. The United States and every person intending to appropriate any public waters shall, before commencing work or taking water from constructed works, make application to the department of roads and irrigation for a permit to make such appropriation (81–6316).

2.1. The priority dates from the filing of the application (46–505 and 81–6317).

2.2. If there is unappropriated water in the source of supply and if such appropriation when perfected is not otherwise detrimental to the public welfare, the application shall be approved (81–6317).

2.2.1. The holder of an approved application for water power must enter into contract with the State of Nebraska, through the department of roads and irrigation, for leasing the use of all water so appropriated, such lease not to run for a greater period than 50 years. Upon expiration of such lease, the value of improvements shall be appraised by the department, subject to appeal to the district court, and the value as finally determined shall be paid to the lessee owning such improvements by any subsequent lessee (81–6318).

2.3. If there is no unappropriated water in the source of supply the department may refuse the application (81–6318). The department may approve the application for a less amount of water or for a less amount of land than applied for. An applicant feeling himself aggrieved may be granted a hearing before the department (81–6317).

2.4. When an application has been perfected the department sends to the county clerk a certificate for record (81–6320).

2.5. Water may be appropriated for storage in reservoirs for irrigation or other useful purposes. The holder of an approved application may impound waters not otherwise appropriated and appropriated water not needed for immediate use, but may not impound water when required for direct irrigation or for reservoirs holding senior rights. Persons proposing to apply the stored water to beneficial use shall apply to the department for permits; the owner of the reservoir has a preferred right to make such application within 6 months from the time limited for completion of the reservoir (46–617).

2.6. A special section authorizes the United States to appropriate, develop, and store water under the Reclamation Act in conformity with the laws of Nebraska (46–628).

3. When the use of appropriated water ceases, the right ceases. The department, if it finds that an appropriation has not been used beneficially for more than 3 years, shall hold a hearing to determine whether the appropriation shall not be declared forfeited. Appeal may be taken to the district court from the decision (81–6309).

4. Interested parties dissatisfied with any decision or order of the department concerning water rights may institute proceedings in the supreme court to reverse, vacate, or modify the order complained of (81–6315).

### Determination of Rights

1. The department of roads and irrigation shall make determinations of priorities of right to use the public waters of the State (81–6307).

2. As the adjudication of a stream progresses, and as each claim is finally adjudicated, the department shall make an order determining and establishing the several priorities of right (81–6310).

3. Upon the determination of the priorities, the department shall issue to each appropriator a certificate of his appropriation (81–6312).

4. The time for perfecting an appeal to the supreme court is limited to 60 days (81–6315).

### Administration and Distribution of Water

1. The department of roads and irrigation is given jurisdiction over all matters pertaining to water rights for irrigation, power, or other beneficial purposes (81–6314).

1.1. For the purpose of administration the State is divided into two water divisions, and the department is to divide the water divisions into water districts, the boundaries of which conform to the divisions between watersheds. Superintendents are required to be appointed for water divisions and water commissioners for water districts. The duty of the superintendents and commissioners, under the direction of the department, is to distribute water in accordance with rights of priority of appropriation (46–510 to 46–512, 81–6303 to 81–6306, 81–6322 to 81–6325).

2. Water may be conducted into or along any natural stream or channel and withdrawn at any point, due allowance to be made for transmission losses determined by the department. The consent of the majority of residents and landowners bordering the stream must be obtained (46–608 and 46–617). Natural streams may be so used for conducting water stored by the United States and delivered under contract to users, but not so as to raise the water of the stream above ordinary high-water mark (46–628).

2.1. Water appropriated from a river or stream shall not be turned or permitted to run into a different river or stream unless the latter exceeds 100 feet in width, in which event not more than 75 percent of the regular flow shall be taken (46–508).

2.2. Unused water from a ditch or canal shall be returned with as little waste as possible to the stream from which taken, or to the Missouri River (46–620).

3. Where the amount of water allotted under an appropriation to irrigate an area of 40 acres or less, at the rate of one-seventieth of a cubic foot per second or less continuous flow per acre, is too small for proper distribution and application to the land, as much water as the applicant can use without waste may be allotted for a limited time proportioned to the rights of all appropriators (81–6311).

4. Appropriations for irrigation are made for use upon specific tracts of land and certificates contain a description of such land (81–6316, 81–6319, and 81–6312).

5. The point of diversion of appropriated water or the line of any flume, ditch, or aqueduct may be changed with the approval of the department. The new point of diversion for power purposes shall not be more than 2 miles distant from the original point of diversion (46–606).

6. When the waters of a natural stream are not sufficient for the use of all those desiring the same, those using the water for domestic purposes shall have preference over those claiming for any other purpose, and those using water for agricultural purposes shall have preference over those using for manufacturing purposes. But no inferior right to the use of water shall be acquired by a superior right without just compensation (Const., art. XV, sec. 6).

## NEVADA

(All references herein, unless otherwise indicated, are to sections of the Nevada Compiled Laws, 1929)

### Appropriation of Water

1. The water of all sources of supply, whether above or beneath the surface of the ground, belongs to the public, and subject to existing rights may be appropriated for beneficial use as provided in the statute and not otherwise (7890, 7891; Sess. Laws 1939, ch. 178, sec. 1).

1.1. Ground waters are made specifically subject to appropriation, except for domestic purposes where the draught does not exceed 2 gallons per minute and where the water developed is not from an artesian well (Sess. Laws 1939, ch. 178, sec. 3).

1.2. Beneficial use shall be the basis, the measure, and the limit of the right to the use of water (7892). The water right is limited to the quantity reasonably and economically necessary for beneficial purposes, irrespective of the carrying capacity of the ditch (7897).

1.2.1. Diversion of water for direct irrigation shall not exceed one-hundredth of 1 cubic foot per second per acre of land to be irrigated, measured at the land; stored water, not to exceed 4 acre-feet per acre stored in the reservoir (7899).

2. Any corporation, or citizen over 21 years of age, desiring to appropriate water shall apply to the State engineer for a permit. Individual domestic use may be included with another use in any application (7944).

2.1. In case of appropriations for storage, parties proposing to apply the water to beneficial use shall apply for secondary permits (7962).

2.2. Except in the case of small uses of ground water to which the appropriation act does not apply, every person before installing a well in any proven artesian district or any basin or subbasin designated by the State engineer, must apply for a permit to appropriate. In other basins or subbasins not so designated, where the water is not under artesian pressure, no application or permit is necessary until after the water has been developed, but permit must be applied for before such water may be diverted (Sess. Laws 1939, ch. 178, sec. 6). The legal right to appropriate ground water by means of works constructed after March 22, 1913, can only be acquired by complying with the provisions of the statute. The date of priority of all appropriations of ground water is the date of filing application with the State engineer (Sess. Laws 1939, ch. 178, sec. 9).

2.3. Appropriations for water for watering range livestock are subject to special procedure, which includes applications to the State engineer, and which protects subsisting rights to water range livestock at particular places (7979 to 7985).

2.4. Applications must be approved where the beneficial use contemplated does not tend to impair the value of existing rights or is otherwise detrimental to the public welfare (7948).

2.5. Where there is no unappropriated water in the proposed source or where the use conflicts with existing rights or threatens to prove detrimental to the public interests, it is the duty of the State engineer to reject the application (7948). Permit may be issued for a less amount of water than applied for (7950).

2.6. Upon the completion of the appropriation a certificate is issued (7957).

2.7. An application or permit may be assigned, but no assignment is binding except between the parties unless recorded in the office of the State engineer (7951).

3. No permit to appropriate shall be denied because of the fact that the point of diversion, or any portion of the works, or the place of use, shall be in some other State, provided such latter State authorizes the diversion of water therefrom for use in Nevada (7986).

4. When the necessity for the use of water does not exist, the right ceases (7894). In case of failure to use water beneficially during 5 successive years, the right shall be considered as having been abandoned and all rights pertaining thereto shall be forfeited; such water may again be appropriated for beneficial use (7897).

5. Any party aggrieved by any decision of the State engineer may have the same reviewed in the courts (7961).

**Determination of Rights**

1. Upon petition of one or more water users of a stream, if the facts and conditions justify, the State engineer shall determine the rights of the stream; and in the absence of such petition it is his duty to do so upon any stream selected by him. Tributaries are included. Hydrographic surveys are made, notice given, proofs of claimants filed, hearings held, and a preliminary determination made to which objections may be filed, followed by an order of determination. The order of determination is filed with the clerk of the district court, whereupon it has the legal effect of a complaint in a civil action; and the order and exceptions taken constitute the entire pleadings. A decree is entered affirming or modifying the order of the State engineer (7905 to 7923).

2. In any suit brought for the determination of water rights, all claimants shall be made parties, and the court shall direct the State engineer to furnish a complete hydrographic survey. Any such suit may be transferred to the State engineer for determination under the statutory procedure, at any time after its inception, in the discretion of the court (7930).

3. Upon the final determination, the State engineer shall issue a certificate of water right to each person represented (7936).

**Administration and Distribution of Water**

1. The duty of the State engineer is to distribute water according to the rights of users and to control headgates. The State engineer and his assistants have the power to make arrests (7939 to 7942).

1.1. The State engineer shall divide the State into water districts when the necessity therefor shall arise, and shall create them from time to time as the priorities on streams are determined. Water commissioners may be appointed for streams subject to regulation, to serve under the direction of the State engineer (7937 and 7938).

1.2. Upon receipt by the State engineer of a petition by not less than 10 percent of the owners of wells having a legal right to appropriate water in a particular basin, such basin shall be designated for administrative purposes. On wells drilled prior to March 1, 1913, supervision over the distribution of water therefrom as against rights subsequently acquired is limited to cases of flagrant waste of water, pending a determination of existing rights by court decree. Hearings may be held upon petition of water users or motion of the State engineer to determine the adequacy of water supply and withdrawals may be restricted in time of shortage. Artesian well supervisors may be appointed (Sess. Laws 1939, ch. 178, secs. 4, 5, and 10).

2. Any water stored for irrigation or other beneficial purposes may be turned into the channel of any natural stream or watercourse and subsequently diverted, water already appropriated by others not to be diminished in quantity (8238). Water turned into a natural channel or watercourse, whether stored in Nevada or in an adjoining State, may be diverted below, subject to existing rights, under supervision of the State engineer, transmission losses to be determined by the State engineer (7896 and 7963).

3. Water users may rotate in the use of water to which they are collectively entitled, or a single user may rotate his different priorities, if holders of earlier priorities are not injured, to the end that each user may have an irrigation head of at least 2 cubic feet per second (7971).

4. Water shall remain appurtenant to the place of use. If it becomes impracticable to use such water beneficially or economically on such land, the right may be severed from the place of use and simultaneously transferred to other places of use without loss of priority. This does not apply to water diverted for distribution to private users at an annual charge (7893).

5. The point of diversion, place of use, or manner of use of water may be changed only by applying for a permit from the State engineer to do so under the procedure provided for the appropriation of water (7944).

## NEW MEXICO

(All references herein, unless otherwise indicated, are to sections of the New Mexico Statutes Annotated, Compilation 1929, and New Mexico Supplement, 1938)

### Appropriation of Water

1. The unappropriated water of every natural stream, perennial or torrential, is declared to belong to the public and to be subject to appropriation for beneficial use. Priority of appropriation shall give the better right (Const. art. XVI, sec. 2). All natural waters flowing in streams and watercourses, perennial or torrential, belong to the public and are subject to appropriation for beneficial use (151–101).

1.1. The waters of underground streams, channels, artesian basins, reservoirs, or lakes, having reasonably ascertainable boundaries, are declared to be public waters and to belong to the public and to be subject to appropriation for beneficial use (Supp. 151–201).

1.2. The natural right of people living in the upper valleys of stream systems, to impound and utilize a reasonable share of the waters precipitated upon and having their source in such valleys and superadjacent mountains, is recognized, the exercise of the right to be subject to the provisions of the laws governing the appropriation of water (151–135).

1.3. Travelers are declared to have the right to take water from all springs, rivers, ditches, and currents of water flowing from natural sources, for their own use and that of a small number of animals under their charge. This does not apply to wells or to ponds or reservoirs constructed for the use of the builders thereof (151–1001).

1.4. Beneficial use shall be the basis, the measure, and the limit of the right to the use of water (Const. art. XVI, sec. 3; 151–102; Supp. 151–202).

1.4.1. Water appropriated for irrigation shall not be in excess of 1 cubic foot per second for each 70 acres, delivered on the land (151–155).

2. Any person, association, or corporation, public or private, in order to appropriate water shall make application to the State engineer for a permit to appropriate (151–129). An application to appropriate ground water for irrigation or industrial purposes is so made (Supp. 151–203).

2.1. Rights initiated prior to March 19, 1907, relate back to the initiation of the claim, and those thereafter initiated relate back to the receipt of application in the office of the State engineer (151–102).

2.2. If the State engineer determines that there is unappropriated water available, he shall approve the application which thereupon becomes a permit to appropriate water. He may approve an application for a less amount of water or may vary the periods of annual use (151–133).

2.3. The application is to be rejected if there is no unappropriated water available, and the State engineer may reject an application if in his opinion its approval would be contrary to the public interest (151–134).

2.4. Upon completion of works a certificate of construction is issued (151–140). Upon application of the water to beneficial use, a license to appropriate water is issued (151–143).

2.5. The State engineer may approve applications to appropriate flood waters upstream under conditions which would result in a considerable return flow above the works of other appropriators and thus not deprive the latter of water to the extent of their reasonable requirements (151–136).

2.6. Owners of works proposing to store or carry water in excess of their needs for beneficial use may make application for such excess, and shall be held as trustees of such rights for the parties applying the water to beneficial use, to whom they are required to furnish water at reasonable rates (151–129 and 151–151).

2.7. In case of seepage water from any constructed works, the owner of such works shall have first right to the use thereof upon filing an application with the State engineer; but if such owner fails to file an application within 1 year after completion of the works or appearance upon the surface of such seepage water, then any party may appropriate the seepage water by applying therefor to the State engineer, paying the owner of the works reasonable rates for the storage or carriage of such water (151–165).

2.8. Claimants of vested water rights from ground-water sources may file declarations of their rights with the State engineer (Supp. 151–205).

2.9. Any permit or license may be assigned, but the assignment is not binding except upon the parties unless recorded in the office of the State engineer (151–148).

2.10. Whenever the proper official of the United States shall notify the State engineer of the intention to utilize certain specified waters, the water so described and unappropriated or not filed upon shall not be subject to further appropriation for a period of 3 years (151–152).

3. The statute governing the appropriation of waters shall not apply to stockmen, or stock owners who may construct water tanks or wells for watering stock (151–179).

4. When the party entitled to the use of water fails to use beneficially all or any part thereof for a period of 4 years, except in case of waters for storage reservoirs, such unused water shall revert to the public and shall be regarded as unappropriated public water (151–154 and Supp. 151–208).

5. Appeals may be taken from any decision of the State engineer to the district court (151–173).

### Determination of Rights

1. Upon completion of hydrographic surveys of any stream system, the attorney general shall, at the request of the State engineer, enter suit on behalf of the State for a determination of all rights to the use of the waters of such stream (151–120).

1.1. If suit is brought by a private party, the attorney general shall intervene if the State engineer notifies him that in his opinion the public interest requires such action (151–120).

2. In any suit for the determination of a right to use water, all claimants so far as they may be ascertained shall be made parties, and the court shall direct the State engineer to furnish a complete hydrographic survey of the stream system in question (151–122).

3. Upon the adjudication of rights to the use of waters of a stream system, a decree is issued adjudging the several water rights to the parties involved (151–128).

### Administration and Distribution of Water

1. The State engineer has general supervision of the waters of the State (Supp. 151–104). It is his duty to distribute water according to licenses and adjudications of the courts (151–112).

1.1. The State engineer shall divide the State in conformity with drainage areas into such water districts and subdistricts as may be necessary (151–113). He may, upon request of the majority of water users in a district, appoint a watermaster and if necessary assistants, to have immediate charge of the apportionment of waters in the district under the general supervision of the State engineer (151–114). No watermaster shall be appointed until the rights to the use of water have been determined (151–169).

1.1.1. Any person may appeal from the acts or decisions of the watermaster to the State engineer, and thence to the district court (Supp. 151–115).

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2. Water may be delivered into any ditch, stream, or watercourse to supply appropriations therefrom in exchange for water taken either above or below such point of delivery, less transmission losses determined by the State engineer, if the rights of others are not injured thereby (151–171).

3. Water may be transferred from one stream or drainage into another and diverted therefrom, less transmission losses determined by the State engineer (151–171). It shall be unlawful for any person, company, or corporation to divert the waters of any public stream for use in a valley other than that of such stream, to the impairment of subsisting prior appropriations (151–178).

4. All waters appropriated for irrigation purposes, except as otherwise provided by contract between the owner of the land and the owner of works for the storage or conveyance of water, shall be appurtenant to specified lands so long as beneficially useful thereon and pending a severance (151–102). By and with the consent of the landowner, a water right may be severed from the land and simultaneously transferred and shall become appurtenant to other land or for other purposes without losing priority of right, if this can be done without detriment to existing rights, upon the approval of the State engineer (151–156).

4.1. No right to appropriate waters, except for storage reservoirs, for irrigation purposes shall be transferred apart from the land except as specifically provided by law. The transfer of title to land carries with it all rights to the use of water appurtenant thereto for irrigation purposes, unless previously alienated in the manner provided by law (151–148).

5. An appropriator of water may use the same for other than the purpose for which it was appropriated, or may change the place of diversion, storage, or use after first obtaining the approval of the State engineer (151–157, 151–156, 151–131, and Supp. 151–207).

## NORTH DAKOTA

(All references herein, unless otherwise indicated, are to sections of the Compiled Laws of North Dakota, 1913)

### Appropriation of Water

1. All waters from all sources of water supply belong to the public and are subject to appropriation for beneficial use (8235, as amended by Laws 1939, ch. 255). Priority in time shall give the better right (8236).

1.1. The owner of land owns water standing thereon, or flowing over or under the surface, but not forming a definite stream. Water running in a definite natural stream over or under the surface may be used by him as long as it remains there; but he may not prevent the natural flow of the stream or of the natural spring from which it commences its definite course, nor pursue nor pollute the same (5341).

1.2. In the case of seepage water from any constructed works, any party desiring to use the same shall make application to the State engineer as in the case of unappropriated water; such party to pay the owner of the works reasonable charge for the storage or carriage of such water therein (8297).

1.3. Beneficial use shall be the basis, the measure, and the limit of the right to use water (8236).

1.3.1. In the issuance of permits or in the adjudication of rights, the amount allowed shall not exceed 1 cubic foot per second for each 80 acres, delivered on the land, for a specified time each year (8287).

2. Any person, association, or corporation shall before commencing construction or taking water from constructed works, make application to the State engineer for a permit to appropriate (8253). The State water conservation commission may initiate a right to the use of water by executing a declaration of intention and filing the same in the office of the State engineer (Laws 1939, ch. 256, sec. 16).

2.1. Claims to the use of water initiated prior to March 1, 1905, relate back to the initiation of the claim, and those initiated thereafter relate back to the date of receipt of the application in the office of the State engineer (8236). A right initiated by the State water conservation commission vests on the date of filing the declaration of intention (Laws 1939, ch. 256, sec. 16).

2.2. If the State engineer determines that there is unappropriated water available, he shall approve the application, which thereupon becomes a permit to appropriate (8256). However, the water conservation commission act provides that the State engineer may, *subject to the approval of the commission*, grant water rights to any person, association, firm, corporation, or municipality in the manner provided by law (Laws 1939, ch. 256, sec. 16).

2.3. If in the opinion of the State engineer there is no appropriated water available, or if the approval would be contrary to the public interest, he shall reject the application (8257).

2.4. Upon completion of works a certificate of construction is issued, and upon application to beneficial use a license to appropriate is issued (8260 and 8263). The State water conservation commission, on completion of an appropriation, files in the office of the State engineer a declaration of completion (Laws 1939, ch. 256, sec. 16).

2.5. The owners of works proposing to store or carry water in excess of their needs for beneficial use, may make application for such excess and shall be held as trustees of the additional water for such parties as may apply it to beneficial use, to whom they are required to furnish the water at reasonable rates (8253).

2.6. Any permit or license to appropriate water may be assigned, but no such assignment shall be binding except upon the parties thereto unless recorded in the office of the State engineer (8265).

2.7. Whenever the proper officers of the United States shall notify the State engineer that the United States intends to utilize certain waters, the waters so described and unappropriated at that date shall not be subject to further appropriation for a period of 3 years (8270).

2.8. Any person, association, or corporation having possession or title to agricultural lands, desiring to utilize for irrigation or stock purposes the flood waters of any draw, coulee, stream, or watercourse having a flow of not to exceed one-third cubic foot per second during the greater part of the year, may file a location certificate with the State engineer (8271 and 8272).

2.8.1. If no objection is filed to the appropriation, the State engineer shall approve the application, which thereby becomes a permit to appropriate water. If objections are filed, the general appropriation procedure governs (8273).

2.8.2. The amount of water allowed hereunder is limited to 2 acre-feet per acre for any one irrigation season (8274).

3. Upon failure to use water beneficially for a period of 3 years, such unused water shall revert to the public and shall be regarded as unappropriated public water (8286).

3.1. If the owner of land to which water has become appurtenant abandons the use of such water on such land, the water becomes public water subject to general appropriation (8288).

4. Appeal from any decision of the State engineer which denies a substantial right may be taken by an applicant to the district court (8257).

**Determination of Rights**

1. The State engineer shall make hydrographic surveys of each stream system and source of water supply and on completion shall deliver copies to the attorney general, who shall enter suit for the determination of all rights to the use of such water. The attorney general shall intervene on behalf of the State in any suit for the adjudication of water rights if advised by the State engineer that the public interest so requires (8248 and 8249).

2. In any suit for the determination of water rights all claimants shall be made parties. When any suit has been filed the court shall direct the State engineer to furnish a complete hydrographic survey (8250).

3. Upon adjudication of the rights, the decree shall declare the conditions of the water right adjudged to each claimant (8252).

### Administration and Distribution of Water

1. The appropriation statute vests general supervision of the waters of the State in the State engineer (8239). The State water conservation commission act gives the commission full control over all unappropriated public waters of the State to the extent necessary to fulfill the purposes of the act; and State agencies are required, before performing any duties with respect to the use or disposition of water or water rights, to submit the contemplated action to the commission for approval (Laws 1939, ch. 256, secs. 16 and 13).

1.1. The statute divides the State into water divisions and provides for the appointment and duties of water commissioners, creation of water districts, and appointment of watermasters (8275 to 8284).

2. Water turned into any natural or artificial watercourse may be reclaimed and rediverted, subject to existing rights, due allowance for losses being determined by the State engineer (8238).

3. All water used for irrigation shall remain appurtenant to specified lands (8236).

3.1. If it should become impracticable to use water beneficially or economically upon such land, the right may be severed and simultaneously transferred and become appurtenant to other land, without losing priority of right, with the approval of the State engineer, if this can be done without detriment to existing rights (8288).

3.2. No right to appropriate water for irrigation purposes shall be transferred apart from the land to which it is appurtenant, except as specially provided by law. Transfer of title to land in any manner carriers with it all rights to the use of water appurtenant thereto for irrigation purposes (8265).

4. An appropriator may change the purpose of use or place of diversion, storage or use, after first obtaining the approval of the State engineer (8289).

## OKLAHOMA

(All references, unless otherwise indicated, are to sections of Oklahoma Statutes Annotated [1936], tit. 82)

### Appropriation of Water

1. Beneficial use shall be the basis, the measure, and the limit of the right to the use of water. Priority in time shall give the better right (1).

1.1. In the appropriation of water for irrigation, or in an adjudication of rights to the use of water for such purpose, the amount shall not be in excess of 1 cubic foot per second for each 70 acres, delivered on the land for a specified time each year (33).

1.2. Any party may appropriate seepage from any constructed works by making an application to the Oklahoma planning and resources board, as in case of appropriated water, paying to the owner of such works a reasonable charge for the storage or carriage of such water (102).

1.3. The planning and resources board is directed to capture and impound flowing streams as nearly as practicable at their heads, to conserve such waters in the uplands for conservation of the water supply (488). Any person or corporation may appropriate and use waters so impounded, when not utilized publicly or privately, except individual farm ponds in which the board joins for flood control purposes, as if from a natural stream or lake, at a cost agreed upon between the party and the board. The cost is subject to review in court (489).

1.4. The owner of land owns water standing thereon, or flowing over or under the surface, but not forming a definite stream. Water running in a definite natural stream over or under the surface may be used by him as long as it remains there; but he may not prevent the natural flow of the stream or of the natural spring from which it commences its definite course, nor pursue nor pollute the same (tit. 60, sec. 60).

2. Any person intending to acquire the right to beneficial use of any water shall before constructing works make an application to the Oklahoma planning and resources board for a permit to appropriate (21). It is made a misdemeanor to begin or carry on any construction of works for storing or carrying water until after the issuance of a permit to appropriate such water, except in case of construction carried on under authority of the United States (59).

2.1. In case of claims originated prior to November 15, 1907, the right relates back to the initiation of the claim; claims initiated thereafter relate back to the date of receipt of application in the office of the board (1).

2.2. The board shall determine whether there is unappropriated water available; if so, it shall approve the application, which shall thereupon become a permit to appropriate water (24).

2.3. If in the opinion of the board there is no unappropriated water available, or the approval would be contrary to the public interest, it shall reject the application (25).

2.4. On completion of the works a certificate of completion of construction is issued (53) and on application of water to beneficial use a license to appropriate is issued (26).

2.5. The owners of works proposing to store or carry water in excess of their needs for beneficial use, may make application for such excess and shall be held as trustees of such right for the parties applying the water to a beneficial use, to whom the water must be furnished at reasonable rates (21 and 101).

2.6. Any permit or license to appropriate water may be assigned, but such assignment shall not be binding except upon the parties unless recorded in the office of the board (27).

2.7. Whenever the proper officer of the United States shall notify the board that the United States intends to utilize certain specified waters, the described waters then unappropriated shall not be subject to further appropriation for a period of 3 years (91).

3. In case of failure to use appropriated water for a period of 2 years, such unused water shall revert to the public and be regarded as unappropriated (32). If the owner of land to which water has become appurtenant abandons the use of such water upon such land, the water becomes public water subject to general appropriation (34).

4. Any applicant may appeal to the district court from a decision of the board which denies a substantial right (25).

### Determination of Rights

1. The board shall make hydrographic surveys and investigations of each stream system and source of water supply and shall deliver a copy to the attorney general, who shall enter suit on behalf of the State for the determination of all rights to the use of such water. The attorney general shall intervene on behalf of the State in any suit for the adjudication of rights to water if advised by the State engineer that the public interest requires such action (11 and 12).

2. In any suit for the determination of water rights, all claimants shall be made parties. When any suit shall have been filed the court shall direct the State engineer to furnish a complete hydrographic survey (13).

2.1. The court may appoint a referee to take testimony and report upon the rights of the parties as in other equity cases (29).

3. Upon adjudication of the rights, the decree shall specify the conditions of the water right adjudged to each party (14).

### Administration and Distribution of Water

1. The Oklahoma planning and resources board is charged with the supervision over the apportionment of water (81).

1.1. Water districts may be created and water masters appointed to apportion the water under the general supervision of the board (71 and 72). The water officials may regulate headgates and may make arrests (57 and 58).

2. Water turned into any natural or artificial watercourse may be diverted below, subject to existing rights, due allowance for losses being made by the board (3).

3. All waters appropriated for irrigation purposes shall be appurtenant to specified land so long as they can be beneficially used thereon (1).

3.1. If it should become impracticable to use such waters beneficially or economically on such land, the right may be severed therefrom and simultaneously transferred and become appurtenant to other land without loss of priority, if this can be done without detriment to existing rights, with the approval of the board (34).

3.2. No right to appropriate water shall be transferred apart from the land to which appurtenant, except as specially provided by law. The transfer of title to land in any manner carries with it all rights to the use of water appurtenant thereto for irrigation purposes (27).

4. Any appropriator of water may use the same for other than the purposes for which it was appropriated or may change the place of diversion, storage, or use, if this can be done without detriment to existing rights, with the approval of the board (22, 34, and 35).

## OREGON

(All references herein are to sections of the Oregon Code 1930 and Supplement of 1935)

### Appropriation of Water

1. All water from all sources of water supply belongs to the public (47–401).

1.1. Subject to existing rights, all waters within the State may be appropriated for beneficial use as provided in the statute and not otherwise (47–402).

1.2. Vested rights to the use of water are not affected by the appropriation statute. Actual application of water to beneficial use prior to the passage of the act by a riparian proprietor shall be deemed to create in him a vested right to the extent of the actual application of water to beneficial use, where not abandoned for a continuous period of 2 years; and the right shall be deemed vested if construction of works was under way at the time of the enactment and if the water was devoted to beneficial use within a reasonable time thereafter (47–403).

1.3. Certain waters of the State have been withdrawn from appropriation in a series of enactments.

1.4. The State engineer is authorized and required to withdraw and withhold from appropriation any unappropriated water which may be required for any proposed project for the development of land, water, and power under investigation under a cooperative agreement between the State engineer and the Federal Government (47–1801 to 47–1803, as amended by Laws 1937, ch. 10).

1.5. Waters in counties east of the summit of the Cascade Mountains found in underground streams, channels, artesian basins, reservoirs, or lakes, the boundaries of which may reasonably be ascertained, are declared to be public waters and to belong to the public and subject to appropriation for any purpose other than for domestic and culinary use, for stock, or for the watering of lawns and gardens not exceeding one-half acre in area (Supp. 47–1302).

1.6. Ditches constructed for the purpose of utilizing waste, spring, or seepage waters shall be governed by the same laws relating to priorities as those for utilizing the waters of running streams; the person on whose lands the seepage or spring waters first arise to have the right to the use of such waters (47–1401).

1.7. Beneficial use shall be the basis, the measure, and the limit of all rights to the use of water (47–901).

1.7.1. Permits to use water from an underground source shall be contingent upon its use in an economical and beneficial manner, and the State engineer may fix the maximum amount which may be used per acre of land each season or which may be used for other purposes (Supp. 47–1308).

2. Any person, association, or corporation shall, before performing construction work in connection with the diversion of water, make application to the State engineer for a permit to make an appropriation (47–501). Appropriations of water for hydroelectric development are required to be made as noted below in paragraph 2.6.

2.1. The right of appropriation dates from the filing of the application with the State engineer (47–509).

2.2. Proper applications contemplating beneficial use of water shall be approved unless the proposed use conflicts with existing rights. Showing of financial ability and good faith may be required in case of applications for more than 10 cubic feet per second. An application may be approved for a less amount of water than applied for, or upon terms and conditions necessary for the protection of the public interest, if substantial reasons exist therefor (47–503, as amended by Laws 1937, ch. 235).

2.2.1. No permit shall be granted for the development of ground or artesian waters beyond the capacity of the subterranean strata to yield such water with a reasonable or feasible pumping lift in case of pumping developments or a reasonable or feasible reduction of pressure in case of artesian developments (47–1307).

2.2.2. Applications for municipal water supplies may be approved to the exclusion of all subsequent appropriations, if the exigencies of the case demand (47–503, as amended by Laws 1937, ch. 235). Water may be appropriated for such future reasonable and usual municipal purposes as may be reasonably anticipated (47–901).

2.2.3. The State engineer shall reject, or grant subject to municipal uses, all applications where in his judgment the appropriation of the waters applied for would impair a municipal water supply (47–1501).

2.3. If in the judgment of the State engineer the proposed use may prejudicially affect the public interest, he shall refer the application to the State reclamation commission for consideration. If upon hearing the commission determines that the proposed use would impair or be detrimental to the public interest, it shall order the application rejected or modified to conform to the public interest to the end that the highest public benefit may result. In determining this question the commission shall have due regard for conserving the highest use of such water for any and all purposes including irrigation, domestic use, municipal water supply, power development, public recreation, and the protection of commercial and game fishing, or any other beneficial use for which the water may have a special value to the public, and also the maximum economical development of the waters involved. Appeal may be taken to the circuit court (47–503, as amended by Laws 1937, ch. 235).

2.4. Parties proposing to apply to beneficial use waters stored in a reservoir under a primary permit shall make application for secondary permits (47–507).

2.5. Upon perfection of an appropriation a certificate is issued (47–508, as amended by Laws 1939, ch. 56).

2.5.1. In any valuation for rate-making purposes or proceeding for the acquisition of rights and property in connection therewith, no value shall be recognized for such rights in excess of the actual cost to the owner of perfecting the rights hereunder (47–508, as amended by Laws 1939, ch. 56).

2.5.2. Each certificate issued for power purposes to a person or private agency must contain a recapture clause under which ultimately the State or any municipality may take over all works connected therewith upon making compensation therefor. The right of the State or any municipality to condemn property which has devoted to beneficial use water rights specified in the certificate, is expressly reserved (47–508, as amended by Laws 1939, ch. 56).

2.6. Appropriations of water for the generation of electricity are governed by the hydroelectric act, the provisions of which do not apply to any water-power

project or development constructed by the United States, or to cities, towns, municipal corporations, or utility districts, but are otherwise applicable. An application may be made to the hydroelectric commission by a citizen, association, or private corporation to appropriate water for such purpose and to construct and operate the necessary works. A preliminary permit may be issued for such purpose, and a license may be issued for a period not exceeding 50 years. The State or any municipality may take over any project constructed under a license, upon making compensation, and the right of condemnation is expressly reserved. Upon amortization of the entire net investment the project shall become the property of the State (Supp. 47–2101 to 47–2137).

2.7. Any permit or license to appropriate water may be assigned, but no such assignment shall be binding except upon the parties unless recorded with the State engineer (47–505).

2.8. Whenever the proper officer of the United States shall notify the State engineer that the United States intends to utilize certain specified waters, the waters so described and unappropriated shall not be subject to further appropriation but shall be deemed to have been appropriated by the United States pending the filing of final plans within 3 years (47–1201).

3. No permit shall be denied because the point of diversion or any portion of the works or place of intended use or any part of the lands to be irrigated may be situated in some other State. Where either the point of diversion or any of the works or place of use or any lands to be irrigated are situated within Oregon, the permit shall issue, provided that the State engineer in his discretion may decline to issue a permit where the point of diversion is within Oregon but the place of beneficial use is in some other State unless under the laws thereof water may be lawfully diverted therein for beneficial use in Oregon (47–510).

3.1. No lake shall be used as a storage basin for water to be used for irrigation or power outside of the State, without the consent of the county court and the approval of the State reclamation commission (47–510).

3.2. Any municipal corporation of any adjoining State may acquire title to any land or water right within Oregon, by purchase or condemnation, which lies within any watershed from which such municipal corporation desires to obtain its water supply (56–2601).

4. If the owner of a completed water right fails to use the appropriated water for a period of 5 successive years, the right ceases and such failure to use shall be conclusively presumed to be an abandonment of such water right, and thereafter the water shall revert to the public and become again the subject of appropriation, subject to existing priorities. This does not apply to the rights of cities and towns for all reasonable and usual municipal purposes (47–901).

4.1. The abandonment and forfeiture of water rights acquired under laws enacted prior to the water code are covered in other legislative provisions (47–1009, 47–1103, 53–209).

5. Any person, association, or corporation aggrieved by any order or regulation of the State engineer may appeal to the circuit court (47–307).

### Determination of Rights

1. Upon petition to the State engineer signed by one or more water users upon any stream, requesting the determination of the relative rights of the various claimants to the waters thereof, it shall be the duty of the State engineer, if the facts and conditions justify, to make such determination (47–601).

2. Whenever proceedings are instituted for determination of water rights, it is the duty of all claimants to appear and submit proof of their claims (47–620).

3. Upon the completion of the hearings and findings under a statutory determination, the State engineer makes an order of determination and files the record with the clerk of the circuit court, whereupon the proceedings shall be as nearly as possible like those of a suit in equity. After final hearing the court enters a decree affirming or modifying the order of the State engineer (47–612 and 47–614).

4. Upon final determination a certificate is issued to each person, association, or corporation represented therein, setting forth the water right (47–613).

5. In case any suit for the determination of water rights is brought in the circuit court, the court may in its discretion transfer the case to the State engineer for determination (47–601).

5.1. The plaintiff in any suit for the protection of water rights may make all persons who have diverted water from the same stream or source parties thereto, and the court may in one decree determine the relative rights and priorities of all parties (47–1010).

5.2. In any suit for the determination of rights to the use of waters of a stream system, wherein the State is a party, all claimants shall be made parties and the court shall call upon the State engineer for a complete hydrographic survey (47–622).

### Administration and Distribution of Water

1. The State engineer is charged with the duty of administering the water laws of the State (47–306).

1.1. The State engineer shall divide the State into water districts as the necessity therefor arises, and may appoint one watermaster for each district (47–308 and Supp. 47–309).

1.2. It is the duty of the watermasters, under the general control of the State engineer, to divide the water of each district according to the several rights thereto, and to regulate headgates. They have the power to make arrests. An aggrieved party may appeal to the circuit court for an injunction (47–306 to 47–316).

1.3. In case of a ditch or reservoir the users from which are unable to agree, the watermaster may take charge of the distribution of water upon request of the owner or any user; and the circuit court having jurisdiction may request the watermaster to take charge of such ditch or reservoir and to enforce any decree made under the jurisdiction of such court (Supp. 47–707). This does not apply to the irrigation systems of irrigation districts or district improvement compies (47–709).

2. The operator of a reservoir may use the bed of a stream or other watercourse for the purpose of carrying stored water to the consumers, under regulation by the watermaster (47–704).

3. Water users may rotate in the use of a supply to which they are collectively entitled, the watermaster to distribute the water in accordance with their agreement (47–710).

4. All water used for any purpose shall remain appurtenant to the premises upon which it is used, and may not be changed to other lands without the approval of the State engineer (Supp. 47–712).

5. The owner of a water right may change the place of use, place of diversion, or character of use without loss of priority, with the approval of the State engineer, which is to be granted only upon a finding that the proposed change can be effected without injury to existing rights (Supp. 47–712).

6. When the waters of a natural stream are not sufficient for the service of all those desiring their use, those using water for domestic purposes shall, subject to such limitations as may be prescribed by law, have preference over those claiming for any other purpose, and those using water for agricultural purposes shall have the preference over those using the same for manufacturing purposes (47–1403).

## SOUTH DAKOTA

(All references herein are to section numbers of the South Dakota Code of 1939, as amended by Laws 1939)

### Appropriation of Water

1. Subject to vested private rights, and with exceptions herein noted, all waters from whatever source of supply belong to the public, and, except navigable waters, are subject to appropriation for beneficial use. Subject to the

laws relating to artesian wells and water, the owner of land owns water standing thereon or flowing over or under the surface but not forming a definite stream. The landowner may use the water of a definite natural surface or subterranean stream while on his land, but may not interfere with the flow of the stream or of a spring which contributes to the flow, other than under the appropriation laws (61.0101).

1.1. In the case of seepage water from any constructed works, any person desiring to use the same shall make application to the State engineer as in the case of unappropriated water. Such party shall pay the owner of the works reasonable charge for the storage or carriage of such water in such works (61.0146).

1.2. Any landowner may install artesian wells on his land for domestic, irrigation, or manufacturing purposes, but no more water shall be appropriated than needed therefor when such additional use of water shall interfere with the flow of wells on adjacent lands (61.0401).

1.3. Beneficial use shall be the basis, the measure, and the limit of the right to the use of water. Beneficial use means herein the use of water for domestic, stock-watering, irrigation, mining, milling, power, fish culture, fire protection, and public recreational purposes (61.0102 as amended by Laws 1939, ch. 289).

1.3.1. In the issuance of permits to appropriate water for irrigation, or in the adjudication of rights to the use of water therefor, the amount allowed shall not be in excess of 1 cubic foot of water per second for each 70 acres or its equivalent, delivered on the land for a specified time each year (61.0140).

2. Any person, association, or corporation, public or private, intending to acquire the right to beneficial use of water shall, before commencing any construction or taking the water from constructed works, make an application to the State engineer for a permit to appropriate (61.0122).

2.1. The date of receipt of the application is the date of priority (61.0102).

2.2. If the State engineer determines that there is unappropriated water available, he shall approve the application, which thereby becomes a permit to appropriate water. He may approve an application for a less amount of water than applied for, or may vary the periods of annual use (61.0125).

2.3. If in the opinion of the State engineer there is no water available, he shall reject the application. Appeal may be taken to the circuit court from such decision or from any other decision which denies a substantial right (61.0126).

2.4. A certificate of construction is issued by the State engineer upon completion of construction and a license to appropriate upon application of the water to beneficial use (61.0127 to 61.0132).

2.5. Appropriations of water for power purposes in excess of 25 horsepower may not be made for periods exceeding 50 years, but the appropriator and his assigns have the prior right of reappropriation (61.0152).

2.6. The owners of works proposing to store or carry water in excess of their needs for beneficial use may make application for such excess, and shall be held as trustees of the additional water for such parties as may apply it to beneficial use, to whom they must furnish the water at reasonable rates (61.0122).

2.7. Any permit or license to appropriate water may be assigned, but no such assignment shall be binding on other than the parties thereto unless recorded with the State engineer (61.0134).

2.8. Whenever any proper officer of the United States shall notify the State engineer that the United States intends to utilize certain specified waters, or to make a survey therefor, the waters so described and unappropriated at the date of such notice may be withdrawn by the State engineer from other appropriations during such period as he is satisfied that construction is contemplated by the United States (61.0137).

3. *Dry-draw law.* Any person who may hold possession, right, or title to any agricultural lands shall be entitled to the usual enjoyment of the waters of streams or creeks within the State, and for the purpose of directing flood waters for irrigation or for livestock purposes, may build or construct dams across

any dry draw or watercourse with necessary rights-of-way for conveyance of the water. The words "dry draw" and "watercourse" shall be construed herein to mean any ravine or watercourse not having a flow of at least 20 miner's inches of water during the greater part of the year (61.0133).

3.1. To obtain a right in this manner a location certificate shall be filed with the register of deeds and copies posted at point of diversion and mailed to the State engineer (61.0133).

3.2. A certificate of the State engineer may be obtained for the right by submitting a petition therefor, but holders are not subject to rules and regulations of the State engineer or under his jurisdiction (61.0133).

4. When any person entitled to the use of appropriated water fails to use beneficially all or any part of such water for the purpose for which it was appropriated, for a period of 3 years, such unused water shall revert to the public and shall be regarded as unappropriated public water (61.0139).

5. If the owner of land to which water has become appurtenant abandons the use of such water on such land, such water shall become public water, subject to general appropriation (61.0141).

6. An appeal may be taken to the circuit court from any decision of the State engineer which denies a substantial right (61.0126).

### Determination of Rights

1. In any action for the determination of the right to the use of water of any stream system, all those whose claims to the use of such waters are of record and all other ascertainable claimants shall be made parties (61.0119).

2. When any such action has been begun, the court shall request the State engineer to make or furnish a complete hydrographic survey of the stream system; and whenever funds are available out of moneys appropriated by the legislature or contributed from other sources, it is the duty of the State engineer to proceed with such survey (61.0119).

2.1. The costs of the action shall be charged against each of the private parties thereto in proportion to water rights allotted; but no part of the costs on behalf of the State or of the hydrographic survey may be charged against private parties without their express consent (61.0119).

3. The attorney general may bring suit for the determination of water rights in any court having jurisdiction over any part of the stream system (61.0119).

4. The court has jurisdiction to determine all questions necessary for the adjudication of water rights within the stream system (61.0119).

### Administration and Distribution of Water

1. The State engineer is vested with full control of all waters in definite streams, so far as they relate to irrigation or other riparian rights (61.0104).

1.1. It is the duty of the State engineer, upon the request of five or more landowners having riparian rights on a definite stream, to apportion such waters among them in such manner as to permit all persons to receive the benefits of the stream (61.0105).

1.2. Water commissioners for the distribution of water from any source may be appointed by the State engineer after consultation with the water users, when necessary in the judgment of the State engineer or the court (61.0121).

1.2.1. Recommendations of the majority of water users are to be followed; if they cannot agree, the State engineer determines upon personnel, duties, and compensation (61.0121).

1.2.2. Water commissioners are agents of the State engineer and have necessary police powers (61.0121).

2. Water turned into any natural or artificial watercourse by the holder of the right of use may be diverted by him below, subject to existing rights, due allowance for losses to be determined by the State engineer (61.0118).

3. All water appropriated for irrigation purposes shall be appurtenant to specified land owned by the person claiming the right to use the water, so long as it can be beneficially used thereon; but the right to water which can no longer be used beneficially or economically upon such land may be severed therefrom and be simultaneously transferred and become appurtenant to other land without losing priority of right, if this can be done without detriment to existing rights, with the approval of the State engineer (61.0102 and 61.0141).

3.1. Transfer of title to land in any manner carries with it all rights to the use of water appurtenant thereto for irrigation purposes (61.0134).

4. An appropriator may use the water for a purpose other than that for which it was appropriated, or may change the place of diversion, storage, or use, in the manner and under the conditions prescribed by law (61.0142).

4.1. A change in the proposed point of diversion of water from a stream by an applicant for a permit to appropriate water is subject to the approval of the State engineer, which shall not be allowed to the detriment of the rights of others having valid claims to the use of water from such stream (61.0123).

## TEXAS

(All references herein are to articles of Vernon's Texas Statutes, Revised Civil Statutes, 1936, and 1939 Cumulative Supplement)

### Appropriation of Water

1. The waters of the ordinary flow and underflow and tides of every flowing river or natural stream, of all lakes, bays, or arms of the Gulf of Mexico, and the storm, flood, or rain waters of every river or natural stream, canyon, ravine, depression, or watershed are declared to be the property of the State, and the right to the use thereof may be acquired by appropriation (7467).

1.1. Nothing in the statute covering the appropriation of water shall be construed as recognizing any riparian right in the owner of any lands the title to which passed out of the State of Texas after July 1, 1895 (7619).

1.2. Water may be appropriated for irrigation, mining, milling, manufacturing, development of power, construction and operation of water works for cities and towns, stock raising, public parks, game preserves, recreation and pleasure resorts, power and water supply for industrial purposes and plants, and domestic use (7470 and 7470a).

1.3. An appropriation contemplates beneficial use of water by any person, association, corporation, or irrigation district under any law prior to chapter 171, 33d legislature, recorded with the State board of water engineers, or under a permit issued by that board; and shall not be considered as having been perfected without such beneficial use for a purpose named in the law and specified in the appropriation (7473).

1.3.1. Beneficial use means the use of such quantity of water as is economically necessary for application to a lawful purpose under reasonable intelligence and reasonable diligence (7476).

1.3.2. The water right is limited to the requirements of beneficial use irrespective of the capacity of the ditch or other works (7542 and 7543).

2. Every person, association, corporation, water-improvement district, or irrigation district shall, before commencing work in connection with the storage or diversion of water, make an application to the State board of water engineers for a permit to make such appropriation (7492). Application for a permit is not required for an alteration, enlargement, or extension of a canal or other work not involving an increased appropriation or use of a larger quantity of water, but a statement of the proposed work must first be filed for the information of the board (7495). Diversion of water without first complying with the provisions of the statute is made a misdemeanor (7520).

2.1. Anyone may construct on his own property a dam and reservoir to impound not to exceed 250 acre-feet of water, without the necessity of securing a permit therefor (7500a).

2.2. The priority of appropriation dates from the filing of the application in the office of the board (7523).

2.3. A presentation may be filed for the purpose of investigating the feasibility of development in excess of 20,000 acre-feet storage or 50 second-feet diversion, or for generation of 2,000 hydroelectric horsepower, which has priority from the date of filing in case a permit is thereafter granted (7496).

2.4. It is the duty of the board to approve proper applications and to issue permits if the proposed application is for one of the purposes enumerated in the law, does not impair existing water rights or vested riparian rights, and is not detrimental to the public welfare (7507).

2.4.1. Priority over all other applications shall be given to an application by any person, association, corporation, water-improvement or irrigation district to appropriate the ordinary flow, underflow, or storm, flood, or rain waters of any river or stream for the purpose of storage by dams across such stream for irrigating, mining, milling, manufacturing, development of power, water for cities and towns, or stock raising. The appropriator may collect from any riparian owner who shall divert such impounded water by pumping or otherwise, a reasonable sum therefor, to be determined by the board of water engineers if the sum cannot be agreed upon (7545).

2.4.2. When an application is made to appropriate water for mining purposes, the owner of land through which the water flows and is to be appropriated shall have the prior right to appropriate the same if exercised within 10 days after notice of such application (7467).

2.4.3. Preference and priority in the allotment and appropriation of water in the following order is declared to be the public policy of the State: (1) Domestic and municipal uses, including water for human life and for domestic animals; (2) water to be used in processes designed to convert materials of a lower order or value into forms having greater usable and commercial value, and to include water necessary for the development of electric power by means other than hydroelectric; (3) irrigation; (4) mining and recovery of minerals; (5) hydroelectric power; (6) navigation; (7) recreation and pleasure (7471).

2.4.4. As between applicants, preference shall be given not only in the order of preferential uses so declared, but shall also be given those applications designed to effectuate the maximum utilization of waters and to prevent their escape without contribution to a beneficial public service (7472c).

2.4.5. All appropriations of water other than for domestic or municipal purposes shall be granted subject to the right of any city, town, or municipality to make further appropriations of said water thereafter for domestic and municipal purposes, without the necessity of condemnation or paying therefor. This provision does not apply to any stream which constitutes or defines the international border between the United States and Mexico (7472 and 7472a).

2.5. It is the duty of the board to reject an application if there is no unappropriated water in the source of supply or if the proposed use conflicts with existing water rights or is detrimental to the public welfare (7503 and 7506). An application may be approved or rejected in whole or in part (7510).

2.6. Whenever any appropriator shall have obtained a permit from the board or filed a record of appropriation with the board and shall have made use of water under the terms thereof for a period of 3 years after the taking effect of this provision, he shall be deemed to have acquired a title to such appropriation by limitation against all other claimants of water from the same stream or other source of supply and against all riparian owners thereon (7592).

3. Any appropriation of water which shall be willfully abandoned during any 3 successive years shall be forfeited, and the water shall be again subject to appropriation (7544).

### Determination of Rights

1. Texas formerly had statutory provision for the determination of water rights by the State board of water engineers. As a part of the procedure was declared unconstitutional by the Texas Supreme Court (see ch. 2, page 104), the provisions of the statutes relating to the determination of rights have been repealed. Adjudications, therefore, are made exclusively in the courts.

1.1. It is the duty of the clerk of any court which shall render any judgment, order, or decree affecting title to any water right or claim, to transmit a copy to the office of the board of water engineers (7513).

### Administration and Distribution of Water

1. An appropriator having in possession storm, flood, or rain waters conserved or stored may supply the same to any person, association, corporation, water improvement, or irrigation district having the right to acquire such use, and in conveying such waters from the place of storage to the place of use it shall be lawful to use the channel of any natural flowing stream under rules and regulations prescribed by the board of water engineers (7547 and 7548).

2. Water diverted and not used shall be returned to the stream from which diverted, wherever this may be done by gravity, whenever reasonably practicable (7579).

3. It is unlawful for any person, association, corporation, water improvement or irrigation district to divert water from any stream, watercourse, or watershed into any other natural stream, watercourse, or watershed to the prejudice of any person or property situated within the watershed from which such water is proposed to be taken. Before any water may be taken from one watershed to another, application must be made to the board of water engineers for a permit so to do. Permits shall not be issued without a hearing as to the rights to be affected thereby, from which appeal may be taken to the courts (7589 and 7590).

4. No permit is required for the alteration or extension of a ditch in which an increased appropriation is not involved, but statements must first be filed with the board for their information (7495).

## UTAH

(All references herein, unless otherwise noted, are to sections of the Revised Statutes of Utah, 1933, and Supplement of 1939)

### Appropriation of Water

1. All waters, whether above or under the ground, are declared to be the property of the public, subject to all existing rights to their use (100–1–1).

1.1. Beneficial use shall be the basis, the measure, and the limit of all rights to the use of water (100–1–3).

2. Any citizen, association, corporation, certain State officers, or the United States, intending to acquire a water right by appropriation, before commencing construction work shall make an application to the State engineer (100–3–2, amended Laws 1939, ch. 111).

2.1. Appropriative rights may be acquired only by complying with the statutory procedure. No right to the use of water either appropriated or unappropriated may be acquired by adverse use or adverse possession (100–3–1, amended Laws 1939, ch. 111).

2.2. The priority is the date of the original receipt of the application to appropriate (100–3–5, 100–3–18, amended Laws 1939, ch. 111).

2.3. It is the duty of the State engineer to approve proper applications if there is unappropriated water in the proposed source, if the proposed use will not impair existing rights or interfere with the more beneficial use of the water, if the proposed plan is physically and economically feasible unless the application is filed by the United States Bureau of Reclamation and would not prove detrimental to the public welfare, if the applicant has financial means and applies in good faith (100–3–8, amended Laws 1939, ch. 111).

2.4. Action on an application shall be withheld pending investigation if it appears that it would interfere with more beneficial use for irrigation, domestic or culinary purposes, stock watering, power or mining development or manufacturing, or would prove detrimental to the public welfare (100–3–8, amended Laws 1939, ch. 111).

2.5. Upon completion of the appropriation a certificate is issued (100–3–17).

2.6. In all cases of appropriation of ground water the right of replacement is granted to any junior appropriator whose appropriation may diminish the quantity or injuriously affect the quality of appropriated ground water, upon the approval of the State engineer and at the expense of the junior appropriator (100–3–23).

2.7. All existing claimants to the use of ground water are required to file notice of their claims with the State engineer (100–5–12; 100–5–13, amended Laws 1939, ch. 111).

2.8. Whenever in the judgment of the Governor and the State engineer the welfare of the State demands, the Governor by proclamation, upon recommendation of the State engineer, may suspend the right of the public to appropriate the surplus or unappropriated waters of any stream or other source of water supply. Waters so withdrawn from appropriation may be restored in the same manner (100–8–1, amended Laws 1939, ch. 111, and 100–8–2).

3. The State engineer is authorized and empowered to receive and grant applications and issue certificates to appropriate water from interstate streams within Utah for use within any border State (100–2–8).

4. Upon abandonment or cessation of the right to use appropriated waters for a period of 5 years, the right ceases and such waters shall revert to the public and may again be appropriated, unless extensions of time for a given cause shown are granted by the State engineer for not exceeding 5 years each. These provisions apply whether such unused or abandoned water is permitted to run to waste or is used by others without right; but they do not apply to ground waters (100–1–4, amended Laws 1939, ch. 111).

5. A person aggrieved by any decision of the State engineer may have the same reviewed in court (100–3–14).

### Determination of Rights

1. Upon petition to the State engineer filed by 5 or more or a majority of the water users upon any stream, requesting an investigation of relative rights, it shall be the duty of the State engineer, if conditions justify, to file in the district court an action to determine the rights. In any suit involving water rights the court may order an investigation by the State engineer (100–4–1).

2. Upon the filing of any action for determination of water rights, the clerk of the district court shall notify the State engineer, who shall file a statement giving the names and addresses of all claimants and proceed with a hydrographic survey. Claimants are required to file statements of their claims with the court. The State engineer formulates a report and proposed determination of all rights to the use of water of the stream system or water source. If no contest is filed, the court is to render judgment in accordance with such determination. Hearings are held upon contests; upon completion of hearings the court enters judgment determining and establishing the several rights (100–4–3, amended Laws 1939, ch. 112, to 100–4–17).

3. Whenever any civil action is commenced involving the use of water from any river system or water source, and if a general determination has not been made, the court in its discretion may proceed to make a general determination in which the State of Utah shall be joined as a necessary party (100–4–18).

### Administration and Distribution of Water

1. The State engineer has general administrative supervision of the waters of the State (100–2–1).

1.1. The State engineer may appoint water commissioners for the distribution of water from any river system or water source (100–5–1).

1.2. The State engineer may upon his own motion or upon petition of not less than one-third of the users of ground water in a defined area, hold a hearing to determine whether the ground water supply within such area is adequate for the existing claims. If found inadequate, he shall divide or cause to be divided the waters according to the respective rights of the claimants (100–5–1).

1.3. The duties of the State engineer and the water administrative organization are to carry into effect the judgments of courts in relation to the distribution and use of water and to divide the waters among appropriators according to their respective rights. They may regulate headgates and works for the withdrawal and control of water, and may make arrests (100–5–3 and 100–2–9).

2. With the approval of the State engineer, appropriated water may be turned from the channel of any stream or lake or other body of water into the channel of any natural stream or natural body of water or into a reservoir in the bed of a stream, and a like quantity less transmission losses may be taken out either above or below the point of discharge. The original water must not be deteriorated in quality or diminished in quantity; additional water turned in must bear proportionate reservoir costs (100–3–20, amended Laws 1939, ch. 111).

3. A right to the use of water appurtenant to land shall pass to the grantee of the land, but may be reserved by the grantor in express terms in the conveyance, or it may be separately conveyed (100–1–11).

3.1. Water appropriated for irrigation purposes in works constructed or controlled by the United States shall be appurtenant to specified lands; but if it becomes impracticable to use such water beneficially or economically thereon, the right may be severed from such land and simultaneously transferred and become appurtenant to other land without losing priority, upon approval of the State engineer, if this can be done without detriment to existing rights (100–1–14).

4. The point of diversion, place of use, and purpose of use of appropriated water may be changed without loss of priority, if vested rights are not impaired without just compensation, but only with the approval of the State engineer. Such changes may be permanent or temporary (100–3–3, amended Laws 1939, ch. 111).

5. In times of scarcity, while priority of right shall give the better right as between those using the water for the same purpose, the use for domestic purposes, without unnecessary waste, shall have preference over use for all other purposes, and use for agricultural purposes shall have preference over use for any other purpose except domestic use (100–3–21).

## WASHINGTON

(All references herein, unless otherwise noted, are to sections of Remington's Revised Statutes of Washington, Annotated, 1931)

### Appropriation of Water

1. Subject to existing rights, all waters within the State belong to the public and rights thereto may be acquired only by appropriation for a beneficial use in the manner provided by statute and not otherwise; and as between appropriations, the first in time shall be the first in right (7351).

1.1. Nothing in the act governing the appropriation of water shall be construed to lessen, enlarge or modify the existing rights of any riparian owner or any existing right acquired by appropriation or otherwise (7351).

2. Any person, municipal corporation, firm, irrigation district, association, corporation, or water users association, desiring to appropriate water for a beneficial use, shall make application to the State supervisor of hydraulics for a permit to make such appropriation (7378).

2.1. The appropriative right relates back to the date of filing the application in the office of the supervisor of hydraulics (7387).

2.2. A temporary permit may be granted upon proper showing, to be valid only during the pendency of the application for a permit (7378). A preliminary permit may be issued in order that the applicant may make investigations of the proposed project (7382, amended by Laws 1939, ch. 127).

2.3. In case of appropriations of water for storage in reservoirs, the parties proposing to apply the water to beneficial use shall also file applications for permits to be known as secondary permits (7390).

2.4. The supervisor of hydraulics shall issue a permit if he finds that water is available and that the appropriation will not impair existing rights or be detrimental to the public welfare. An application may be approved for a less amount of water than applied for, if substantial reasons exist. Each permit shall contain a provision that the holder shall comply with all fisheries and game laws (7382, amended by Laws 1939, ch. 127).

2.5. If there is no unappropriated water in the proposed source, or if the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, having due regard to the highest feasible development of the use of public waters, it is the duty of the supervisor to reject the application (7382, amended by Laws 1939, ch. 127).

2.6. When the appropriation has been perfected a certificate is issued (7386).

2.7. Any permit to appropriate water may be assigned, but no such assignment shall be binding unless recorded in the office of the supervisor. An application for a permit may be assigned with the previous consent of the supervisor (7384).

2.8. Whenever any proper officer of the United States notifies the State that pursuant to the provisions of the Federal reclamation act the United States intends to make investigations of the utilization of certain specified waters, such waters to which appropriations have not already been initiated shall not thereafter be subject to appropriation for a period of 1 year, or upon further notice for a period of 3 years. Further extensions may be granted. Appropriations under such withdrawals relate back to the date of the first withdrawal (7410 and 7411).

3. No permit for the appropriation of water shall be denied because the point of diversion or any portion of the works or the place of use or any part of the lands to be irrigated are situated in some other State or nation. Where either the point of diversion or any of the works or the place of use or all or part of the lands are within Washington, the permit shall issue; but the supervisor of hydraulics in his discretion may decline to issue a permit where the point of diversion is in Washington but the place of beneficial use is in some other State or nation, unless under the laws thereof water may be lawfully diverted therein for beneficial use in Washington (7383).

3.1. Any person, association, or corporation may appropriate water for domestic, manufacturing, irrigation, or interstate transportation use in any city, town, village, or hamlet and contiguous territory partly within Washington and partly within an adjoining State, to the same extent as though made wholly for use within Washington, provided reciprocal rights are granted by or under the laws of such adjoining State (11577 and 11578).

4. Any person, corporation, or association aggrieved at any order or decision of the State supervisor of hydraulics, or subordinate, or any watermaster, may have the same reviewed by a proceeding in the nature of an appeal in the superior court (7361).

### Determination of Rights

1. Upon filing a petition with the State supervisor of hydraulics by one or more claimants of water rights, or if in the judgment of the supervisor the public interest will be subserved thereby, he shall prepare a statement of the facts together with a plan or map of the locality under investigation, and shall file such material in the superior court (7364). The State of Washington becomes plaintiff and all claimants of water from the source involved are made defendants (7365). Each defendant is required to file a statement of his claim (7367).

2. Upon completion of the service of summons the court makes an order referring the proceedings to the supervisor to take testimony as referee and to file a report thereon (7369).

3. Upon the final determination of the rights and entry of the decree of the court, the supervisor issues to each party a certificate setting forth the conditions of his water right (7377).

### Administration and Distribution of Water

1. Supervision of public waters and administration of the water code are vested in the State supervisor of hydraulics (7355 and 7358).

1.1. The supervisor of hydraulics shall designate water districts from time to time as required and shall appoint watermasters therefor upon application of interested parties upon reasonable showing of necessity (7359).

1.1.1. The duty of the watermaster, acting under the direction of the supervisor of hydraulics, is to divide the waters within his district according to rights and priorities. He regulates headgates, and has power to make arrests (7360 and 7362).

1.2. Where water rights of a stream have been adjudicated, a stream patrolman shall be appointed by the supervisor upon application of interested parties upon reasonable showing of necessity, if approved by the supervisor. The powers of a stream patrolman are the same as those of a watermaster but are confined to the regulation of a designated stream or streams. He is under the supervision of the supervisor of hydraulics, deputy supervisor of hydraulics, or watermaster of the district in which the stream is located and is required to enforce such special rules and regulations as the supervisor may prescribe (7351–1).

2. Water may be conveyed along any natural stream or lake, but not so as to raise the water thereof above ordinary high water mark without making just compensation to persons injured thereby, due allowance to be made of transmission losses by the supervisor of hydraulics (7353).

2.1. The United States shall have the right to turn into any natural or artificial watercourse any water that it may have acquired the right to divert or store and may reclaim such water therefrom for irrigation purposes subject to existing rights (7409).

3. Water users may rotate in the use of water to which they are collectively entitled, or an individual water user having water rights of different priority may rotate in use when this can be done without detriment to existing water rights and has the approval of the watermaster or the supervisor of hydraulics (7391a).

4. The right to the use of water shall remain appurtenant to the land or place upon which used, subject to transfer as noted below (7391); and water appropriated for irrigation purposes shall become appurtenant only to such land as may be reclaimed thereby to the full extent of the soil for agricultural purposes (7382, amended by Laws 1939, ch. 127).

5. The water right may be transferred and become appurtenant to other land or place of use without loss of priority of right, if such change can be made without detriment to existing rights; and the point of diversion or purpose of use may be changed if it can be done without detriment to existing rights. The prior approval of the supervisor of hydraulics is required (7391).

5.1. A seasonal or temporary change of point of diversion or place of use may be made when it can be done without detriment to existing rights, with the permission of the watermaster or the supervisor of hydraulics (7391a).

6. Any person may exercise the right of eminent domain to acquire property or rights necessary to effectuate the beneficial use of water, including the right and power to condemn an inferior use of water for a superior one, the court to determine what use shall be for the greatest public interest and, therefore, the superior use. But no property right in water or the use of water shall be acquired by condemnation for irrigation purposes which shall deprive any person of such quantity of water as may be reasonably necessary for the irrigation of his land then under irrigation to the full extent of the soil, by the most economical method of artificial irrigation applicable to such land according to the usual methods of artificial irrigation employed in the vicinity; the court to determine what is the most economical method of irrigation (7354).

## WYOMING

(All references herein, unless otherwise noted, are to the Wyoming Revised Statutes, 1931)

### Appropriation of Water

1. The water of all natural streams, springs, lakes, or other collections of still water is declared to be the property of the State (Const. art. VIII, sec. 1). It is declared that the control of water must be in the State, which in providing for its use shall equally guard all interests involved (Const. art. I, sec. 31). Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests (Const. art. VIII, sec. 3).

1.1. The right to the use of water is limited to the quantity necessary for beneficial use, irrespective of the carrying capacity of the ditch (122–421). Beneficial use shall be the basis, the measure, and the limit of the right of use (122–401).

1.1.1. In the adjudication of priorities no allotment for the direct use of the natural unstored flow of any stream shall exceed 1 cubic foot per second for each 70 acres. Where there may be in any stream water in excess of the total amount of all appropriations, such excess shall be divided among the appropriators in proportion to the acreage covered by their permits, provided such additional water shall be beneficially used (122–117, amended by Laws 1935, ch. 105).

2. Any person, association, or corporation shall, before commencing construction or performing any work in connection with a proposed appropriation, make an application to the State engineer for a permit to make such appropriation (122–404 and 122–1502).

2.1. The priority of appropriation dates from the filing of the application in the State engineer's office (122–419).

2.2. A party desiring to appropriate water stored under a reservoir permit files with the State engineer an application for a secondary permit (122–1501, amended by Laws 1939, ch. 59, and 122–1502).

2.2.1. Owners of reservoirs impounding more water than the owners require for their own lands are required to furnish, upon application, surplus water at reasonable rates to the owners of lands irrigable therefrom (122–1605). This does not apply to reservoirs in connection with Carey Act projects (122–1607).

2.3. It is the duty of the State engineer to approve all proper applications where the proposed use does not tend to impair the value of existing rights or is otherwise detrimental to the public welfare. The approved application constitutes a permit to make the appropriation (122–406 and 122–407; 122–411, amended by Laws 1939, ch. 68).

2.4. No appropriation shall be denied except when such denial is demanded by the public interests (Const., art. VIII, sec. 3). Where there is no unappropriated water in the proposed source, or where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, it is the duty of the State engineer to reject the application (122–406).

2.5. When an appropriation has been perfected in accordance with the permit and the right has been adjudicated by the board of control, a certificate of appropriation is issued by the board (122–418, amended by Laws 1937, ch. 72).

3. None of the waters of Wyoming shall ever be appropriated while within the State for use outside the State boundaries except pursuant to an act of the legislature permitting the diversion specifically designated as such (Laws 1939, ch. 125; Supp. 1940, sec. 122–433).

3.1. The 1939 legislature amended an act authorizing reciprocity with Utah, to include appropriations of water from the Little Missouri River in Wyoming for use in Montana, existing water rights in Wyoming not to be impaired. This act was to take effect April 1, 1939, and was approved February 20 (122–432, amended by Laws 1939, ch. 96). Five days later the above act (Laws 1939, ch. 125), prohibiting appropriations within the State for use outside of the State without the specific authorization of the legislature, was passed, effective from and after its passage.

3.2. Water stored in a reservoir cannot be used outside of the State of Wyoming without specific permit from the State engineer (122–1601).

3.3. The point of diversion of water from an interstate stream for use in Wyoming may be changed from its existing point in an adjoining State to a point within Wyoming, with the permission of the board of control, as noted below in paragraph 6 under "Administration and distribution of water."

4. If the owners of a ditch, canal, or reservoir fail to use the water therefrom for 5 successive years, they shall be considered as having abandoned the same and shall forfeit all water rights appurtenant thereto; the water formerly appropriated may be again appropriated for beneficial use (122–421).

4.1. A water user who might be affected by a declaration of abandonment of existing water rights may present his case to the board of control. Hearings are held by the division superintendent and the board of control, followed by an order of the board declaring the right abandoned or declining to do so. A declaration of abandonment is filed in the district court; if no objections are filed a judgment or order is issued affirming the order of the board of control; if objection is filed, the contestants become the plaintiffs and the objectors the defendants and the issue tried is whether or not such water rights have in fact been abandoned, the case to be tried by the rules governing civil actions (122-422 to 122-427).

5. The decisions of the board of control are subject to review by the courts (Const. art. VIII, sec. 2).

6. An applicant for a permit to appropriate water aggrieved by the action of the State engineer may appeal to the board of control. Appeal may be taken to the district court from any order or determination of the board of control in cases embracing such appeals from the State engineer (122-410).

## Determination of Rights

1. The board of control, composed of the State engineer and superintendents of the four water divisions (Const. art. VIII, sec. 2; 122-101), is directed to make adjudications of priorities of water rights of the various stream systems (122-103).

2. In the original adjudication of a stream the State engineer makes a hydraulic survey and the superintendent of the water division takes testimony as to the rights of the claimants. All claimants must appear and submit proof of their appropriations. Hearings are held upon contests, and the record is transmitted to the board of control which enters an order determining and establishing the several priorities. A certificate is issued to each person, association, or corporation designating the water right so adjudicated (122-105 to 122-118, 112-136).

2.1. Any party aggrieved by the determination of the board of control may appeal to the district court. The determination of the board of control is final unless appealed from (122-119 to 122-135).

2.2. Where the rights to water of a stream and all its tributaries have been adjudicated but not in the same proceeding, the board of control is authorized to open the records to inspection and to hear contests between appropriators who were not parties to the same adjudication proceedings in the original hearings, the procedure to be the same as in the original adjudication of a stream (122-137 and 122-138).

3. A special adjudication is made by the board of control of each appropriative right perfected in accordance with a permit issued by the State engineer, and a certificate is issued of the same character as that issued to each appropriator concerned in a general stream adjudication proceeding (122-418, as amended by Laws 1937, ch. 72).

## Administration and Distribution of Water

1. The board of control, composed of the State engineer and superintendents of the four water divisions, has supervision of the waters of the State. The State engineer is president of the board of control and has general supervision of the waters of the State and of the officers connected with their distribution. The legislature is required to divide the State into four water divisions and to provide for the appointment of superintendents thereof (Const. art. VIII, secs. 2, 4, and 5; 122-201, 122-202).

1.1. The superintendent has general control of the water commissioners of the districts in his division, and, under the general supervision of the State engineer, has charge of the distribution of water according to rights of appropriation. His authority extends to the regulation and control of the storage and use of water under all rights adjudicated by the board of control or the courts, and under all permits approved by the State engineer whether adjudicated or not. Appeal may be taken to the State engineer from any order or regulation of the superintendent (122-203 to 122-205).

1.2. The board of control is required to divide the State into water districts, each stream system of practicable administrative scope to be included within a single district (122–301, amended by Laws 1933 (Sp.), ch. 26). A water commissioner is appointed for each district, whose duty is to divide the waters according to priorities of right and to regulate headgates. He has the power to make arrests. Appeal may be taken from any act of the water commissioner to the division superintendent, thence to the State engineer, and thence to the district court. Assistant water commissioners may be appointed (122–302, amended by Laws 1933 (Sp.), ch. 26, to 122–306; 122–1206).

2. The operator of a reservoir may use the bed of a stream or other watercourse to convey stored water to consumers, under the supervision of the water commissioner (122–1504).

3. Reservoir water may be discharged into a stream for the use of prior appropriators in exchange for an equal amount of natural flow to be used on lands of the owners of the reservoir or owners of interests therein, if such exchange can be made without injury to the prior appropriators (122–428).

3.1. Application for a permit to make the exchange must be filed with the State engineer as in case of applications for permits to appropriate water; the application to be in the form of an application for a secondary permit for stored water (122–429).

4. Water users may rotate in the use of the supply to which they are collectively entitled, or a single water user having different priorities may rotate in use, when this can be done without injury to other appropriators and has the approval of the water commissioner (122–308).

5. Rights to the use of water shall attach to the land for irrigation, or to such other purpose or object for which acquired. Water rights for the direct use of the natural unstored flow of any stream cannot be detached from the lands, place, or purpose for which acquired without loss of priority (122–401).

5.1. Water and rights acquired under reservoir permits and adjudications shall not attach to any particular lands except by deed or other sufficient instrument executed by the owner of the reservoir. Such water and water rights, except when so attached to particular lands, may be transferred and used in such manner and upon such lands as the owners of the rights may desire, so long as the water is used for beneficial purposes (122–1602).

6. Where a water right has been acquired on an interstate stream, the point of diversion being in an adjoining State, for the purpose of irrigating land within Wyoming, the point of diversion may be changed from within the adjoining State to a point within Wyoming upon application to the board of control, which shall be granted after a hearing if the proposed change does not tend to impair the value of existing rights or is otherwise detrimental to the public interest. Appeal may be taken to the district court (Laws 1939, ch. 123).

7. Preferred uses of water shall include rights for domestic and transportation purposes; existing rights not preferred may be condemned to supply water for such preferred uses. Such domestic and transportation purposes shall include the following: First, water for drinking purposes for both man and beast; second, water for municipal purposes; third, water for the use of steam engines and general railway use; fourth, water for culinary, laundry, bathing, refrigerating (including the manufacture of ice), and for steam and hot-water heating plants. The use of water for irrigation shall be superior and preferred to any use for turbine or impulse water wheels installed for power purposes (122–402).

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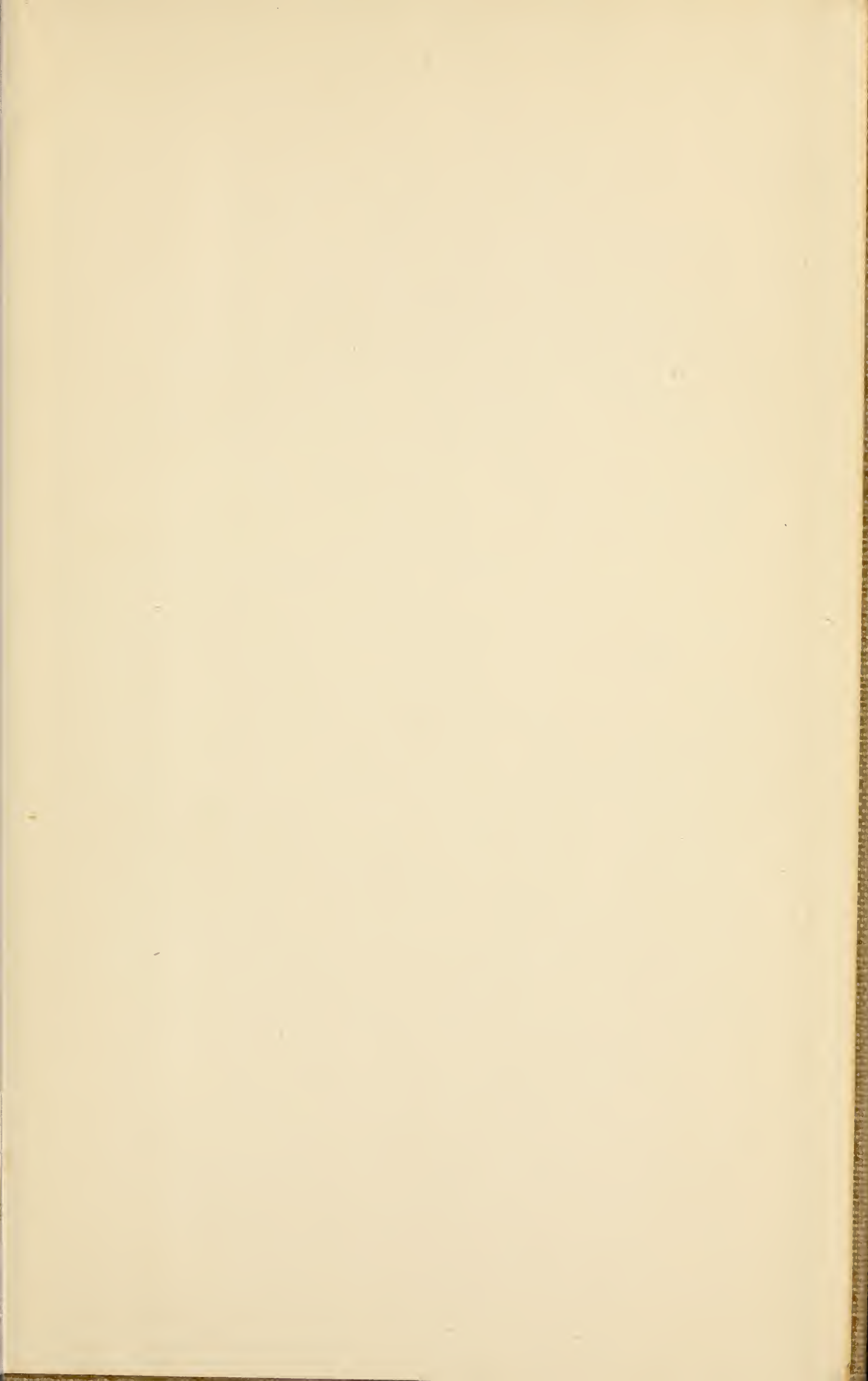

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